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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 455 U. S., Part 1)

ADVERTISING BY LAWYERS. See **Constitutional Law.**

ANTITRUST ACTS.

Collective-bargaining agreement—Employee health and retirement funds—Employer contributions.—In an action to enforce collective-bargaining provision whereby petitioner coal producer, as a member of a multiemployer bargaining unit, agreed to contribute to employee health and retirement funds on basis of its purchases of coal from producers not under contract with union, petitioner was entitled to plead and have adjudicated its defense based on alleged illegality of contract provision under Sherman Act. Kaiser Steel Corp. v. Mullins, p. 72.

Regulation of cable television—Validity of city ordinance.—"Home rule" city's ordinance prohibiting cable television business, operating under city permit, from expanding its area of operation within city for three months to allow city to draft new cable television ordinance and to invite new businesses to enter market, is not exempt from antitrust scrutiny under "state action" doctrine. Community Communications Co. v. Boulder, p. 40.

APPEALS. See **Jurisdiction.**

ARRESTS. See **Constitutional Law.**

ATTORNEY ADVERTISING. See **Constitutional Law.**

BIAS OF JURORS. See **Constitutional Law.**

BOULDER, COLO. See **Antitrust Acts.**

"BROTHER-SISTER CONTROLLED GROUP." See **Internal Revenue Code.**

CABLE TELEVISION. See **Antitrust Acts.**

CAPITAL PUNISHMENT. See **Constitutional Law.**

CASE OR CONTROVERSY. See **Jurisdiction.**

COAL PRODUCERS. See **Antitrust Acts; National Labor Relations Act.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Antitrust Acts; National Labor Relations Act.**

COMMERCE CLAUSE. See **Constitutional Law.**

COMMERCIAL SPEECH. See **Constitutional Law.**

CONSENT TO SEARCH. See **Constitutional Law.**

CONSTITUTIONAL LAW. See also **Jurisdiction.**

Commerce Clause—Oil and gas leases—Indian reservation—Validity of severance tax.—Respondent Indian Tribe's imposition of severance tax—pursuant to ordinance approved by Secretary of Interior—on oil and gas production on tribal reservation lands by petitioners as Tribe's lessees under mineral leases approved by Secretary does not violate Commerce Clause and is within Tribe's inherent power to govern and to pay for costs of self-government. Merrion v. Jicarilla Apache Tribe, p. 130.

Cruel and unusual punishment—Death penalty—Consideration of mitigating factors.—Where petitioner, who was 16 years old at time of offense, was convicted of first-degree murder, and where trial judge, in imposing death sentence, refused as a matter of law to consider petitioner's evidence at sentencing hearing concerning his unhappy upbringing and emotional disturbance, death sentence must be vacated as it was imposed without type of individualized consideration of mitigating factors required by Eighth and Fourteenth Amendments in capital cases. Eddings v. Oklahoma, p. 104.

Due process—Right to fair trial—Conduct of juror and prosecuting attorneys.—Respondent, who was convicted of murder in state prosecution, was not denied due process by conduct of juror, who, during trial, submitted an application for employment as an investigator in District Attorney's Office, or by conduct of prosecuting attorneys, who withheld information about juror from trial court and defense counsel until after trial. Smith v. Phillips, p. 209.

Freedom of speech—Advertising by lawyers—Validity of restrictions.—Where Missouri Supreme Court Rule specified areas of practice that could be included in lawyers' advertisements and limited persons to whom professional announcement cards could be sent, and where appellant lawyer received a private reprimand in a disciplinary action resulting from his having (1) published advertisements that listed areas of practice in language other than as specified in Rule, and that listed courts in which he was admitted to practice (information not authorized under Rule), and (2) mailed announcement cards to persons not specified in Rule, such restrictions upon appellant's First Amendment rights could not be sustained. In re R. M. J., p. 191.

Searches and seizures—Arrest of university student—Seizure of contraband in dormitory room.—Fourth Amendment was not violated where a university police officer, after arresting a student and accompanying him to his dormitory room to retrieve his identification, (1) observed marihuana seeds and a pipe in plain view in room while waiting in doorway, (2) then entered room, and (3) after student and his roommate waived their

CONSTITUTIONAL LAW—Continued.
Miranda rights, was given a box containing more marihuana and cash, and where more marihuana and another controlled substance were discovered upon search of room to which students consented. Washington v. Chrisman, p. 1.

CONTRIBUTIONS BY EMPLOYER TO EMPLOYEE HEALTH AND RETIREMENT FUNDS. See **Antitrust Acts; National Labor Relations Act.**

"CONTROLLED GROUP OF CORPORATIONS." See **Internal Revenue Code.**

CORPORATE INCOME TAXES. See **Internal Revenue Code.**

CRIMINAL LAW. See **Constitutional Law; Jurisdiction.**

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law.**

DEATH PENALTY. See **Constitutional Law.**

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law.**

DISTRIBUTION OF POLITICAL LITERATURE ON UNIVERSITY CAMPUS. See **Jurisdiction.**

DORMITORY ROOM SEARCHES. See **Constitutional Law.**

DUE PROCESS. See **Constitutional Law.**

EIGHTH AMENDMENT. See **Constitutional Law.**

EMOTIONAL DISTURBANCE AS MITIGATING AGAINST DEATH PENALTY. See **Constitutional Law.**

EMPLOYER AND EMPLOYEES. See **Antitrust Acts; National Labor Relations Act.**

EXEMPTIONS FROM INCOME TAXES. See **Internal Revenue Code.**

FAIR TRIALS. See **Constitutional Law.**

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL-STATE RELATIONS. See **Antitrust Acts.**

FIFTH AMENDMENT. See **Jurisdiction.**

FIRST AMENDMENT. See **Constitutional Law; Jurisdiction.**

FOURTEENTH AMENDMENT. See **Constitutional Law; Jurisdiction.**

FOURTH AMENDMENT. See **Constitutional Law.**

FREEDOM OF SPEECH. See **Constitutional Law.**

"HOT CARGO" CLAUSE. See **Antitrust Acts; National Labor Relations Act.**

IMMUNITY FROM ANTITRUST LIABILITY. See **Antitrust Acts.**

INDIAN REORGANIZATION ACT OF 1934. See **Constitutional Law.**

INTERNAL REVENUE CODE.

Surtax exemption—"Controlled group of corporations."—Code provisions limiting a "controlled group of corporations" to a single surtax exemption and defining such a group as including a "brother-sister controlled group," as determined by ownership of specified percentages of corporations' stock by five or fewer persons, apply only where each person whose stock is taken into account owns stock in each corporation of group, and implementing Treasury Regulation to contrary is invalid. United States v. Vogel Fertilizer Co., p. 16.

INTERSTATE COMMERCE. See **Constitutional Law.**

JURISDICTION.

Supreme Court—Appeal from State Supreme Court—Reversal of trespass conviction.—Appeal to this Court from New Jersey Supreme Court's judgment—which reversed appellee's trespass conviction based on his distributing political materials on a university campus without having first received permission from university officials as required by a university regulation—is dismissed for want of jurisdiction where (1) State, while joining in university's jurisdictional statement, declined to take a position on merits in its brief, asking only that issues be decided, and (2) university lacked standing to invoke this Court's jurisdiction because of mootness, having amended its pertinent regulations while appeal was pending and State Supreme Court not having passed on validity of revised regulations. Princeton University v. Schmid, p. 100.

JUROR'S MISCONDUCT. See **Constitutional Law.**

LABOR UNIONS. See **Antitrust Acts; National Labor Relations Act.**

LAWYER ADVERTISING. See **Constitutional Law.**

LEASES OF OIL AND GAS INTERESTS ON INDIAN LANDS. See **Constitutional Law.**

MINERAL LEASES ON INDIAN LANDS. See **Constitutional Law.**

MISSOURI. See **Constitutional Law.**

MITIGATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law.**

MOOTNESS. See **Jurisdiction.**

MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980. See **Antitrust Acts; National Labor Relations Act.**

NATIONAL LABOR RELATIONS ACT.

Collective-bargaining agreement—Employee health and retirement funds—Employer contributions.—In an action to enforce collective-bargaining provision whereby petitioner coal producer, as a member of a multiemployer bargaining unit, agreed to contribute to employee health and retirement funds on basis of its purchases of coal from producers not under contract with union, petitioner was entitled to plead and have adjudicated its defense based on alleged illegality of contract provision under § 8(e) of Act. Kaiser Steel Corp. v. Mullins, p. 72.

NATURAL GAS POLICY ACT OF 1978. See **Constitutional Law.**

NEW YORK. See **Constitutional Law.**

OIL AND GAS LEASES ON INDIAN LANDS. See **Constitutional Law.**

OKLAHOMA. See **Constitutional Law.**

ORDINANCES REGULATING CABLE TELEVISION. See **Antitrust Acts.**

PENSION FUNDS. See **Antitrust Acts; National Labor Relations Act.**

"PLAIN-VIEW" EXCEPTION. See **Constitutional Law.**

PRINCETON UNIVERSITY. See **Jurisdiction.**

PROFESSIONAL ANNOUNCEMENT CARDS OF LAWYERS. See **Constitutional Law.**

PROSECUTORIAL MISCONDUCT. See **Constitutional Law.**

RIGHT TO FAIR TRIAL. See **Constitutional Law.**

ROOM SEARCHES. See **Constitutional Law.**

SEARCHES AND SEIZURES. See **Constitutional Law.**

SEVERANCE TAXES IMPOSED BY INDIAN TRIBES. See **Constitutional Law.**

SHERMAN ACT. See **Antitrust Acts.**

SOVEREIGNTY OF INDIAN TRIBES. See **Constitutional Law.**

"STATE ACTION" EXEMPTION FROM ANTITRUST LAWS. See **Antitrust Acts.**

SUPREME COURT. See **Jurisdiction.**

SURTAX EXEMPTIONS. See **Internal Revenue Code.**

TAXES. See **Constitutional Law; Internal Revenue Code.**

TELEVISION. See **Antitrust Acts.**

TREASURY REGULATIONS. See **Internal Revenue Code.**

TRIBAL SELF-GOVERNMENT. See **Constitutional Law.**

UNION TRUST FUNDS. See **Antitrust Acts; National Labor Relations Act.**

UNIVERSITY'S REGULATION OF DISTRIBUTION OF LITERATURE. See **Jurisdiction.**

WAIVER OF MIRANDA RIGHTS. See **Constitutional Law.**

WASHINGTON. See **Constitutional Law.**

WORDS AND PHRASES.

1. *"Brother-sister controlled group."* § 1563(a)(2), Internal Revenue Code of 1954, 26 U. S. C. § 1563(a)(2). United States v. Vogel Fertilizer Co., p. 16.

2. *"Controlled group of corporations."* §§ 1561(a), 1563(a)(2), Internal Revenue Code of 1954, 26 U. S. C. §§ 1561(a), 1563(a)(2). United States v. Vogel Fertilizer Co., p. 16.

TABLE OF CASES REPORTED

(Vol. 455 U. S., Part 1)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Ackerman *v.* National Bureau of Standards	929
Adams; Murphy *v.*	920
Alabama; Palmer *v.*	922
Alander *v.* Florida	919
Alaska Railroad; Sea-Land Service, Inc. *v.*	919
Alberto-Culver Co.; Webb *v.*	929
Alford; American Bridge Division, United States Steel Corp. *v.*	927
Alford *v.* Garrison	925
American Bridge Division, United States Steel Corp. *v.* Alford	927
American Pharmaceutical Assn.; Federal Prescription Service *v.*	928
Americans for Change; Federal Election Comm'n *v.*	129
Amir *v.* Sacred Heart Hospital	923
Amis *v.* United States	915
Amoco Production Co. *v.* Jicarilla Apache Tribe	130
Andrews *v.* United States	919
Antonelli *v.* Old Republic Ins. Co.	923
Arizona; Gates *v.*	928
Arnold *v.* Marshall	922
Arrington *v.* Associated General Contractors of America	913
Associated General Contractors of America; Arrington *v.*	913
Auburn News Co. *v.* Providence Journal Co.	921
Ayers *v.* Collins	922
B.; Treen *v.*	913

Page
Bank of America; Johnson *v.* 921
Barnes *v.* Carden 921
Barnes; Moye *v.* 925
Barnes Group, Inc.; Harper *v.* 921
Bates; Yapalater *v.* 908
Beach, *In re* 906
Bechtel Power Corp. *v.* Pennsylvania 905
Bennett *v.* Ford Motor Co. 923
Best *v.* New York 926
Bethea *v.* Hanberry 912
B. F. Goodrich Co.; Worrell *v.* 913
Bickel; Craig *v.* 901
Bliss Dairy, Inc.; United States *v.* 906
Blue Shield of Virginia *v.* McCready 916
Boag *v.* California 910
Board of Ed., Island Trees Union School Dist. No. 26 *v.* Pico 903
Board of Ed. of Los Angeles; Crawford *v.* 904
Board of Govs. of Reg. Dentists of Okla.; Cryan *v.* 907
Board of Govs. of Reg. Dentists of Okla.; Denturist-Denture Lab *v.* 907
Boulder; Community Communications Co. *v.* 40
Brannon *v.* Kentucky 911
Bromwell *v.* Delaware 924
Brown *v.* New York 929
Browning Contracting Co. *v.* National Stabilization Agreement of Sheet Metal Industry Trust Fund 909
Bryant *v.* DeFrancis 911
Bunnell; New England Teamsters Pension Fund *v.* 908
Burlington Northern Inc. *v.* United States 907
Burton *v.* Jackson 913
Busbee *v.* Texas 929
Busbee; Watson *v.* 925
Bush *v.* Muncy 910
Cady *v.* United States 919
Caldwell *v.* Missouri 929
California; Boag *v.* 910
California *v.* Grace Brethren Church 904
California; Kulik *v.* 907
California; Murtishaw *v.* 922
California; Stephens *v.* 910
Campagno *v.* Florida 912
Carden; Barnes *v.* 921
Carmen *v.* Idaho 918
Carter *v.* United States 926
Caterpillar Tractor Co.; Chicago Bridge & Iron Co. *v.* 905, 917

Page
Caterpillar Tractor Co.; Industrial Workers *v.* 915
Cattanach; Schneider Transport, Inc. *v.* 909
Central Intelligence Agency *v.* Holy Spirit Assn. 906
Chadha; Immigration and Naturalization Service *v.* 903
Chagra *v.* United States 907
Charlton *v.* Cortez Development Corp. 920
Cheng *v.* GAF Corp. 909
Cherokee Homes Apartments *v.* United States 913
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 905, 917
Chicco *v.* New Bedford 924
Chicco *v.* Peck 923
Ching Yee *v.* Shintaku 916
Chrisman; Washington *v.* 1
City. See name of city.
Claiborne Hardware Co.; NAACP *v.* 904
Clayborne, *In re* 906
Cleveland Elec. Illuminating Co. *v.* Office of Consumers' Counsel 914
Cohen *v.* Disciplinary Bd. of Supreme Court of Pa. 914
College Exxon Service Station *v.* Donovan 920
Collins; Ayers *v.* 922
Collins *v.* United States 906
Commissioner *v.* Delta Metalforming Co. 906
Commissioner; Hillsboro National Bank *v.* 906
Commissioner of Internal Revenue. See Commissioner.
Commodore Business Machines, Inc. *v.* McDonnell Douglas Corp. 920
Common Cause *v.* Schmitt 129
Commonwealth. See name of Commonwealth.
Community Communications Co. *v.* Boulder 40
Connecticut *v.* Teal 903
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania 905
Cook; Watts *v.* 921
Coppola *v.* Warden 927
Corbitt *v.* United States 908
Corrections Commissioner. See name of commissioner.
Cortez *v.* United States 923
Cortez Development Corp.; Charlton *v.* 920
Cortez-Espinoza *v.* United States 923
Cotten; Witco Chemical Corp. *v.* 909
Couf *v.* DeBlaker 921
Craig *v.* Bickel 901
Crawford *v.* Board of Ed. of Los Angeles 904
Crenshaw *v.* United States 912
Crick *v.* Smith 922
Crude Co. *v.* United States 908

Page
Cryan *v.* Board of Governors of Registered Dentists of Okla. 907
Cunningham *v.* Perini 924
Cuyler; Pennsylvania *ex rel.* Zapata *v.* 911
Dahlstrum; United States *v.* 928
D'Angelo *v.* United States 906
Davis *v.* District Director, INS 929
Davis *v.* United States 919
Dearmas *v.* United States 922
DeBlaker; Couf *v.* 921
Deer Park Medical Gp., Money Purchase Pension Plan *v.* Winchell 908
DeFrancis, *In re* 902
DeFrancis; Bryant *v.* 911
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 917
Delaware; Bromwell *v.* 924
Delaware; Whalen *v.* 910
Delta Metalforming Co.; Commissioner *v.* 906
Denturist-Denture Lab *v.* Board of Govs. of Reg. Dentists of Okla. 907
Devine; Giesey *v.* 908
Diaz *v.* United States 910
Dillard *v.* Martin 912
Director of penal or correctional institution. See name or title of director.
Disciplinary Bd. of Supreme Court of Pa.; Cohen *v.* 914
District Director, INS; Davis *v.* 929
Donovan; College Exxon Service Station *v.* 920
Donovan; J. P. Stevens Employees Education Committee *v.* 930
Donovan; Scoles *v.* 920
Dugan; Michigan *v.* 927
Dunbar *v.* Louisiana 911
D. W. Browning Contracting Co. *v.* National Stabilization Agreement of Sheet Metal Industry Trust Fund 909
Eddings *v.* Oklahoma 104
Estelle; Grant *v.* 911
Estelle; Johnson *v.* 924
Estelle *v.* Sellers 927
Estes *v.* United States 919
Evans *v.* Reed 924
Evans; Watson *v.* 925
Falsetta; Regira *v.* 914
Federal Election Comm'n *v.* Americans for Change 129
Federal Prescription Service, Inc. *v.* American Pharm. Assn. 928
Ferber; New York *v.* 904, 916
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 917
Finnegan *v.* Leu 903

Page
First Pentecostal Church *v.* United States 920
Fisher *v.* United States 908
Flight Attendants *v.* Trans World Airlines 915
Florida; Alander *v.* 919
Florida; Campagno *v.* 912
Foddrell *v.* United States 925
Ford Motor Co.; Bennett *v.* 923
GAF Corp.; Cheng *v.* 909
Galis *v.* Wainwright 929
Garrett *v.* United States 924
Garrison; Alford *v.* 925
Gaspard; Taylor Diving & Salvage Co. *v.* 907
Gaston *v.* New York 911
Gates *v.* Arizona 928
Gaylor *v.* United States 926
Geller *v.* Merit Systems Protection Bd. 901
General Accounting Office; Quarry *v.* 912
General Building Contractors Assn. *v.* Pennsylvania 905
Georgia; Hardy *v.* 929
Georgia; High *v.* 927
Georgia; Spradlin *v.* 925
Georgia; Wallace *v.* 927
Giesey *v.* Devine 908
Glasgow, Inc. *v.* Pennsylvania 905
Glitsch, Inc. *v.* Jones 920
Goetz *v.* North Dakota 924
Goldfield Deep Mines Co. of Nevada *v.* United States 907
Gomez *v.* United States 922
Goodhead *v.* United States 912
Goodrich Co.; Worrell *v.* 913
Goss *v.* United States 908
Grace Brethren Church; California *v.* 904
Grace Brethren Church *v.* United States 904
Grace Brethren Church; United States *v.* 904
Grant *v.* Estelle 911
Gray *v.* Van Ooteghem 909
Greathouse *v.* United States 926
Greene *v.* Lindsey 916
Grieg *v.* United States 907
Gutter *v.* Merrill Lynch, Pierce, Fenner & Smith, Inc. 909
Haldeman *v.* United States Railway Assn. 930
Hamlin *v.* Warren 911
Hanberry; Bethea *v.* 912
Hardy *v.* Georgia 929

Page
Harper *v.* Barnes Group, Inc. 921
Harris; Lee *v.* 910
Hartzell Propeller, Inc. *v.* Reyno 928
Hathorn *v.* Lovorn 916
Hawkins *v.* West Virginia 925
H & D, Inc.; National Labor Relations Bd. *v.* 902
Hernandez *v.* Lafayette 901
Hernandez; Lafayette *v.* 907
High *v.* Georgia 927
Hilliard *v.* Simpson 912
Hillsboro National Bank *v.* Commissioner 906
Holland *v.* Sea-Land Service, Inc. 919
Hollingshead *v.* United States 926
Holman, *In re* 902
Holmes; Theatres West, Inc. *v.* 913
Holmes; Westworld Cinema *v.* 913
Holy Spirit Assn.; Central Intelligence Agency *v.* 906
Hopkinson *v.* Wyoming 922
Hughes *v.* United States 922
Idaho; Carmen *v.* 918
Idaho; National Organization for Women, Inc. *v.* 901, 918
Illinois; Weaver *v.* 911
Illinois; Winters *v.* 923
Immigration and Naturalization Service *v.* Chadha 903
Immigration and Naturalization Service; U. S. House of Reps. *v.* 903
Immigration and Naturalization Service; U. S. Senate *v.* 903
Industrial Workers *v.* Caterpillar Tractor Co. 915
In re. See name of party.
Iowa Beef Processors, Inc.; Rufenacht *v.* 921
J., *In re* 191
Jackson; Burton *v.* 913
Jackson Transit Authority *v.* Transit Union 917
Jicarilla Apache Tribe; Amoco Production Co. *v.* 130
Jicarilla Apache Tribe; Merrion *v.* 130
Jicarilla Apache Tribe; Merrion & Bayless *v.* 130
Jiles *v.* United States 923
Jimenez; Lunz 913
Johns; Margoles *v.* 909
Johnson *v.* Bank of America 921
Johnson *v.* Estelle 924
Johnson; Mayor and City Council of Baltimore *v.* 916
Johnson *v.* Superior Court of Cal., City & County of San Francisco 921
Johnston; Myers *v.* 925
Jones; Glitsch, Inc. *v.* 920

Page
Jos. Schlitz Brewing Co.; McCluney *v*. 929
J. P. Stevens Employees Education Committee *v*. Donovan..... 930
Kaiser Steel Corp. *v*. Mullins 72
Kansas Power & Light Co.; Mesa Petroleum Co. *v*. 928
Karen B.; Treen *v*. 913
Kelly *v*. Oklahoma Pardon and Parole Bd. 923
Kentucky; Brannon *v*. 911
Kentucky; Kessinger *v*. 920
Kentucky Bd. of Elections; Prime Movers, Inc. *v*. 909
Kessinger *v*. Kentucky 920
King, *In re* 906
Kretchmar *v*. United States 910
Kriegel *v*. Van Ooteghem 909
Krupp *v*. New Jersey 925
Kulik *v*. California 907
Labor Union. See name of trade.
Lafayette *v*. Hernandez 907
Lafayette; Hernandez *v*. 901
Larsen *v*. Van Slootev 901
Leader *v*. United States 922
Lee *v*. Harris 910
Legare *v*. Zant 914
Lektro-Vend Corp. *v*. Vendo Co. 921
Leonard *v*. United States 910
Lerma *v*. United States 921
Leu; Finnegan *v*. 903
Lindsey; Greene *v*. 916
Local. For labor union, see name of trade.
Lonberger; Marshall *v*. 917
Longshoremen *v*. Waterfront Comm'n of N. Y. Harbor..... 915
Loretto *v*. Teleprompter Manhattan CATV Corp. 904
Louisiana; Dunbar *v*. 911
Louisiana; Scott *v*. 924
Lovett; Piatt *v*. 910
Lovorn; Hathorn *v*. 916
Lowe *v*. Ohio State Bar Assn. 920
L/P/G Benghazi *v*. Velibor 929
Lunz *v*. Jimenez 913
Mabry; West *v*. 911
Mandelkorn *v*. Ward 907
Marathon Pipe Line Co.; Northern Pipeline Construction Co. *v*... 916
Marathon Pipe Line Co.; United States *v*. 916
Margoles *v*. Johns 909
Marshall; Arnold *v*. 922

Page
Marshall *v.* Lonberger 917
Martin; Dillard *v.* 912
Martinez *v.* Ohio Bureau of Employment Services 911
Massachusetts Council of Construction Employers, Inc.; White *v.* 919
Maynard; Shabazz *v.* 925
Mayor and City Council of Baltimore *v.* Johnson 916
Mayor of Birmingham *v.* Associated Gen. Contractors of America 913
Mayor of Boston *v.* Massachusetts Council of Constr. Employers 919
Mazyak *v.* United States 922
McBroom *v.* McCarthy 911
McCarthy; McBroom *v.* 911
McClendon *v.* United States 923
McCluney *v.* Jos. Schlitz Brewing Co. 929
McCready; Blue Shield of Virginia *v.* 916
McDonnell Douglas Corp.; Commodore Business Machines, Inc. *v.* 920
McGee; Missouri *v.* 930
McIntyre *v.* Morris 923
Melia *v.* United States 902
Merit Systems Protection Bd.; Geller *v.* 901
Merrill Lynch, Pierce, Fenner & Smith, Inc.; Gutter *v.* 909
Merrion *v.* Jicarilla Apache Tribe 130
Merrion & Bayless *v.* Jicarilla Apache Tribe 130
Mesa Petroleum Co. *v.* Kansas Power & Light Co. 928
Mescalero Apache Tribe *v.* O'Cheskey 929
Michigan *v.* Dugan 927
Missouri; Caldwell *v.* 929
Missouri *v.* McGee 930
Montgomery; Morgan *v.* 927
Moore *v.* Wainwright 924
Morgan *v.* Montgomery 927
Morgan *v.* United States 929
Morris; McIntyre *v.* 923
Morrison *v.* United States 912
Moss *v.* Polland 925
Moye *v.* Barnes 925
Mullins; Kaiser Steel Corp. *v.* 72
Muncy; Bush *v.* 910
Murphy *v.* Adams 920
Murtishaw *v.* California 922
Myers *v.* Johnston 925
Myrick *v.* United States 926
NAACP *v.* Claiborne Hardware Co. 904
National Bureau of Standards; Ackerman *v.* 929
National Labor Relations Bd. *v.* H & D, Inc. 902

Page
National Organization for Women, Inc. *v.* Idaho 901, 918
National Stabilization Agreement of Sheet Metal Industry Trust Fund; D. W. Browning Contracting Co. *v.* 909
New Bedford; Chicco *v.* 924
New Body Boutique, Inc.; Vibrant Sales, Inc. *v.* 909
New England Teamsters Pension Fund *v.* Bunnell 908
New Jersey; Krupp *v.* 925
New York; Best *v.* 926
New York; Brown *v.* 929
New York *v.* Ferber 904, 916
New York; Gaston *v.* 911
New York; Pleasant *v.* 924
North Dakota; Goetz *v.* 924
Northern Pipeline Construction Co. *v.* Marathon Pipe Line Co. .. 916
O'Cheskey; Mescalero Apache Tribe *v.* 929
Office of Consumers' Counsel; Cleveland Elec. Illuminating Co. *v.* 914
Oglala Sioux Tribe of Pine Ridge *v.* United States 907
Ohio Bureau of Employment Services; Martinez *v.* 911
Ohio State Bar Assn.; Lowe *v.* 920
Oklahoma; Eddings *v.* 104
Oklahoma Pardon and Parole Bd.; Kelly *v.* 923
Old Republic Ins. Co.; Antonelli *v.* 923
Palmer *v.* Alabama 922
Paul, *In re* 906
Peck; Chicco *v.* 923
Pennsylvania; Bechtel Power Corp. *v.* 905
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 905
Pennsylvania; General Building Contractors Assn. *v.* 905
Pennsylvania; Glasgow, Inc. *v.* 905
Pennsylvania; United Engineers & Constructors, Inc. *v.* 905
Pennsylvania *ex rel.* Zapata *v.* Cuyler 911
Pennsylvania Higher Education Assistance Agency; Phillips *v.* ... 924
Penoyer *v.* Wainwright 925
Perini; Cunningham *v.* 924
Perini; Poole *v.* 910
Peters *v.* Sjoholm 914
Phillips *v.* Pennsylvania Higher Education Assistance Agency ... 924
Phillips; Smith *v.* 209
Phillips *v.* United States 912
Piatt *v.* Lovett 910
Pico; Board of Ed., Island Trees Union School Dist. No. 26 *v.* ... 903
Piper Aircraft Co. *v.* Reyno 928
Pitoniak; Vigilant Ins. Co. *v.* 901
Pleasant *v.* New York 924

Page
Polland; Moss *v*. 925
Pool *v*. United States 926
Poole *v*. Perini 910
Port Arthur *v*. United States 917
Prime Movers, Inc. *v*. Kentucky Bd. of Elections 909
Princeton Univ. *v*. Schmid 100
Providence Journal Co.; Auburn News Co. *v*. 921
Pullman-Standard *v*. Swint 903
Quarry *v*. General Accounting Office 912
Ralston *v*. Robinson 929
Ray *v*. United States 926
Reader's Digest Assn. *v*. United States 908
Reddish *v*. Wainwright 925
Reed; Evans *v*. 924
Regira *v*. Falsetta 914
Reneer *v*. Smith 924
Reyno; Hartzell Propeller, Inc. *v*. 928
Reyno; Piper Aircraft Co. *v*. 928
Ribotsky *v*. United States 910
R. M. J., *In re* 191
Roach *v*. South Carolina 927
Roberts *v*. United States 929
Robinson; Ralston *v*. 929
Romeo; Youngberg *v*. 915
Ross *v*. United States 926
Rossi; Weinberger *v*. 915
Rufenacht *v*. Iowa Beef Processors, Inc. 921
Ryndak *v*. United States 912
Sacred Heart Hospital; Amir *v*. 923
Sailors *v*. Schweiker 920
Salama *v*. Virginia 928
Sarcinelli *v*. United States 909
Schicker; Vorbeck *v*. 921
Schlitz Brewing Co.; McCluney *v*. 929
Schmid; Princeton Univ. *v*. 100
Schmitt; Common Cause *v*. 129
Schneider Transport, Inc. *v*. Cattanach 909
Schriever *v*. United States 919
Schweiker; Sailors *v*. 920
Schweiker; Ware *v*. 912
Scoles *v*. Donovan 920
Scott *v*. Louisiana 924
Scott *v*. United States 907
Sea-Land Service, Inc. *v*. Alaska Railroad 919

Page
Sea-Land Service, Inc.; Holland *v.* 919
Secretary of Defense *v.* Rossi..... 915
Secretary of HHS; Sailors *v.* 920
Secretary of HHS; Ware *v.*..... 912
Secretary of Interior; Teclaw *v.*..... 908
Secretary of Labor; College Exxon Service Station *v.*..... 920
Secretary of Labor; J. P. Stevens Employees Ed. Committee *v.* . 930
Secretary of Labor; Scoles *v.*..... 920
Securities and Exchange Comm'n; Sprecher *v.* 908
Sedigh *v.* United States..... 921
Sellers; Estelle *v.* 927
Shabazz *v.* Maynard 925
Sheppard; Sumner *v.* 919
Shintaku; Ching Yee *v.* 916
Simko *v.* United States 913
Simpson; Hilliard *v.* 912
Sjoholm; Peters *v.*..... 914
Smith; Crick *v.*..... 922
Smith *v.* Phillips 209
Smith; Reneer *v.*..... 924
Smith's Moving & Trucking Co. *v.* Svendsen 927
South Carolina; Roach *v.*..... 927
Southern Union Exploration Co.; Wynn Oil Co. *v.* 920
Sparks *v.* United States..... 910
Spradlin *v.* Georgia..... 925
Sprecher *v.* Securities and Exchange Comm'n..... 908
State. See name of State.
Steelworkers *v.* Swint 903
Stephens *v.* California 910
Stone; Wichita Falls *v.*..... 905
Strzelecki *v.* Sweatlock 908
Sumner *v.* Sheppard..... 919
Super Duper Food Store *v.* United States 920
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., City & County of San Francisco; Johnson *v.* 921
Svendsen; Smith's Moving & Trucking Co. *v.*..... 927
Sweatlock; Strzelecki *v.*..... 908
Swint; Pullman-Standard *v.* 903
Swint; Steelworkers *v.*..... 903
Tant *v.* United States..... 920
Taylor Diving & Salvage Co. *v.* Gaspard..... 907
Teal; Connecticut *v.* 903
Teclaw *v.* Watt..... 908

Page
Teleprompter Manhattan CATV Corp.; Loretto *v.* 904
Texas; Busbee *v.* 929
Theatres West, Inc. *v.* Holmes 913
Tinkle *v.* United States 924
Todd *v.* United States 926
Todisco *v.* United States 906
Torres *v.* United States 926
Transit Union; Jackson Transit Authority *v.* 917
Trans World Airlines; Flight Attendants *v.* 915
Trans World Airlines; Zipes *v.* 915
Treen *v.* Karen B. 913
Undetermined Quantities of Articles of Drugs; United States *v.* ... 902
Union. For labor union, see name of trade.
United. For labor union, see name of trade.
United Engineers & Constructors, Inc. *v.* Pennsylvania 905
United States. See name of other party.
U. S. House of Representatives *v.* INS 903
United States Railway Assn.; Haldeman *v.* 930
U. S. Senate *v.* Immigration and Naturalization Service 903
Vallone *v.* United States 906
Vandetti *v.* United States 912
Van Ooteghem; Gray *v.* 909
Van Ooteghem; Kriegel *v.* 909
Van Slooten; Larsen *v.* 901
Vasquez-Gonzalez *v.* United States 923
Velibor; L/P/G Benghazi *v.* 929
Vendo Co.; Lektro-Vend Corp. *v.* 921
Vibrant Sales, Inc. *v.* New Body Boutique, Inc. 909
Vigilant Ins. Co. *v.* Pitoniak 901
Virginia; Salama *v.* 928
Vogel Fertilizer Co.; United States *v.* 16
Vorbeck *v.* Schicker 921
Wainwright; Galis *v.* 929
Wainwright; Moore *v.* 924
Wainwright; Penoyer *v.* 925
Wainwright; Reddish *v.* 925
Walker *v.* United States 908
Wallace *v.* Georgia 927
Ward; Mandelkorn *v.* 907
Ward *v.* United States 922
Warden. See also name of warden.
Warden; Coppola *v.* 927
Ware *v.* Schweiker 912
Warren; Hamlin *v.* 911

Page
Washburn *v.* Washburn 902
Washington *v.* Chrisman 1
Waterfront Comm'n of N. Y. Harbor; Longshoremen *v.* 915
Watson *v.* Busbee 925
Watson *v.* Evans 925
Watt; Teclaw *v.* 908
Watts *v.* Cook 921
Weaver *v.* Illinois 911
Webb *v.* Alberto-Culver Co. 929
Weinberger *v.* Rossi 915
West *v.* Mabry 911
West Virginia; Hawkins *v.* 925
Westworld Cinema *v.* Holmes 913
Whalen *v.* Delaware 910
White *v.* Massachusetts Council of Construction Employers, Inc. . 919
Wichita Falls *v.* Stone 905
Widemon, *In re* 905
Williams *v.* United States 913, 919
Winchell; Deer Park Medical Gp., Money Purchase Pension Plan *v.* 908
Winter *v.* United States 912
Winters *v.* Illinois 923
Witco Chemical Corp. *v.* Cotten 909
Worrell *v.* B. F. Goodrich Co. 913
Worrell *v.* United States 913
Wynn Oil Co. *v.* Southern Union Exploration Co. 920
Wyoming; Hopkinson *v.* 922
Yapalater *v.* Bates 908
Yazzie *v.* United States 923
Yee *v.* Shintaku 916
Young *v.* United States 926
Youngberg *v.* Romeo 915
Zambuto *v.* United States 906
Zant; Legare *v.* 914
Zapata *v.* Cuyler 911
Zavala-Pizano *v.* United States 929
Zipes *v.* Trans World Airlines 915
Zwego *v.* United States 919

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

WASHINGTON *v.* CHRISMAN

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 80–1349. Argued November 3, 1981—Decided January 13, 1982

An officer of the Washington State University police department observed a student (Overdahl) leave a dormitory carrying a bottle of gin; because Overdahl appeared to be under 21 (the minimum age allowable under Washington law for possession of alcoholic beverages), the officer stopped him and asked for identification. After Overdahl requested to retrieve his identification from his dormitory room, the officer accompanied him there and, while remaining in the open doorway watching Overdahl and his roommate (respondent), noticed what he believed to be marihuana seeds and a pipe lying on a desk in the room. The officer then entered the room, confirmed that the seeds were marihuana and determined that the pipe smelled of marihuana, and informed Overdahl and respondent of their rights under *Miranda* v. *Arizona*, 384 U. S. 436. The students indicated their willingness to waive such rights, and after the officer asked if there were any other drugs in the room, respondent gave him a box which contained more marihuana and cash. After a second officer arrived, the students voluntarily consented, orally and in writing, to a search of the room, which yielded more marihuana and another controlled substance. Respondent was later charged with two counts of possessing the controlled substances and, after denial of his pretrial motion to suppress the evidence seized in the room, was convicted. The Washington Court of Appeals affirmed, but the Washington Supreme Court reversed. It held that, although Overdahl had been placed under lawful arrest, the officer had no right to enter the room and

seize contraband without a warrant, and that because the students' consent to the subsequent search of the room was the fruit of the officer's initial entry, the contraband found during that search should also have been suppressed.

Held:

1. It is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested. Once the officer had placed Overdahl under lawful arrest, he was authorized to accompany him to his room for the purpose of obtaining identification. The officer had a right to remain literally at Overdahl's elbow at all times, and thus a showing of "exigent circumstances" was not necessary to warrant the officer's accompanying Overdahl from the public corridor of the dormitory into his room. Pp. 5–7.

2. The Fourth Amendment did not prohibit the seizure of the contraband discovered in plain view in the room. Regardless of where the officer was positioned with respect to the room's threshold when he observed the contraband, and regardless of whether he may have hesitated briefly at the doorway before entering the room, he did not abandon his right to be in the room with Overdahl whenever he considered it essential. Accordingly, he had the right to act as soon as he observed the seeds and pipe. Pp. 8–9.

3. The seizure of other contraband taken from respondent's room pursuant to his valid consent did not violate the Fourth Amendment. He voluntarily produced marihuana after being informed of his *Miranda* rights, and he then consented to the search of the room. Thus, all of the seized contraband was properly admitted at his trial. Pp. 9–10.

94 Wash. 2d 711, 619 P. 2d 971, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined., *post*, p. 10.

Ronald R. Carpenter argued the cause and filed briefs for petitioner.

Robert F. Patrick argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed by *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* for Americans for Effective Law

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether a police officer may, consistent with the Fourth Amendment, accompany an arrested person into his residence and seize contraband discovered there in plain view.

I

On the evening of January 21, 1978, Officer Daugherty of the Washington State University police department observed Carl Overdahl, a student at the University, leave a student dormitory carrying a half-gallon bottle of gin. Because Washington law forbids possession of alcoholic beverages by persons under 21, Wash. Rev. Code § 66.44.270 (1981), and Overdahl appeared to be under age,[1] the officer stopped him and asked for identification. Overdahl said that his identification was in his dormitory room and asked if the officer would wait while he went to retrieve it. The officer answered that under the circumstances he would have to accompany Overdahl, to which Overdahl replied "OK."

Overdahl's room was approximately 11 by 17 feet and located on the 11th floor of the dormitory. Respondent Chrisman, Overdahl's roommate, was in the room when the officer and Overdahl entered. The officer remained in the open doorway, leaning against the doorjamb while watching Chrisman and Overdahl. He observed that Chrisman, who was in the process of placing a small box in the room's medicine cabinet, became nervous at the sight of an officer.

Enforcement, Inc.; and by *David Crump* and *Michael C. Kuhn* for the Legal Foundation of America et al.

Timothy K. Ford filed a brief for the American Civil Liberties Union of Washington as *amicus curiae* urging affirmance.

[1] In addition, University regulations prohibit possession of alcoholic beverages on University property. Tr. 4, 34. At the suppression hearing, Officer Daugherty testified that, because of these regulations, he would have stopped Overdahl without regard to his age. *Id.*, at 6–7.

Within 30 to 45 seconds after Overdahl entered the room, the officer noticed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing. From his training and experience, the officer believed the seeds were marihuana and the pipe was of a type used to smoke marihuana. He entered the room and examined the pipe and seeds, confirming that the seeds were marihuana and observing that the pipe smelled of marihuana.

The officer informed Overdahl and Chrisman of their rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966); each acknowledged that he understood his rights and indicated that he was willing to waive them. Officer Daugherty then asked whether the students had any other drugs in the room. The respondent handed Daugherty the box he had been carrying earlier, which contained three small plastic bags filled with marihuana and $112 in cash. At that point, Officer Daugherty called by radio for a second officer; on his arrival, the two students were told that a search of the room would be necessary. The officers explained to Overdahl and Chrisman that they had an absolute right to insist that the officers first obtain a search warrant, but that they could voluntarily consent to the search. Following this explanation, which was given in considerable detail, the two students conferred in whispers for several minutes before announcing their consent; they also signed written forms consenting to the search of the room. The search yielded more marihuana and a quantity of lysergic acid diethylamide (LSD), both controlled substances.

Respondent was charged with one count of possessing more than 40 grams of marihuana and one count of possessing LSD, both felonies under Wash. Rev. Code § 69.50.401(c) (1976) (current version at Wash. Rev. Code § 69.50.401(d) (1981)). A pretrial motion to suppress the evidence seized in the room was denied; respondent was convicted of both counts. On appeal, the Washington Court of Appeals affirmed the convictions, upholding the validity of the search. 24 Wash. App. 385, 600 P. 2d 1316 (1979).

The Supreme Court of Washington reversed. 94 Wash. 2d 711, 619 P. 2d 971 (1980). It held that, although Overdahl had been placed under lawful arrest and "there was nothing to prevent Officer Daugherty from accompanying Overdahl to his room," the officer had no right to enter the room and either examine or seize contraband without a warrant. The court reasoned there was no indication that Overdahl might obtain a weapon or destroy evidence, and, with the officer blocking the only exit from the room, his presence inside the room was not necessary to prevent escape. Because the officer's entry into the room and his observations of its interior were not justified by "exigent circumstances," the seizure of the seeds and pipe were held not to fall within the plain view exception to the Fourth Amendment's warrant requirement. The court went on to hold that because the students' consent to the subsequent search of the room was the fruit of the officer's initial entry, the contraband found during that search should also have been suppressed.[2]

Three justices dissented. They concluded it was reasonable for a police officer to keep an arrested person in sight at all times; accordingly, the officer had a legitimate reason for being in the place where he discovered the contraband, and was entitled, under the plain view doctrine, to seize it.

We granted certiorari, 452 U. S. 959 (1981), and reverse.

II

A

The "plain view" exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize

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[2] The opinion of the Supreme Court of Washington repeatedly refers to the Fourth Amendment and our cases construing it. The court did not, however, cite Art. I, § 7, of the Washington Constitution, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." While respondent, relying on this latter provision, urges that we "treat the case as having been decided under the Washington State Constitution," it is clear that the court did not rest its decision on an independent state ground.

what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *Harris* v. *United States*, 390 U. S. 234 (1968). Here, the officer had placed Overdahl under lawful arrest, and therefore was authorized to accompany him to his room for the purpose of obtaining identification.[3] The officer had a right to remain literally at Overdahl's elbow at all times; nothing in the Fourth Amendment is to the contrary.

The central premise of the opinion of the Supreme Court of Washington is that Officer Daugherty was not entitled to accompany Overdahl from the public corridor of the dormitory into his room, absent a showing that such "intervention" was required by "exigent circumstances." We disagree with this novel reading of the Fourth Amendment. The absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer's authority to maintain custody over the arrested person. See *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109–110 (1977); *United States* v. *Robinson*, 414

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[3] The trial court found that it was Overdahl who proposed to retrieve the identification, and, after being informed that Officer Daugherty would have to accompany him, agreed to the officer's presence. Respondent nevertheless claims that Overdahl was "coerced" to return to the room in violation of the Fifth Amendment, because he was in custody and had not yet been advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). He argues that since identification would serve as proof of Overdahl's age—an element of the offense for which he had been arrested—the officer could not ask him for this "incriminating" evidence without first advising him of his rights to counsel and to remain silent.

Assuming, *arguendo*, that Overdahl's Fifth Amendment rights were violated in some fashion, this does not vitiate the legality of his arrest, nor does it undercut the officer's right to maintain custody over an arrested person. The failure to give "*Miranda* warnings" might preclude introduction of incriminating statements made by Overdahl while in custody; but no such statements are even peripherally involved in this case. The act of going to the room was neither "incriminating" nor a "testimonial communication." Cf. *Fisher* v. *United States*, 425 U. S. 391, 408–414 (1976).

U. S. 218, 234–236 (1973). Nor is that authority altered by the nature of the offense for which the arrest was made.

Every arrest must be presumed to present a risk of danger to the arresting officer. Cf. *United States* v. *Robinson*, *supra*, at 234, n. 5. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious. Although the Supreme Court of Washington found little likelihood that Overdahl could escape from his dormitory room, an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation. Cf. *New York* v. *Belton*, 453 U. S. 454, 458–460 (1981); *United States* v. *Robinson*, *supra*, at 235.

We hold, therefore, that it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested.[4]

It follows that Officer Daugherty properly accompanied Overdahl into his room, and that his presence in the room was lawful. With restraint, the officer remained in the doorway momentarily, entering no farther than was necessary to keep the arrested person in his view. It was only by chance that, while in the doorway, the officer observed in plain view what he recognized to be contraband. Had he exercised his undoubted right to remain at Overdahl's side, he might well have observed the contraband sooner.

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[4] Indeed, were the rule otherwise, it is doubtful that an arrested person would ever be permitted to return to his residence, no matter how legitimate the reason for doing so. Such a rule would impose far greater restrictions on the personal liberty of arrested individuals than those occasioned here.

B

Respondent nevertheless contends that the officer lacked authority to *seize* the contraband, even though in plain view, because he was "outside" the room at the time he made his observations. The Supreme Court of Washington noted that "[t]he record is in conflict as to whether Officer Daugherty stood in the doorway and then entered the room or whether, while in the doorway, he was in fact in the room." 94 Wash. 2d, at 716, 619 P. 2d, at 974. It concluded, however, that it "need not . . . let the result be determined by such niceties," and assumed for purposes of its decision that the officer "was in the room at the time he observed the seeds and pipe." *Ibid.* We agree that on this record "such niceties" are not relevant. It is of no legal significance whether the officer was in the room, on the threshold, or in the hallway, since he had a right to be in any of these places as an incident of a valid arrest.

Respondent's argument appears to be that, even if the officer could have stationed himself "inside" the room had he done so immediately upon Overdahl's entry, his 30- to 45-second hesitation was fatal; and that having chosen to remain in the doorway, the officer was precluded from proceeding further to seize the contraband. We reject this contention. Respondent's argument, if accepted, would have the perverse effect of penalizing the officer for exercising more restraint than was required under the circumstances. Moreover, it ignores the fundamental premise that the Fourth Amendment protects only against unreasonable intrusions into an individual's privacy. See *Katz* v. *United States*, 389 U. S. 347 (1967).

The "intrusion" in this case occurred when the officer, quite properly, followed Overdahl into a private area to a point from which he had unimpeded view of and access to the area's contents and its occupants. His right to custodial control did not evaporate with his choice to hesitate briefly in the doorway rather than at some other vantage point inside the

room. It cannot be gainsaid that the officer would have had unrestricted access to the room at the first indication that he was in danger, or that evidence might be destroyed—or even upon reassessment of the wisdom of permitting a distance between himself and Overdahl.

We therefore conclude that, regardless of where the officer was positioned with respect to the threshold, he did not abandon his right to be in the room whenever he considered it essential. Accordingly, he had the right to act as soon as he observed the seeds and pipe.[5] This is a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy. The Fourth Amendment does not prohibit seizure of evidence of criminal conduct found in these circumstances.[6]

III

Since the seizure of the marihuana and pipe was lawful, we have no difficulty concluding that this evidence and the contraband subsequently taken from respondent's room were properly admitted at his trial. Respondent voluntarily produced three bags of marihuana after being informed of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). He then consented, in writing, to a search of the room, after being advised that his consent must be voluntary and that he had an absolute right to refuse consent and demand procurement of a search warrant. The seizure of the drugs pursuant

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[5] The circumstances of this case distinguish it significantly from one in which an officer, who happens to pass by chance an open doorway to a residence, observes what he believes to be contraband inside. See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 585–589 (1980); *Johnson* v. *United States*, 333 U. S. 10, 14–15 (1948).

[6] In light of our disposition, we need not decide whether, as the Washington Court of Appeals held, the likelihood that the contraband would be destroyed constituted an "exigent circumstance" independently justifying the officer's entry into the room.

to respondent's valid consent did not violate the Fourth Amendment.[7]

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The arrest in this case was made on the street. It gave officer Daugherty no authority to enter Overdahl's quarters without his consent. But Overdahl wanted to retrieve his identification from his room; if Daugherty was willing for Overdahl to do so, he could properly condition his consent on accompanying Overdahl and keeping him under close surveillance. Accordingly, when Overdahl entered his room, Daugherty could stay as close to Overdahl as he deemed necessary to protect himself and maintain control over his arrestee. If it had been reasonably necessary for Daugherty to enter the room in pursuit of these purposes, he would not have violated any of Overdahl's Fourth Amendment rights. It is also plain enough that he was entitled to stand in the doorway and keep Overdahl in sight.

The record in this case is clear, however, that Daugherty did not leave the doorway and enter the room in order to protect himself or maintain control over Overdahl. Daugherty's uncontradicted testimony was that he entered the room solely to confirm his suspicion that the seeds and the seashell he had observed from the doorway were marihuana seeds and a seashell pipe that had been used to smoke marihuana.[1]

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[7] We reject as frivolous the respondent's contention that, on the facts presented here, Officer Daugherty was required to knock and announce his presence at the doorway prior to entering the room.

[1] The officer testified at the suppression hearing that he had entered the room for just one purpose—"to affirm my beliefs and to seize the articles, if they were [contraband]." Tr. 44.

Daugherty made no claim that he entered the room as a necessary incident to the permission given Overdahl to secure his identification. Rather, he claimed that the entry was justified because of what was in plain view on the desk inside the room.

The plain-view doctrine, however, does not authorize an officer to enter a dwelling without a warrant to seize contraband merely because the contraband is visible from outside the dwelling. This is settled law. As the Court said in *Coolidge* v. *New Hampshire*, 403 U. S. 443, 468 (1971):

> "[P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has re-

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The officer also testified:

"I stood in the doorway without entering, actually physically entering the room. . . . I was standing against the doorjamb. . . . I was not in the room. I was in the doorway." *Id.*, at 7, 9, 21.

The trial court stated in its memorandum opinion that "[t]he officer stood in the doorway, and watched [Overdahl]," observed the seashell pipe and the seeds from the doorway, and "*then entered* the room and examined the pipe and seeds closely." App. 47 (emphasis added). Similarly, the Court of Appeals stated: "*Prior to entering the room*, the officer saw from his vantage point in the doorway what he believed to be contraband. *Only at that time, did he cross the threshold* and seize the pipe and marijuana seeds." 24 Wash. App. 385, 389, 600 P. 2d 1316, 1318 (1979) (emphasis added).

As I read the Supreme Court of Washington's opinion, the court held that whether or not the officer had physically entered the room by standing in the doorway, his presence in the doorway was sufficiently intrusive that his observations were unlawful unless he could justify his presence. The court concluded that the officer should have remained outside the room, since there was no indication that Overdahl was likely to escape, destroy evidence, or seize a weapon.

> peatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor* v. *United States*, 286 U. S. 1; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451; *Jones* v. *United States*, 357 U. S. 493, 497–498; *Chapman* v. *United States*, 365 U. S. 610; *Trupiano* v. *United States*, 334 U. S. 699."[2]

Coolidge emphasized that the plain-view doctrine applies only after a lawful search is in progress or the officer was otherwise legally present at the place of the seizure. The initial intrusion must be justified by a warrant, by an exception to the warrant requirement, or by other circumstances authorizing his presence.

If a police officer passing by an open door of a home sees incriminating evidence within the house, his observation may provide probable cause for the issuance of a search warrant. Yet the officer may not enter the home without a warrant unless an exception to the warrant requirement applies.[3] This rule is fully supported by *Coolidge* v. *New Hampshire*, *supra*, and the cases cited in the Court's opinion in that case.[4]

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[2] One of the many cases cited in *Coolidge* to illustrate this point was *Taylor* v. *United States*, 286 U. S. 1 (1932). The police officers in *Taylor* had looked through a small opening in a garage and had seen cardboard cases inside the garage that they believed contained contraband liquor. The officers could smell the odor of whiskey coming from the garage. Yet this Court held that they had violated the Fourth Amendment by entering the garage and seizing the whiskey without obtaining a warrant.

[3] There is no contention in this case that by entering the dormitory building the officer had already entered respondent's dwelling. The officer himself testified at trial that a dormitory room is considered a "private area" but that the public has access to the hallway. Tr. 37.

[4] *Harris* v. *United States*, 390 U. S. 234 (1968), is not to the contrary. There, an automobile had been impounded and towed to a police station. The windows of the car were open, the doors were unlocked, and it had begun to rain. The Court held that the Fourth Amendment did not require the police officer to obtain a warrant before opening the door of the car to roll up the car window, for this was simply "a measure taken to protect the car while it was in police custody." *Id.*, at 236. *Harris* did not rely on the plain-view doctrine to justify the warrantless intrusion into the

Any contrary rule would severely undercut the protection afforded by the Fourth Amendment, for it is the physical entry of the home that is the chief evil against which the Amend-

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automobile. The Court emphasized that the police officer had already lawfully entered the car when he saw incriminating evidence in plain view inside the car and seized it:

"*Once the door had lawfully been opened*, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Ibid.* (emphasis added).

The broad wording of the second sentence quoted above has apparently created some confusion regarding the plain-view doctrine. One commentator remarked:

"The hardest conceptual problem attending the plain view doctrine is to grasp that it is not a universal statement of the right of a policeman to seize after seeing something in open view; it is rather a limited statement of that right in one of its several instances—following a valid intrusion. . . . The source of difficulty is that the harbinger case, *Harris* v. *United States*, spoke carelessly in universal terms: 'It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure. . . .'

"Seeing something in open view does not, of course, dispose . . . of the problem of crossing constitutionally protected thresholds." Moylan, The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L. Rev. 1047, 1096 (1975).

See also 1 W. LaFave, Search and Seizure § 2.2(a) (1978).

This problem of "crossing constitutionally protected thresholds" without a warrant is easily resolved if the so-called "automobile exception" to the warrant requirement applies, for that exception justifies a warrantless entry into the automobile to seize contraband in plain view inside the car. In *Colorado* v. *Bannister*, 449 U. S. 1 (1980), for example, we held that an officer's observation of items in plain view inside a car did not violate the occupant's Fourth Amendment rights. *Id.*, at 4, n. 4. The officer's observations could therefore be used to establish probable cause to search the car. Yet it was also necessary to justify the warrantless intrusion into the car. We did not seek to justify that intrusion by relying on the plain-view doctrine. Rather, we held that the warrantless entry was justified under the "automobile exception" to the warrant requirement. See *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Carroll* v. *United States*, 267 U. S. 132 (1925).

ment is directed. *Payton* v. *New York*, 445 U. S. 573, 585–586 (1980); *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972).

The Court does not purport to hold otherwise. There is apparent agreement that the seizure in this case is consistent with the Fourth Amendment only if the officer was legally where he was when he made the seizure. Neither does the Court purport to find that Daugherty's presence in the room was in fact necessary to effectuate the arrest or to protect the officer. To do so would require contradicting Daugherty's own testimony. Rather, the Court asserts that Daugherty *could* have remained at Overdahl's elbow, that he *could* have entered the room wholly apart from his observation of the seeds, and that the case should be judged as though Daugherty had found it necessary to enter the room for the purpose of guarding Overdahl. Under this approach, the officer's presence at the desk where he made the seizure should be deemed lawful.

The difficulty with this is not merely that the officer himself did not suggest that he entered the room to maintain control over Overdahl or to protect himself. The more basic issue is whether the Court is justified in concluding as a matter of law that the circumstances would have warranted an entry for those reasons. The trial court did not sustain the entry on this basis, and the Washington Supreme Court expressly held that there were no exigent circumstances connected with Overdahl's arrest and custody that gave Daugherty sufficient reason to enter the room. I am unwilling on this record to decide as a matter of law what is more properly to be resolved as a matter of fact; and I would not differ with the state court on the record we now have before us.

I perceive no justification for what is in effect a *per se* rule that an officer in Daugherty's circumstances could always enter the room and stay at the arrestee's elbow. This would be true only if there were no limits to the conditions which

the officer could attach when he permits his charge to return to his room. I doubt, for example, that he could insist that he be permitted to search desks, closets, drawers, or cabinets. Likewise, he should not be permitted to invade living quarters any more than is necessary to maintain control and protect himself. Bright-line rules are indeed useful and sometimes necessary, cf. *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109–110 (1977); *United States* v. *Robinson*, 414 U. S. 218, 234–236 (1973), but the Court should move with some care where the home or living quarters are involved.

This is not a case, therefore, involving punishing an officer for entering a room for the wrong reason when there was a perfectly legal basis for his doing so. See *Scott* v. *United States*, 436 U. S. 128, 138 (1978); *Massachusetts* v. *Painten*, 389 U. S. 560, 564–565 (1968) (WHITE, J., dissenting). This is a case where the record before us does not demonstrate that it was necessary for the officer to enter the room as an incident to his custodial arrest. He thus had no legal basis for being in the room unless his sighting of the seeds permitted him to be there. The Court agrees that the plain-view doctrine does not provide that justification.

For me, the case comes down to whether the trial court properly found that the officer's observation from the doorway furnished exigent circumstances for the entry and seizure. The Washington Supreme Court did not review this finding of the trial court, but it should have before setting the conviction aside. I would therefore vacate and remand for this purpose.

UNITED STATES *v.* VOGEL FERTILIZER CO.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 80–1251. Argued November 3, 1981—Decided January 13, 1982

Section 1561(a) of the Internal Revenue Code of 1954 limits a "controlled group of corporations" to a single surtax exemption. Section 1563(a)(2) provides that a "controlled group of corporations" includes a "brother-sister controlled group," defined as "[t]wo or more corporations if 5 or fewer persons . . . own . . . stock possessing (A) at least 80 percent of the total combined voting power . . . or at least 80 percent of the total value . . . of each corporation, and (B) more than 50 percent of the total combined voting power . . . or more than 50 percent of the total value . . . of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation." An implementing Treasury Regulation interprets the statutory term "brother-sister controlled group" to mean two or more corporations if the same five or fewer persons own "*singly or in combination*" the two prescribed percentages of voting power or total value. One shareholder, Vogel, owned 77.49 percent of the outstanding stock of respondent Vogel Fertilizer Co. Another shareholder, Crain, owned the remaining 22.51 percent. Vogel also owned 87.5 percent of the voting power in Vogel Popcorn Co. and 90.66–93.42 percent of the value of its stock. Crain owned no stock in Vogel Popcorn. Respondent claimed refunds for taxes paid in certain tax years for which it did not claim a full surtax exemption, asserting that respondent and Vogel Popcorn were not members of a controlled group and respondent was therefore entitled to a full surtax exemption for each taxable year. When the Internal Revenue Service disallowed the refund claims, respondent filed suit for refund in the Court of Claims, which held that respondent was entitled to a refund.

Held: The implementing Treasury Regulation is invalid as not being a reasonable interpretation of the statute, which, as indicated by its language, structure, and legislative history, was intended to apply only where each person whose stock is taken into account for purposes of the 80-percent requirement owns stock in each corporation of the group. Pp. 22–35.

(a) Since the Regulation was promulgated only under the Commissioner of Internal Revenue's general authority to prescribe all needful rules and regulations, it is owed less deference than a regulation issued under a specific grant of authority to define a statutory term. Moreover, the Regulation purports to do no more than add a clarifying gloss on a term already specifically defined by Congress. Pp. 24–25.

(b) The statutory language is in closer harmony with respondent's interpretation than with the Regulation in question. The term the statute defines—"brother-sister controlled group"—connotes a close horizontal relationship *between* two or more corporations, suggesting that the same indivisible group of five or fewer persons must represent 80 percent of the ownership of each corporation. This interpretation is strengthened by the structure of the statute, which suggests that precisely the same shareholders must satisfy both the 80-percent and 50-percent requirements. Since under Part (B)'s 50-percent requirement, stock ownership is taken into account only to the extent it is "identical," that part of the statutory test clearly includes a common ownership requirement. And the mere fact that there are no words in Part (A) explicitly requiring each shareholder to own stock in each corporation does not mean that the Regulation's interpretation, "singly or in combination," must be accepted as reasonable. Pp. 25–26.

(c) The statute's legislative history makes it plain that the Regulation is not a reasonable statutory interpretation, where it appears that the intended targets of § 1563(a)(2) were groups of *interrelated* corporations—corporations characterized by *common* control and ownership—and that Congress intended the *80-percent* requirement, as an expanded version of the former statute, to be the primary requirement for defining the interrelationship between two or more corporations, the 50-percent requirement being an additional proviso necessary in light of the expanded number of shareholders whose overlapping interests were to be considered. The "singly or in combination" provision of the Regulation is clearly incompatible with this intent. Pp. 26–32.

225 Ct. Cl. 15, 634 F. 2d 497, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 35.

Stuart A. Smith argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Acting Assistant Attorney General Murray*, *Ernest J. Brown*, and *William A. Friedlander*.

Ronald C. Jensen argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed by *David Elliot Weisman* and *W. G. Dinning, Jr.*, for Dixie Realty Co., Inc., et al.; and by *Michael A. Williams* for the *Minnequa Bank of Pueblo* et al.

JUSTICE BRENNAN delivered the opinion of the Court.

Section 1561(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 1561(a), limits a "controlled group of corporations" to a single corporate surtax exemption.[1] Section 1563(a)(2) provides that a "controlled group of corporations" includes a "brother-sister controlled group," defined as "[t]wo or more corporations if 5 or fewer persons . . . own . . . stock possessing (A) at least 80 percent of the total combined voting power . . . or at least 80 percent of the total value . . . of each corporation, and (B) more than 50 percent of the total combined voting power . . . or more than 50 percent of the total value . . . of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation."[2]

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[1] For two of the tax years in question in this case—the years ending November 30, 1973 and 1974—the Code exempted the first $25,000 of corporate earnings from the federal surtax on corporate income, 26 U. S. C. § 11(d) (1970 ed.), and for the third year—ending November 30, 1975—the Code exempted the first $50,000. 26 U. S. C. § 11(d). For each of these tax years, however, § 1561 of the Code limited the members of a "controlled group" of corporations to a single shared surtax exemption. Amendments to the Code in 1978 replaced the surtax exemption with a graduated five-step tax rate structure on taxable corporate income. 26 U. S. C. § 11 (1976 ed., Supp. III). Now members of a controlled group must share a single rate schedule. 26 U. S. C. § 1561(a) (1976 ed., and Supp. III).

[2] The full text of § 1563(a)(2) is:

"Brother-sister controlled group

"Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing—

"(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

"(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation."

The interpretation of the statutory provision by Treas. Reg. § 1.1563–1(a)(3), 26 CFR § 1.1563–1(a)(3) (1981), is that the "term 'brother-sister controlled group' means two or more corporations if the same five or fewer persons . . . own . . . *singly or in combination*" the two prescribed percentages of voting power or total value.[3] The question presented is whether the regulatory interpretation—that the statutory definition is met by the ownership of the prescribed stock by five or fewer persons "singly or in combination"—is a reasonable implementation of the statute or whether Congress intended the statute to apply only where each person whose stock is taken into account owns stock in each corporation of the group.

I

Respondent, Vogel Fertilizer Co. (Vogel Fertilizer), an Iowa corporation, sells farm fertilizer products. During the tax years in question—1973, 1974, and 1975—Vogel Fertil-

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[3] The full text of the Treasury Regulation is:

"*Brother-sister controlled group.*

"(i) The term 'brother-sister controlled group' means two or more corporations if the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of the rules contained in paragraph (b) of § 1.1563–3), singly or in combination, stock possessing—

"*(a)* At least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock in each corporation; and

"*(b)* More than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

"(ii) The principles of this subparagraph may be illustrated by the following examples:

"*Example (1).* The outstanding stock of corporations P, Q, R, S, and T, which have only one class of stock outstanding, is owned by the following unrelated individuals:

[*Footnote 3 is continued on p. 20*]

izer had only common stock issued and outstanding and Arthur Vogel (Vogel) owned 77.49 percent of that stock. Richard Crain (Crain), who is unrelated to Arthur Vogel, owned the remaining 22.51 percent. Vogel Popcorn Co. (Vogel Popcorn), another Iowa corporation, sells popcorn in both

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Individuals	Corporations					Identical-ownership
	P	Q	R	S	T	
A	60%	60%	60%	60%	100%	60%
B	40%	.....	.....	.....	.....	.....
C	.....	40%	.....	.....	.....	.....
D	.....	.....	40%	.....	.....	.....
E	.....	.....	.....	40%	.....	.....
Total	100%	100%	100%	100%	100%	60%

Corporations P, Q, R, S, and T are members of a brother-sister controlled group.

"*Example (2).* The outstanding stock of corporations U and V, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Individuals	Corporations		Identical ownership
	U	V	
F	5%	.....	.....
G	10%	.....	.....
H	10%	.....	.....
I	20%	.....	.....
J	55%	55%	55%
K		10%	.....
L		10%	.....
M		10%	.....
N		10%	.....
O		5%	.....
Total	100%	100%	55%

Corporations U and V are not members of a brother-sister controlled group because at least 80 percent of the stock of each corporation is not owned by the same five or fewer persons."

the wholesale and retail markets. For the tax years in question Crain owned no stock in Vogel Popcorn. Vogel, however, held 87.5 percent of the voting power, and between 90.66 percent and 93.42 percent of the value of Vogel Popcorn's stock.[4]

Vogel Fertilizer did not claim a full surtax exemption on its tax returns for the years in question,[5] believing that Treas. Reg. § 1.1563–1(a)(3) barred such a claim. But when the United States Tax Court, in 1976, held that Treas. Reg. 1.1563–1(a)(3) was invalid because the statute did not permit the Commissioner to take a person's stock ownership into account for purposes of the 80-percent requirement unless that person owned stock in each corporation within the brother-sister controlled group, *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T.C. 798 (1976), rev'd, 548 F. 2d 501 (CA4 1977), Vogel Fertilizer filed timely claims for refunds, asserting that Vogel Fertilizer and Vogel Popcorn were not members of a controlled group and that Vogel Fertilizer was therefore entitled to a full surtax exemption for each taxable year. The Internal Revenue Service disallowed the claims and respondent brought this suit for a refund in the United States Court of Claims. The Court of Claims held that Vogel Fertilizer and Vogel Popcorn did not

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[4] The remainder of the Vogel Popcorn stock—voting preferred stock—was owned by Arthur Vogel as trustee of the Alex Vogel Family Trust. Under the attribution rules of 26 U. S. C. §§ 1563(d)(2), (e), Arthur Vogel is not deemed to own this stock for tax purposes. See 225 Ct. Cl. 15, 18, 634 F. 2d 497, 499 (1980).

[5] In the original version of §§ 1561–1563, controlled groups retained the option of taking multiple surtax exemptions and paying a penalty. See 26 U. S. C. § 1562 (1964 ed.). During the tax years in question this option was being gradually phased out. 26 U. S. C. § 1564. For 1973 and 1974 respondent utilized the multiple surtax exemption under 26 U. S. C. § 1564(a), and paid the penalty imposed by § 1562(b) (1970 ed.). For the tax year ending November 30, 1975, respondent elected to allocate entirely to Vogel Popcorn the single surtax exemption then allowed to members of a controlled group of corporations.

constitute a brother-sister controlled group within the meaning of § 1563(a)(2)(A); that Treas. Reg. § 1.1563–1(a)(3) is invalid to the extent that it takes into account, with respect to the 80-percent requirement, stock held by a shareholder who owns stock in only one corporation of the controlled group; and that respondent was, accordingly, entitled to a refund. 225 Ct. Cl. 15, 634 F. 2d 497 (1980). We granted certiorari to resolve a conflict among the Circuits on this issue, 450 U. S. 994 (1981),[6] and now affirm.

II

Arthur Vogel's ownership of more than 50 percent of both Vogel Fertilizer and Vogel Popcorn satisfies Part (B) of the statutory test—the 50-percent identical-ownership requirement. The controversy centers on Part (A) of the test—the 80-percent requirement.

Respondent argues that the statute must be construed as including a common-ownership requirement—Congress was attempting to identify interrelated corporations that are in reality subdivided portions of a larger entity. In the taxpayer's view, Congress thus did not intend that a person's stock ownership be taken into account for purposes of the 80-percent requirement unless that shareholder owned stock in *all*

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[6] The Court of Appeals for the Fifth Circuit is in agreement with the Court of Claims and the Tax Court that Treas. Reg. § 1.1563–1(a)(3), 26 CFR § 1.1563–1(a)(3) (1981), is invalid insofar as it permits the 80-percent requirement to be satisfied without common ownership. *Delta Metalforming Co.* v. *Commissioner*, 632 F. 2d 442 (1980). The Tax Court has adhered to its view that the Regulation is invalid. See, *e. g.*, *Charles Baloian Co.* v. *Commissioner*, 68 T.C. 620, 629–631 (1977); *Davidson Chevrolet Co.* v. *Commissioner*, 39 TCM 299 (1979), [¶ 79,414] P-H Memo TC; *Allen Oil Co.* v. *Commissioner*, 38 TCM 355 (1979), [¶ 79,088] P-H Memo TC; *Delta Metalforming Co.* v. *Commissioner*, 37 TCM 1485 (1978), [¶ 78,354] P-H Memo TC; *T. L. Hunt, Inc.* v. *Commissioner*, 35 TCM 966 (1976), [¶ 76,221] P-H Memo TC. This adherence has persisted in the face of reversals by the Courts of Appeals for the Second, Fourth, and Eighth Circuits. *Allen Oil Co.* v. *Commissioner*, 614 F. 2d 336 (CA2 1980); *Fairfax Auto Parts of Northern Virginia* v. *Commissioner*, 548 F. 2d 501 (CA4 1977) *(per curiam)*; *T. L. Hunt, Inc.* v. *Commissioner*, 562 F. 2d 532 (CA8 1977).

of the corporations within the controlled group. The same "5 or fewer" individuals cannot be said to control 80 percent of both Vogel Fertilizer and Vogel Popcorn because Crain owns no stock in Vogel Popcorn and therefore his 22.51 percent of Vogel Fertilizer cannot be added to Vogel's 77.49 percent of that corporation to satisfy § 1563(a)(2)(A). The Commissioner takes the position, however, reflected in his addition of the words "singly or in combination" in Treas. Reg. § 1.1563–1(a)(3) to the statutory language, that there is no common-ownership requirement—various subgroups of "5 or fewer persons" can own the requisite 80 percent of the different corporations within the controlled group. The Commissioner acknowledges that under this interpretation, Part (A)'s 80-percent requirement in no respect measures the interrelationship between two corporations. The Commissioner's view is that only the 50-percent requirement measures this interrelationship. He contends the 80-percent requirement "continues to have independent significance" in that it "insures that all the members of the corporate group will be closely held," so that "the more-than-50-percent shareholder control group can obtain additional control in those instances where a greater interest is needed without the necessity of dealing with a large number of other shareholders." Brief for United States 35.[7]

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[7] The difference between the Commissioner's and the taxpayer's positions is illustrated by the following example:

Individuals	Corporations						Identical Ownership
	U	V	W	X	Y		
A	55%	51%	55%	55%	55%	51%	
B	45%	49%					(45% in U & V)
C			45%				
D				45%			
E					45%		

[*Footnote 7 is continued on p. 24*]

A

Our role is limited to determining the validity of Treas. Reg. § 1.1563–1(a)(3). Deference is ordinarily owing to the agency construction if we can conclude that the regulation "implement[s] the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S 299, 307 (1967). But this general principle of deference, while fundamental, only sets "the framework for judicial analysis; it does not displace it." *United States* v. *Cartwright*, 411 U. S. 546, 550 (1973).

The framework for analysis is refined by consideration of the source of the authority to promulgate the regulation at issue. The Commissioner has promulgated Treas. Reg. § 1.1563–1(a)(3) interpreting this statute only under his general authority to "prescribe all needful rules and regulations." 26 U. S. C. § 7805(a). Accordingly, "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." *Rowan Cos.* v. *United States*, 452 U. S. 247, 253 (1981). In addition, Treas. Reg. § 1.1563–1(a)(3) purports to do no more than add a clarifying gloss on a term—"brother-sister controlled group"—that has already been defined with considerable specificity by Congress. The Commissioner's authority is consequently more circumscribed than would be the case if Congress had used a term "'so general . . . as to render an interpretive regulation appropriate.'" *National Muffler Dealers Assn.*,

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The parties would agree that the 50-percent identical-ownership requirement in Part (B) is met for all corporations by shareholder A's identical ownership of 51 percent of all of the corporations. The Commissioner would find the 80-percent requirement met as well, and would therefore define all five corporations as part of a controlled group, because various subgroups of the five or fewer shareholders can account for 80 percent of each corporation. The taxpayer's position is that only corporations U and V are part of a brother-sister controlled group, because they are the only two corporations in which precisely the same five or fewer persons account for 80 percent of the stock of the putative "brother-sister controlled" corporations.

Inc. v. *United States*, 440 U. S. 472, 476 (1979), quoting *Helvering* v. *R. J. Reynolds Co.*, 306 U. S. 110, 114 (1939). See also *Rowan Cos.* v. *United States*, *supra*.

B

We consider first whether the Regulation harmonizes with the statutory language. *National Muffler Dealers Assn., Inc.* v. *United States*, *supra*, at 477. That language, set forth *supra*, at 18, and n. 2, while not completely unambiguous, is in closer harmony with the taxpayer's interpretation than with the Commissioner's Regulation. The term that the statute defines—"brother-sister controlled group"—connotes a close horizontal relationship *between* two or more corporations, suggesting that the same indivisible group of five or fewer persons must represent 80 percent of the ownership of each corporation.

This interpretation is strengthened by the structure of the statute. Section 1563(a)(2) defines the controlling group of shareholders ("5 or fewer"), and then sets forth the two ownership requirements (80-percent and 50-percent). This structure suggests that precisely the same shareholders must satisfy both the 80-percent and 50-percent requirements. As the Tax Court stated it, "5 or fewer persons" is the "conjunctive subject" of *both* requirements. *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T.C., at 803. Since under Part (B)'s 50-percent requirement, stock ownership is taken into account only to the extent it is "identical," that part of the statutory test clearly includes a common-ownership requirement. If, as the statutory structure suggests, the shareholders whose holdings are considered for purposes of Part (A) must be precisely the same shareholders as those whose holdings are considered for purposes of Part (B), the former also requires common ownership.[8]

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[8] This interpretation of the statutory language is also strengthened by the presence of the phrase "each such person" in Part (B). The Tax Court pointed out:

"The words 'each such person' appearing therein refer to the 'five or fewer

Of course, a Treasury Regulation is not invalid simply because the statutory language will support a contrary interpretation. But the mere fact that there are no words in Part (A) explicitly requiring that each shareholder own stock in each corporation does not mean that the Regulation's interpretation, "singly or in combination," must be accepted as reasonable. This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not "technically inconsistent" with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design. *United States* v. *Cartwright*, 411 U. S., at 557. The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's "origin and purpose." *National Muffler Dealers Assn., Inc.* v. *United States*, *supra*, at 477.

C

The legislative history of § 1563(a)(2) resolves any ambiguity in the statutory language and makes it plain that Treas. Reg. § 1.1563–1(a)(3) is not a reasonable statutory interpretation. Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation—large organizations subdividing into smaller corporations and receiving un-

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persons' constituting the ownership group for purposes of both the 80-percent and 50-percent tests. The import of such usage is that each person—and not just some of the persons—counted for purposes of the 80-percent test must be also counted for purposes of the 50-percent test." *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T.C., at 803.

The Government argues that there is no justification for singling out the phrase "each such person" in Part (B) of the test and transporting it for application in the context of Part (A). This argument, however, mischaracterizes the reasoning of the Tax Court. The court merely intended to show that the term "each such person" refers back to the antecedent "5 or fewer persons," which precedes the 80-percent requirement, thereby strengthening the suggestion that there is one fixed, indivisible group of shareholders whose holdings are to be considered throughout application of both the 80-percent requirement in Part (A) and the 50-percent requirement in Part (B).

intended tax benefits from the multiple use of surtax exemptions, accumulated earnings credits, and various other tax provisions designed to aid small businesses. S. Rep. No. 91–552, p. 134 (1969). The House Ways and Means Committee Report noted that "large organizations have been able to obtain substantial benefits . . . by dividing the organization's income among a number of related corporations. Your committee does not believe that large organizations which operate through multiple corporations should be allowed to receive the substantial and unintended tax benefits resulting from the multiple use of the surtax exemption and the other provisions of present law." H. R. Rep. No. 91–413, pt. 1, p. 98 (1969). The intended targets of § 1563(a)(2) were groups of *interrelated* corporations—corporations characterized by *common* control and ownership. Although the 50-percent requirement measures, to a lesser degree, the overlap between two corporations, the history of the enactment of § 1563(a)(2) illustrates that Congress intended that the *80-percent* requirement be the primary requirement for defining the interrelationship between two or more corporations.

Until 1964, the method prescribed by the Code to curb the abuse of multiple incorporation was subjective: Multiple exemptions or benefits were allowed or disallowed depending on the reasons for the taxpayer's actions.[9] The Revenue Act of 1964 changed this approach, adding §§ 1561–1563 to the Code. Pub. L. 88–272, § 235(a), 78 Stat. 116–125. These sections prescribed the application of mechanical, objective

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[9] Before 1964, the Code provisions designed to prevent taxpayers from using the multiple form of corporate organization in order to avoid taxes were §§ 269, 482, and 1551. H. R. Rep. No. 749, 88th Cong., 1st Sess., 117 (1963). Section 269 gives the Secretary the authority to disallow a tax deduction, credit, or other allowance when an acquisition was made to avoid income tax. Section 482 gives the Secretary the authority to allocate income, deductions, credits, or allowances between or among taxpayers if he determines that such an allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of the taxpayers. Section 1551 permits the Secretary to disallow a surtax exemption or accumulated

tests for determining whether two corporations were a "controlled group" and thereby restricted to one surtax exemption. The original, 1964, definition of a "brother-sister controlled group" was:

> "Two or more corporations if stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations is owned . . . by one person who is an individual, estate, or trust." 26 U. S. C. § 1563(a)(2) (1964 ed.).

Because corporations were not part of a controlled group unless the same person owned 80 percent of all corporations within the group, the 1964 provision clearly included a common-ownership requirement.

In 1969 Congress adopted the present two-part percentage test codified in § 1563(a)(2). Pub. L. 91–172, § 401(c), 83 Stat. 602. This change was proposed by the Treasury Department as part of an extensive package of tax reform proposals. See Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, pp. 5050–5478 (1969) (hereinafter Hearings). The Treasury Department proposed, *inter alia*, that the definition of a brother-sister controlled group "be broadened to include groups of corporations owned and controlled by five or fewer persons, rather than only those owned and controlled by one person," as was the case under then existing law. *Id.*, at 5166. In setting forth the "Technical Explana-

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earnings credit when a transfer of property between two "controlled" corporations occurs, unless the taxpayer can show that the "major purpose" of the transfer was not the securing of such benefits. All of these sections are still in effect, but they are no longer the primary weapons employed against the abuse of multiple incorporation. Rather, the purely objective tests of §§ 1561–1563 have proved to be more effective. See Thomas, Brother-Sister Multiple Corporations—The Tax Reform Act of 1969 Reformed by Regulation, 28 Tax L. Rev. 65, 66–67 (1972).

tion" for this new definition of brother-sister controlled groups, the Treasury Department was most explicit that the 80-percent requirement, like the 50-percent requirement, included common ownership: "[T]he *same five* or fewer persons [must] own at least 80 percent of the voting stock or value of shares of *each* corporation and . . . *these* five or fewer individuals" must satisfy the 50-percent requirement in Part (B). *Id.*, at 5168 (emphasis added except for "*five*").

The Treasury Department's "General Explanation" of the amendment to § 1563(a)(2) defined a brother-sister controlled group as one "in which five or fewer persons own, to a large extent in identical proportions, at least 80 percent of the stock of each of the corporations." Hearings, at 5394 (footnote omitted). The General Explanation then set forth the respective roles of the expanded 80-percent requirement and the new 50-percent requirement:

> "This provision expands present law by considering the combined stock ownership of five individuals, rather than one individual, in applying the 80-percent test. . . .
>
> "However, in order to insure that this expanded definition of brother-sister controlled group applies only to those cases where the five or fewer individuals hold their 80 percent in a way which allows them to operate the corporations as one economic entity, the proposal would add an additional rule that the ownership of the five or fewer individuals must constitute more than 50 percent of the stock of each corporation considering, in this test of ownership, stock of a particular person only to the extent that it is owned identically with respect to each corporation." *Ibid.*

The General Explanation made it clear that, under the 1969 amendment to § 1563(a)(2), the 80-percent requirement would remain the primary basis for determining whether two or more corporations represent the *same* financial interests. Part (A) of the 1969 test was simply an expansion of the 1964 test, which considered the two or more corporations to be a

brother-sister controlled group only when one person owned 80 percent of all of the corporations. This "expansion" was necessary to "close the present opportunity for easy avoidance" of the 80-percent test. Hearings, at 5396. Because five persons now played the role previously played by one, this expanded version of the test required a new safeguard—the 50-percent requirement—to "insure that the new expanded definition is limited to cases where the brother-sister corporations are, in fact, *controlled* by the group of stockholders as one economic enterprise." *Ibid.* (emphasis added).[10]

The "singly or in combination" provision of Treas. Reg. § 1.1563–1(a)(3) is clearly incompatible with the explanation offered by the Treasury Department when it proposed the statute. In addition to the explicit statement that the members of the controlling group must own stock in "each" corporation, the Treasury Department presented a test in which the 80-percent requirement remained the primary indicia of interrelationship. But under the challenged Regulation, the 80-percent requirement measures *only* whether or not the brother-sister corporations are closely held. The fact that a corporation is closely held, absent common ownership, is irrelevant to the congressional purpose of identifying interrelationship: "It is not the *smallness* of the number of persons in each company that triggers § 1563; it is the *sameness* of that small number." *T. L. Hunt, Inc.* v. *Commissioner*, 562 F. 2d 532, 537 (CA8 1977) (Webster, J. dissenting).[11]

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[10] The Treasury Department's explanations included several examples applying the new definition of a brother-sister controlled group. In these examples, all shareholders whose stock was taken into account for purposes of the 80-percent requirement owned stock in each of the other corporations within the controlled group. See Hearings, at 5169, 5170, 5395–5396.

[11] The Commissioner strains to find some ambiguity in the Treasury Department's explanations. He points to the statement in the General Explanation that a brother-sister controlled group is a "group of corporations in which five or fewer persons own, *to a large extent in identical propor-*

The Treasury Department's explanations of the proposed statute are not, as the dissent in the Court of Claims suggested, a mere "admission against interest" by the Commissioner. 225 Ct. Cl., at 44, 634 F. 2d, at 514. The expanded definition of "brother-sister controlled group" was proposed by the Treasury Department and adopted in the same form in which it was presented. Of course, it is Congress' understanding of what it was enacting that ultimately controls. But we necessarily attach "great weight" to agency representations to Congress when the administrators "participated in drafting and directly made known their views to Congress in committee hearings." *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969). The subsequent legislative history of § 1563(a)(2) confirms that Congress adopted not only the proposal of the Treasury Department, but also the Department's explana-

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tions, at least 80 percent of the stock of each of the corporations." *Id.*, at 5394 (footnote omitted, emphasis added). The Commissioner contends that the underscored phrase suggests that there need not be common ownership among all those persons taken into account for purposes of the 80-percent requirement. But the words the Commissioner relies on only further support the taxpayer's position. If the shareholders own stock "to a large extent in identical proportions" they certainly own the stock *to some extent* in identical proportions—there is some overlap among *each* shareholder's holdings in *each* brother-sister corporation.

The dissent makes a similar effort, relying on the statement in the Technical Explanation that the 80-percent requirement "is satisfied if the *group* of five or more persons *as a whole* owns at least 80 percent of the voting stock or value of shares of each corporation, *regardless of the size of the individual holdings of each person.*" *Post*, at 38–39 (emphasis in opinion). This language, however, also supports the taxpayer's interpretation since it appears to assume that "each person" *has* holdings in each corporation. This assumption is demonstrated by the three examples which directly follow this language and are used to illustrate it: The 80-percent requirement "is met whether one person owns 80 percent of the voting stock of each corporation, four persons each own 20 percent of the voting stock of each corporation, or one person owns 60 percent of the voting stock of one corporation and 40 percent of another, and another person owns 40 percent of the voting stock of the first and 60 percent of the second." Hearings, at 5169.

tion and interpretation which are wholly incompatible with the "singly or in combination" interpretation of the Regulation. The Ways and Means Committee Report stated:

> "This bill expands the definition [of a brother-sister controlled group] to include two or more corporations which are owned 80 percent or more (by voting power or value) by five or fewer persons (individuals, estates, or trusts) provided that these five or fewer persons own more than 50 percent of each corporation when the stock of each person is considered only to the extent it is owned identically with respect to each corporation." H. R. Rep. No. 91–413, pt. 1, p. 99 (1969).

The House Committee Report thus reflects the Treasury Department's explanations—the 80-percent requirement is an expanded version of the 1964 statute and measures overlapping interests, while the 50-percent requirement is an additional proviso necessary in light of the expanded number of shareholders whose overlapping interests were to be considered.[12]

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The Commissioner's further reasons for sustaining his interpretation are unpersuasive.

The Commissioner relies on the fact that, in expanding the coverage of § 1563(a)(2), Congress expressly adopted part of the language used in § 1551(b)(2) of the Code to describe a transfer from one corporation to another "controlled" by the same "five or fewer" individuals. The Commissioner contends that Congress thereby approved the interpretation the Commissioner had placed on § 1551(b)(2). Even if we could assume that Congress was aware of Treasury Regulations in-

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[12] The Senate Committee Reports describe the amendment in language almost identical to that employed by the House Report. See S. Rep. No. 91–552, p. 135 (1969); Senate Committee on Finance, Summary of H. R. 13270, Tax Reform Act of 1969, 91st Cong., 1st Sess., 49 (Comm. Print 1969).

terpreting § 1551, promulgated only two years before § 1563 was enacted, see 32 Fed. Reg. 3214–3216 (1967), the promulgated regulations do not support the Commissioner's present interpretation of the statutory language in § 1563(a)(2). The Regulations defining control under § 1551 contain no language similar to the words "singly or in combination" found in Treas. Reg. § 1.1563–1(a)(3) and they contain no suggestion that the Treasury Department had interpreted § 1551(b)(2) as *not* having a common-ownership requirement. See Treas. Reg. § 1.1551–1(e), 26 CFR § 1.1551–1(e) (1981).[13]

Also unpersuasive is the Commissioner's reliance on the fact that § 1563(a)(2) is referred to in § 1015 of the Employee Retirement Income Security Act of 1974, 26 U. S. C. § 414.[14]

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[13] The Commissioner relies on one of the examples used to define a "transfer" for purposes of § 1551—a concept that obviously has no application under § 1563(a)(2). See Treas. Reg. § 1.1551–1(g)(4), 26 CFR § 1.1551–1(g)(4) (1981). The example the Commissioner relies on provides: "Individual A owns 55 percent of the stock of corporation X. Another 25 percent of corporation X's stock is owned in the aggregate by individuals B, C, D, and E. On June 15, 1963, individual A tranfers property to corporation Y (newly created for the purpose of acquiring such property) in exchange for 60 percent of the stock of Y, and B, C, and D acquire all of the remaining stock of Y. The transfer is within the scope of section 1551(a)(3)." Treas. Reg. § 1.1551–1(g)(4), Example (4), 26 CFR § 1.1551–1(g)(4), Example (4) (1981).

Even if this example were read to suggest that a transferor "controls," within the meaning of § 1551(b)(2), a transferee although the persons owning 80 percent of the transferor do not each own stock in the transferee, the example would be inapplicable to § 1563(a)(2) because, as the Tax Court has pointed out, there is no method for determining which brother-sister corporation is to be regarded as the transferor and which as the transferee. See *Fairfax Auto Parts of Northern Virginia, Inc.*, 65 T.C., at 807. See also Bonovitz, Brother-Sister Controlled Groups under Section 1563: The 80 Percent Ownership Test, 28 Tax Lawyer 511, 524, 528–530 (1975).

[14] Section 414(b) provides in relevant part that "all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer."

From this the Commissioner infers congressional approval of all the Regulations promulgated under § 1563(a)(2), including the Regulation at issue in this case. But it is the intent of the Congress that amended § 1563(a), not the views of the subsequent Congress that enacted § 414, that are controlling. See *Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977). In any event, this passing reference in 26 U. S. C. § 414(b), enacted only two years after Treas. Reg. § 1.1563–1(a)(3) was promulgated, 37 Fed. Reg. 8068–8070 (1972), hardly constitutes legislative approval of a longstanding administrative interpretation, from which we could infer any congressional acceptance. Cf. *United States* v. *Correll*, 389 U. S., at 305–306.

Finally, the Commissioner seeks to uphold the Regulation on the ground that a common-ownership requirement leads to the assertedly nonsensical result that ownership of only one share could be determinative. For example, if Richard Crain owned but one share of Vogel Popcorn, then the 80-percent requirement would be met and the taxpayer corporation would be part of a controlled group even under the taxpayer's interpretation of the statute. This argument is without merit, for several reasons. First, Congress purposefully substituted the mechanical formula of § 1563(a)(2) for the subjective, case-by-case analysis that had previously prevailed. Inherent in such an objective test is a sharp dividing line that is crossed by incremental changes in ownership. Moreover, it is obvious that a shareholder would not buy a small amount of stock in order to *create* a controlled group, since it is to the taxpayer's advantage not to be part of such a group. Finally, a person's "mere" ownership of one share of stock plays an important role in the operation of the test. It insures that each of the "5 or fewer" shareholders representing the bulk of the financial interest of the corporations actually knows of the other corporations within the putative brother-sister controlled group. Under this construction of the statute, controlled-group membership cannot

catch such a shareholder by surprise, as it could under the Commissioner's construction.

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, dissenting.

I cannot deny that the Court's opinion persuasively defends a possible interpretation of 26 U. S. C. § 1563(a)(2). In my view, however, the Court has totally failed to establish that the *Commissioner's* interpretation is incorrect. Because I believe that the only certainty about the language and history of § 1563(a)(2) is that both are ambiguous, I would defer to the Commissioner's judgment.

The Court begins by declaring that the statutory language, "while not completely unambiguous, is in closer harmony with the taxpayer's interpretation than with the Commissioner's Regulation" because the term "'brother-sister controlled group'—connotes a close horizontal relationship *between* two or more corporations." *Ante*, at 25 (emphasis in original). In taking this approach, however, the Court simply assumes its conclusion. The 50-percent test of Part (B) already ensures a horizontal relationship between the corporations that constitute the controlled group; nothing in the language of the statute suggests that Part (A) was designed directly to serve the same purpose. At most, § 1563(a)(2) can be read to require that the same *set* of five or fewer persons must satisfy the 50- and 80-percent tests; the statute is entirely silent as to whether each *member* of the set must own stock in each corporation. And, unlike the Court, I have difficulty inferring this conclusion from the term "brother-sister controlled group," a phrase that appears only in the heading of the subsection and that is hardly a household term with an intuitively obvious meaning.

Similar problems attend the Court's analysis of the statute's structure. In the Court's view, the fact that the controlling group of shareholders is defined as "5 or fewer" for both the 50- and 80-percent tests "suggests that precisely the

same shareholders must satisfy both the 80-percent and 50-percent requirements." *Ante*, at 25. Even if this were true, however, it would not mean that *each member* of the set of five or fewer shareholders must own stock in each corporation; it suggests only that the total number of shareholders considered in relation to both tests may not exceed five. In any event, the common-ownership requirement—which takes "into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation," § 1563(a)(2)(B)—is embedded in Part (B), and the simpler and normal reading of the statute therefore would apply the common-ownership restriction only to Part (B)'s 50-percent test.[1] It is the Court's reading, then, that seemingly runs counter to the structure of the statute, for under its approach the 80-percent test would "tend to overlap or swallow the 50% identical ownership requirement." *Allen Oil Co.* v. *Commissioner*, 614 F. 2d 336, 339 (CA2 1980).

The confusing nature of the statutory text leads the Court to rely principally on § 1563(a)(2)'s legislative history, which it cheerfully reads as "resolv[ing] any ambiguity in the statutory language." *Ante*, at 26. It seems to me that this conclusion is substantially overstated. It is undoubtedly true, as the Court observes, that § 1563(a)(2) was aimed at curbing the abuses of multiple incorporation. But this is beside the

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[1] The Court concludes that the phrase "each such person" in Part (B) refers back to the "5 or fewer persons," which precedes Part (A), "strengthening the suggestion that there is one fixed, indivisible group of shareholders whose holdings are to be considered throughout application of both the 80-percent requirement in Part (A) and the 50-percent requirement in Part (B)." *Ante*, at 26, n. 8. But this language proves only that the total number of shareholders considered may not exceed five; it need not be read to require that each 80-percent shareholder own stock in each corporation. Indeed, the presence of an explicit common-ownership requirement in Part (B), along with the absence of analogous language in Part (A), suggests that Congress did not intend to write such a requirement into the 80-percent test.

point, for—as the Court notes—the 50-percent test of Part (B) itself serves to "measur[e] . . . the overlap between two corporations." *Ante*, at 27. The Court's further conclusion "that Congress intended that the *80-percent* requirement be the primary requirement for defining the interrelationship between two or more corporations," *ibid.* (emphasis in original), is entirely without support in the legislative history.[2] Certainly, such a view appears nowhere in the congressional Reports. These simply echo the statutory definition, declaring that a controlled group includes "two or more corporations which are owned 80 percent or more . . . by five or fewer persons . . . provided that these five or fewer persons own more than 50 percent of each corporation when the stock of each person is considered only to the extent it is owned identically with respect to each corporation." H. R. Rep. No. 91–413, pt. 1, p. 99 (1969). Accord, S. Rep. No. 91–552, p. 135 (1969). Again, however, the legislative documents prove only that the same *set* must satisfy the 80- and 50-per-

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[2] The Court apparently derives this conclusion from the nature of the pre-1969 statutory scheme, under which corporations were considered to be part of a controlled group only if the same person owned 80 percent of the stock in each controlled corporation. *Ante*, at 28. In the Court's view, § 1563(a)(2) simply expanded the ownership group to five, retaining the 80-percent requirement as the primary test for interrelatedness. The problem with this approach is that it is entirely speculative. Congress nowhere stated that it had any such intention with regard to the 80-percent test. And the Treasury Department, when it proposed § 1563(a)(2), simply stated the obvious: it declared that the new statute "expand[ed] present law" by considering the ownership interests of five individuals, while adding a 50-percent test "to insure" that controlled corporations operate as one economic entity. Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, p. 5394 (1969). Certainly, the Court can credibly read its conclusion into this history. But the legislative materials are not inconsistent with the Commissioner's contrary view that the newly devised 50-percent test was to serve as the primary indicium of interrelatedness. Because of the absence of any explicit statement on the question in the legislative history, I find the Court's certainty somewhat surprising.

cent tests; they cannot easily be read to require that each *member* of the set own stock in every corporation.

Ironically, then, the Court at bottom is forced to rely on the rationale advanced by the Treasury Department when it proposed the legislation eventually adopted as § 1563(a)(2). The Court's analysis of this proposal, which it explores in some detail, *ante*, at 28–30, is certainly credible. But even this legislative material contains an essential ambiguity.[3] Neither the "General Explanation" nor the "Technical" one addresses whether the 80-percent test requires common ownership, or whether a person excluded from the 50-percent calculation because he owns no stock in one of the controlled corporations may nevertheless be included in the 80-percent test, so long as the total number of relevant shareholders does not exceed five. For example, while the Treasury Department suggested that "the same *five* or fewer persons [must] own at least 80 percent of the voting stock or value of shares of each corporation" to satisfy Part (A), and that "these five or fewer individuals" must satisfy the 50-percent test of Part (B), Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, p. 5168 (1969) (emphasis in original), the Department's explanation—despite the Court's suggestion to the contrary—need not be read as requiring that *each* of the five own stock in every controlled corporation. To the contrary, the Technical Explanation declares that the 80-percent test "is satisfied if the *group* of five or fewer persons *as a whole* owns at least 80 percent of the voting stock or value of shares of each corporation, *regardless of the size of the indi-*

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[3] Indeed, throughout the course of litigation over § 1563(a)(2), both the Commissioner and the various taxpayers involved have drawn support from precisely the same portions of the Treasury Department proposals. Compare *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T. C. 798, 803–804 (1976), rev'd, 548 F. 2d 501 (CA4), cert. denied, 434 U. S. 904 (1977), with 65 T.C., at 809–810 (dissenting opinion). See also *Allen Oil Co.* v. *Commissioner*, 614 F. 2d 336, 340, n. 4 (CA2 1980).

vidual holdings of each person." *Id.*, at 5169 (emphasis added). This obviously suggests that the crucial inquiry is whether a given set of five satisfies both tests, not whether each individual owns stock in each corporation.

Certainly, I do not suggest that the Commissioner's interpretation is compelled by the legislative materials. But the Court, by putting so much effort into reading between the lines, has lost sight of the fact that certain statutory ambiguities cannot be neatly and finally resolved. Here, the Commissioner's interpretation is not "unreasonable or meaningless," for "it insures that the stock is closely held." *Allen Oil Co.* v. *Commissioner*, 614 F. 2d, at 340. In such a situation, "[t]he choice among reasonable interpretations is for the Commissioner, not the courts." *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 488 (1979). See *United States* v. *Correll*, 389 U. S. 299, 307 (1967). For that reason, I respectfully dissent.

COMMUNITY COMMUNICATIONS CO., INC. v. CITY OF BOULDER, COLORADO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 80-1350. Argued October 13, 1981—Decided January 13, 1982

Respondent city of Boulder is a "home rule" municipality, granted by the Colorado Constitution extensive powers of self-government in local and municipal matters. Petitioner is the assignee of a permit granted by a city ordinance to conduct a cable television business within the city limits. Originally, only limited service within a certain area of the city could be provided by petitioner, but improved technology offered petitioner an opportunity to expand its business into other areas, and also offered opportunities to potential competitors, one of whom expressed interest in obtaining a permit to provide competing service. The City Council then enacted an "emergency" ordinance prohibiting petitioner from expanding its business for three months, during which time the Council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance. Petitioner filed suit in Federal District Court, alleging that such a restriction would violate § 1 of the Sherman Act, and seeking a preliminary injunction to prevent the city from restricting petitioner's proposed expansion. The city responded that its moratorium ordinance could not be violative of the antitrust laws because, *inter alia*, the city enjoyed antitrust immunity under the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341. The District Court held that the *Parker* exemption was inapplicable and that the city was therefore subject to antitrust liability. Accordingly, the District Court issued a preliminary injunction. The Court of Appeals reversed, holding that the city's action satisfied the criteria for a *Parker* exemption.

Held: Boulder's moratorium ordinance is not exempt from antitrust scrutiny under the *Parker* doctrine. Pp. 48–57.

(a) The ordinance cannot be exempt from such scrutiny unless it constitutes either the action of the State itself in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. Pp. 48–51.

(b) The *Parker* "state action" exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the Federal Constitution. But this principle is inherently limited: Ours is a "*dual* system of

government," *Parker, supra*, at 351, which has no place for sovereign cities. Here, the direct delegation of powers to the city through the Home Rule Amendment to the Colorado Constitution does not render the cable television moratorium ordinance an "act of government" performed by the city acting as the State in local matters so as to meet *Parker*'s "state action" criterion. Pp. 52–54.

(c) Nor is the requirement of "clear articulation and affirmative expression" of a state policy fulfilled here by the Home Rule Amendment's "guarantee of local autonomy," since the State's position is one of mere neutrality respecting the challenged moratorium ordinance. This case involves city action in the absence of any regulation by the State, and such action cannot be said to further or implement any clearly articulated or affirmatively expressed state policy. Pp. 54–56.

(d) Respondents' argument that denial of the *Parker* exemption in this case will have serious adverse consequences for cities and will unduly burden the federal courts is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws, which laws apply to municipalities not acting in furtherance of clearly articulated and affirmatively expressed state policy. Pp. 56–57.

630 F. 2d 704, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 58. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 60. WHITE, J., took no part in the consideration or decision of the case.

Harold R. Farrow argued the cause for petitioner. With him on the briefs were *Thomas A. Seaton* and *Robert E. Youle*.

Jeffrey H. Howard argued the cause for respondents. With him on the brief were *Kathleen A. McGinn*, *Dale R. Harris*, *Bruce T. Reese*, *Joseph N. de Raismes*, and *Alan E. Boles, Jr.*

Thomas P. McMahon, Assistant Attorney General of Colorado, argued the cause for the States of Colorado et al. as *amici curiae* urging reversal. With him on the brief were *J. D. MacFarlane*, Attorney General of Colorado, *Mary J. Mullarkey*, Solicitor General, and *B. Lawrence Theis*, First Assistant Attorney General; *Wilson L. Condon*, Attorney

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ginia, and *Charles G. Brown*, Deputy Attorney General; and *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case, in which the District Court for the District of Colorado granted preliminary injunctive relief, is whether a "home rule" municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the "state action" exemption from Sherman Act liability announced in *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

Respondent city of Boulder is organized as a "home rule" municipality under the Constitution of the State of Colorado.[1] The city is thus entitled to exercise "the full right of self-government in both local and municipal matters," and with respect to such matters the City Charter and ordinances

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**J. D. MacFarlane*, Attorney General of Colorado, *Richard F. Hennessey*, Deputy Attorney General, *Mary J. Mullarkey*, Solicitor General, *B. Lawrence Theis*, First Assistant Attorney General, and *Thomas P. McMahon*, Assistant Attorney General, filed a brief for the State of Colorado as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Bingham Kennedy* and *Howard J. Gan* for the Cable Television Information Center; by *Robert D. Pritt*, *John D. Cummins*, and *Glenn M. Young* for the City of Akron, Ohio, et al.; by *Burt Pines*, *James A. Doherty*, and *John F. Haggerty* for the City of Los Angeles; by *Susan K. Griffiths* for the Colorado Municipal League; by *Roger F. Cutler*, *John Dekker*, *James B. Brennan*, *Henry W. Underhill, Jr.*, and *Benjamin L. Brown* for the National Institute of Municipal Law Officers; and by *Ross D. Davis*, *Howard W. Fogt, Jr.*, *Jay N. Varon*, and *Catherine B. Klarfeld* for the National League of Cities.

[1] The Colorado Home Rule Amendment, Colo. Const., Art. XX, § 6, provides in pertinent part:

"The people of each city or town of this state, having a population of two thousand inhabitants . . . , are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or

supersede the laws of the State. Under that Charter, all municipal legislative powers are exercised by an elected City Council.[2] In 1964 the City Council enacted an ordinance granting to Colorado Televents, Inc., a 20-year, revocable, nonexclusive permit to conduct a cable television business within the city limits. This permit was assigned to petitioner in 1966, and since that time petitioner has provided cable television service to the University Hill area of Boulder, an area where some 20% of the city's population lives, and where, for geographical reasons, broadcast television signals cannot be received.

From 1966 until February 1980, due to the limited service that could be provided with the technology then available, petitioner's service consisted essentially of retransmissions of programming broadcast from Denver and Cheyenne, Wyo. Petitioner's market was therefore confined to the University Hill area. However, markedly improved technology became available in the late 1970's, enabling petitioner to offer many more channels of entertainment than could be provided by local broadcast television.[3] Thus presented with an oppor-

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town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

. . . . .

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters . . . .

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

[2] Boulder, Colo., Charter § 11 (1965 rev. ed.).

[3] The District Court below noted:

"Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services

tunity to expand its business into other areas of the city, petitioner in May 1979 informed the City Council that it planned such an expansion. But the new technology offered opportunities to potential competitors, as well, and in July 1979 one of them, the newly formed Boulder Communications Co. (BCC),[4] also wrote to the City Council, expressing its interest in obtaining a permit to provide competing cable television service throughout the city.[5]

The City Council's response, after reviewing its cable television policy,[6] was the enactment of an "emergency" ordi-

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originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and 'Home Box Office' companies developed, the public response to cable television greatly increased the market demand for such expanded services.

"The 'state of the art' presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as 'blue sky', indicating that virtually unlimited technological improvements are still expected." 485 F. Supp. 1035, 1036–1037 (1980).

[4] BCC was a defendant below, and is a respondent here.

[5] Regarding this letter, the District Court noted that "BCC outlined a proposal for a new system, acknowledging the presence of [petitioner] in Boulder but stating that '(w)hatever action the City takes in regard to [petitioner], it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit.'" *Id.*, at 1037.

[6] "The . . . City Council . . . initiat[ed] a review and reconsideration of cable television in view of the many changes in the industry since . . . 1964 . . . . Accordingly, they hired a consultant, . . . and held a number of study meetings to develop a governmental response to these changes. The primary thrust of [the consultant's] advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that [petitioner] had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that [petitioner might] not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable

nance prohibiting petitioner from expanding its business into other areas of the city for a period of three months.[7] The City Council announced that during this moratorium it planned to draft a model cable television ordinance and to invite new businesses to enter the Boulder market under its terms, but that the moratorium was necessary because petitioner's continued expansion during the drafting of the model ordinance would discourage potential competitors from entering the market.[8]

Petitioner filed this suit in the United States District Court for the District of Colorado, and sought, *inter alia*, a preliminary injunction to prevent the city from restricting petition-

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companies could make offers and not be hampered by the possibility that [petitioner] would build out the whole area before they even arrived." *Ibid.*

[7] The preamble to this ordinance offered the following declarations as justification for its enactment:

"[C]able television companies have within recent months displayed interest in serving the community and have requested the City Council to grant [them] permission to use the public right-of-way in providing that service; and

" . . . the present permittee, [petitioner], has indicated that it intends to extend its services in the near future . . . ; and

" . . . the City Council finds that such an extension . . . would result in hindering the ability of other companies to compete in the Boulder market; and

" . . . the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits . . . [within] 3 months, and finds that an extension of service by [petitioner] would result in a disruption of this application and evaluation process; and

" . . . the City Council finds that placing temporary geographical limitations upon the operations of [petitioner] would not impair the present services offered by [it] to City of Boulder residents, and would not impair [its] ability . . . to improve those services within the area presently served by it." Boulder, Colo., Ordinance No. 4473 (1979).

[8] The Council reached this conclusion despite BCC's statement to the contrary, see n. 5, *supra*.

er's proposed business expansion, alleging that such a restriction would violate § 1 of the Sherman Act.[9] The city responded that its moratorium ordinance could not be violative of the antitrust laws, either because that ordinance constituted an exercise of the city's police powers, or because Boulder enjoyed antitrust immunity under the *Parker* doctrine. The District Court considered the city's status as a home rule municipality, but determined that that status gave autonomy to the city only in matters of local concern, and that the operations of cable television embrace "wider concerns, including interstate commerce . . . [and] the First Amendment rights of communicators." 485 F. Supp. 1035, 1038–1039 (1980). Then, assuming, *arguendo*, that the ordinance was within the city's authority as a home rule municipality, the District Court considered *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978), and concluded that the *Parker* exemption was "wholly inapplicable," and that the city was therefore subject to antitrust liability. 485 F. Supp., at 1039.[10] Petitioner's motion for a preliminary injunction was accordingly granted.

On appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit reversed. 630 F. 2d 704 (1980). The majority, after examining Colorado law, rejected the District Court's conclusion that regulation of the cable television business was beyond the home rule authority

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[9] 26 Stat. 209, as amended, 15 U. S. C. § 1. Section 1 of the Sherman Act provides in pertinent part that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . , is declared to be illegal."

Petitioner also alleged, *inter alia*, that the city and BCC were engaged in a conspiracy to restrict competition by substituting BCC for petitioner. The District Court noted that although petitioner had gathered some circumstantial evidence that might indicate such a conspiracy, the evidence was insufficient to establish a probability that petitioner would prevail on this claim. 485 F. Supp., at 1038.

[10] The District Court also held that no *per se* antitrust violation appeared on the record before it, and that petitioner was not protected by the First Amendment from all regulation attempted by the city. *Id.*, at 1039–1040.

of the city. *Id.*, at 707. The majority then addressed the question of the city's claimed *Parker* exemption. It distinguished the present case from *City of Lafayette* on the ground that, in contrast to the municipally operated revenue-producing utility companies at issue there, "no proprietary interest of the City is here involved." 630 F. 2d, at 708. After noting that the city's regulation "was the only control or active supervision exercised by state or local government, and . . . represented the only expression of policy as to the subject matter," *id.*, at 707, the majority held that the city's actions therefore satisfied the criteria for a *Parker* exemption, 630 F. 2d, at 708.[11] We granted certiorari, 450 U. S. 1039 (1981). We reverse.

II

A

Parker v. *Brown*, 317 U. S. 341 (1943), addressed the question whether the federal antitrust laws prohibited a State, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. These took the form of a "marketing program" adopted by the State of California for the 1940 raisin crop; that program prevented appellee from freely marketing his crop in interstate commerce. *Parker* noted that California's program "derived its authority . . .

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[11] The majority cited *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), as support for its reading of *City of Lafayette*, and concluded "that *City of Lafayette* is not applicable to a situation wherein the governmental entity is asserting a governmental rather than proprietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability." 630 F. 2d, at 708.

The dissent urged affirmance, agreeing with the District Court's analysis of the antitrust exemption issue. *Id.*, at 715–718 (Markey, C. J., United States Court of Customs and Patent Appeals, sitting by designation, dissenting). The dissent also considered the city's actions to violate "[c]ommon principles of contract law and equity," *id.*, at 715, as well as the First Amendment rights of petitioner and its customers, both actual and potential, *id.*, at 710–714. The petition for certiorari did not present the First Amendment question, and we do not address it in this opinion.

from the legislative command of the state," *id.*, at 350, and went on to hold that the program was therefore exempt, by virtue of the Sherman Act's own limitations, from antitrust attack:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 350–351.

The availability of this exemption to a State's municipalities was the question presented in *City of Lafayette, supra.* In that case, petitioners were Louisiana cities empowered to own and operate electric utility systems both within and beyond their municipal limits. Respondent brought suit against petitioners under the Sherman Act, alleging that they had committed various antitrust offenses in the conduct of their utility systems, to the injury of respondent. Petitioners invoked the *Parker* doctrine as entitling them to dismissal of the suit. The District Court accepted this argument and dismissed. But the Court of Appeals for the Fifth Circuit reversed, holding that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws," *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (1976) (footnote omitted), and directing the District Court on remand to examine "whether the state legislature contemplated a certain type of anticompetitive restraint," *ibid.*[12]

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[12] The Court of Appeals described the applicable standard as follows: "[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the chal-

This Court affirmed. In doing so, a majority rejected at the outset petitioners' claim that, quite apart from *Parker*, "Congress never intended to subject local governments to the antitrust laws." 435 U. S., at 394. A plurality opinion for four Justices then addressed petitioners' argument that *Parker*, properly construed, extended to "all governmental entities, whether state agencies or subdivisions of a State, . . . simply by reason of their status as such." 435 U. S., at 408. The plurality opinion rejected this argument, after a discussion of *Parker*, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), and *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977).[13] These precedents were construed as holding that the *Parker* exemption reflects the federalism principle that we are a Nation of *States*, a principle that makes no accommodation for sovereign subdivisions of States. The plurality opinion said:

> "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have not been treated as

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lenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. . . . A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent." 532 F. 2d, at 434–435 (footnote and citation omitted).

[13] THE CHIEF JUSTICE, in a concurring opinion, focused on the nature of the challenged activity rather than the identity of the parties to the suit. 435 U. S., at 420. He distinguished between "the proprietary enterprises of municipalities," *id.*, at 422 (footnote omitted), and their "traditional government functions," *id.*, at 424, and viewed the *Parker* exemption as extending to municipalities only when they engaged in the latter.

equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." 435 U. S., at 412–413 (footnote and citations omitted).

The opinion emphasized, however, that the State as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability. Under the plurality's standard, the *Parker* doctrine would shield from antitrust liability municipal conduct engaged in "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U. S., at 413. This was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the "state policy" relied upon would have to be "clearly articulated and affirmatively expressed." *Id.*, at 410. This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980).[14]

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[14] In *Midcal* we held that a California resale price maintenance system, affecting all wine producers and wholesalers within the State, was not entitled to exemption from the antitrust laws. In so holding, we explicitly adopted the principle, expressed in the plurality opinion in *City of Lafayette*, that anticompetitive restraints engaged in by state municipalities or subdivisions must be "clearly articulated and affirmatively expressed as state policy" in order to gain an antitrust exemption. *Midcal*, 445 U. S., at 105. The price maintenance system at issue in *Midcal* was denied such an exemption because it failed to satisfy the "active state supervision" criterion described in *City of Lafayette*, 435 U. S., at 410, as underlying our decision in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). Because we conclude in the present case that Boulder's moratorium ordinance does

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Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette*, *Orrin W. Fox Co.*, and *Midcal*. Boulder argues that these criteria are met by the direct delegation of powers to municipalities through the Home Rule Amendment to the Colorado Constitution. It contends that this delegation satisfies both the *Parker* and the *City of Lafayette* standards. We take up these arguments in turn.

(1)

Respondent city's *Parker* argument emphasizes that through the Home Rule Amendment the people of the State of Colorado have vested in the city of Boulder "'*every power* theretofore possessed by the legislature . . . in local and municipal affairs.'"[15] The power thus possessed by Boul-

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not satisfy the "clear articulation and affirmative expression" criterion, we do not reach the question whether that ordinance must or could satisfy the "active state supervision" test focused upon in *Midcal*.

[15] *Denver Urban Renewal Authority* v. *Byrne*, —— Colo. ——, ——, 618 P. 2d 1374, 1381 (1980), quoting *Four-County Metropolitan Capital Improvement District* v. *Board of County Comm'rs*, 149 Colo. 284, 294, 369 P. 2d 67, 72 (1962) (emphasis in original). The *Byrne* court went on to state that "by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs." —— Colo., at ——, 618 P. 2d, at 1381. Petitioner strongly disputes respondent city's premise and its construction of *Byrne*, citing *City and County of Denver* v. *Sweet*, 138 Colo. 41, 48, 329 P. 2d 441, 445 (1958), *City and County of Denver* v. *Tihen*, 77 Colo. 212, 219–220, 235 P. 777, 780–781 (1925), and 2 E. McQuillin, Municipal Corporations § 9.08a, p. 638 (1979), as contrary authority. But it is not for us to determine the correct view on this issue as a matter of state law. *Parker* affords an exemption from *federal* antitrust laws, based upon *Congress'* intentions respecting the scope of those laws. Thus the availability of the *Parker* exemption is and must be a matter of federal law.

der's City Council assertedly embraces the regulation of cable television, which is claimed to pose essentially local problems.[16] Thus, it is suggested, the city's cable television moratorium ordinance is an "act of government" performed by the city *acting as the State* in local matters, which meets the "state action" criterion of *Parker*.[17]

We reject this argument: it both misstates the letter of the law and misunderstands its spirit. The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "*dual* system of government," *Parker*, 317 U. S., at 351 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> "the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legisla-

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[16] Boulder cites the decision of the Colorado Supreme Court in *Manor Vail Condominium Assn.* v. *Vail*, —— Colo. ——, —— - ——, 604 P. 2d 1168, 1171–1172 (1980), as authority for the proposition that the regulation of cable television is a local matter. Petitioner disputes this proposition and Boulder's reading of *Manor Vail*, citing in rebuttal *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 168–169 (1968), holding that cable television systems are engaged in interstate communication. In this contention, petitioner is joined by the State of Colorado, which filed an *amicus* brief in support of petitioner. For the purposes of this decision we will assume, without deciding, that respondent city's enactment of the moratorium ordinance under challenge here did fall within the scope of the power delegated to the city by virtue of the Colorado Home Rule Amendment.

[17] Respondent city urges that the only distinction between the present case and *Parker* is that here the "act of government" is imposed by a home rule city rather than by the state legislature. Under *Parker* and Colorado law, the argument continues, this is a distinction without a difference, since in the sphere of local affairs home rule cities in Colorado possess every power once held by the state legislature.

tive functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States* v. *Kagama*, 118 U. S. 375, 379 (1886) (emphasis added).

The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." 630 F. 2d, at 717. *Parker* itself took this view. When *Parker* examined Congress' intentions in enacting the antitrust laws, the opinion noted: "[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature*. . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." 317 U. S., at 350–351 (emphasis added). Thus *Parker* recognized Congress' intention to limit the state-action exemption based upon the federalism principle of limited state sovereignty. *City of Lafayette*, *Orrin W. Fox Co.*, and *Midcal* reaffirmed both the vitality and the intrinsic limits of the *Parker* state-action doctrine. It was expressly recognized by the plurality opinion in *City of Lafayette* that municipalities "are not themselves sovereign," 435 U. S., at 412, and that accordingly they could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy, 435 U. S., at 413. The Court adopted this view in *Orrin W. Fox Co.*, 439 U. S., at 109, and *Midcal*, 445 U. S., at 105. We turn then to Boulder's contention that its actions were undertaken pursuant to a clearly articulated and affirmatively expressed state policy.

(2)

Boulder first argues that the requirement of "clear articulation and affirmative expression" is fulfilled by the Colorado Home Rule Amendment's "guarantee of local autonomy." It contends, quoting from *City of Lafayette*, 435 U. S., at 394,

415, that by this means Colorado has "comprehended within the powers granted" to Boulder the power to enact the challenged ordinance, and that Colorado has thereby "contemplated" Boulder's enactment of an anticompetitive regulatory program. Further, Boulder contends that it may be inferred, "from the authority given" to Boulder "to operate in a particular area"—here, the asserted home rule authority to regulate cable television—"that the *legislature* contemplated the kind of action complained of." (Emphasis supplied.) Boulder therefore concludes that the "adequate state mandate" required by *City of Lafayette*, *supra*, at 415, is present here.[18]

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F. 2d, at 707. Indeed, Boulder argues that

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[18] Boulder also contends that its moratorium ordinance qualifies for antitrust immunity under the test set forth by THE CHIEF JUSTICE in his *City of Lafayette* concurrence, see n. 13, *supra*, because the challenged activity is clearly a "traditional government function," rather than a "proprietary enterprise."

as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Cf. *City of Lafayette, supra*, at 414, and n. 44. Thus in Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

III

Respondents argue that denial of the *Parker* exemption in the present case will have serious adverse consequences for cities, and will unduly burden the federal courts. But this argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws.[19] Those laws, like other federal laws imposing civil or criminal sanctions upon "persons," of course apply to municipalities as well as to other corporate entities.[20] Moreover, judicial en-

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[19] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

[20] See *City of Lafayette*, 435 U. S., at 394–397.

We hold today only that the *Parker* v. *Brown* exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants

forcement of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *City of Lafayette*, 435 U. S., at 416. As was observed in that case:

> "Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. . . . [A]ssuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs." *Id.*, at 416–417 (footnote omitted).

The judgment of the Court of Appeals is reversed, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE took no part in the consideration or decision of this case.

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against government defendants. As we said in *City of Lafayette*, "[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U. S., at 417, n. 48. Compare, *e. g.*, *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–692 (1978) (considering the validity of anticompetitive restraint imposed by private agreement), with *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978) (holding that anticompetitive effect is an insufficient basis for invalidating a state law). Moreover, as in *City of Lafayette*, *supra*, at 401–402, we do not confront the issue of remedies appropriate against municipal officials.

JUSTICE STEVENS, concurring.

The Court's opinion, which I have joined, explains why the city of Boulder is not entitled to an exemption from the antitrust laws. The dissenting opinion seems to assume that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated. The assumption is not valid. The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism.[1]

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, we held that municipalities' activities as providers of services are not exempt from the Sherman Act. The reasons for denying an exemption to the city of Lafayette are equally applicable to the city of Boulder, even though Colorado is a home-rule State. We did not hold in *City of Lafayette* that the city had violated the antitrust laws. Moreover, that question is quite different from the question whether the city of Boulder violated the Sherman Act because the character of their respective activities differs. In both cases, the violation issue is separate and distinct from the exemption issue.

A brief reference to our decision in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, will identify the invalidity of the dissent's assumption. In that case, the Michigan Public Utility Commission had approved a tariff that required the Detroit Edison Co. to provide its customers free light bulbs. The company contended that its light bulb distribution program was therefore exempt from the antitrust laws on the authority of *Parker* v. *Brown*, 317 U. S. 341. See 428 U. S., at

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[1] Cf. *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 615 (Stewart, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities' ") (quoting Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L. Rev. 693, 728 (1974)). See also *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 176, n. 10.

592. The Court rejected the company's interpretation of *Parker* and held that the plaintiff could proceed with his antitrust attack against the company's program. We surely did not suggest that the members of the Michigan Public Utility Commission who had authorized the program under attack had thereby become parties to a violation of the Sherman Act. On the contrary, the plurality opinion reviewed the *Parker* case in great detail to emphasize the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so.[2]

It would be premature at this stage of the litigation to comment on the question whether petitioner will be able to establish that respondents have violated the antitrust laws. The

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[2] See 428 U. S., at 585–592 (opinion of STEVENS, J.). The point was made explicit in two passages of the plurality opinion. In a footnote, the plurality stated:

"The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand." *Id.*, at 591, n. 24.

The point was repeated in the text:

"The federal statute proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made." *Id.*, at 601 (footnote omitted).

The footnote omitted in the above quotation stated:

"Indeed, it did not even occur to the plaintiff that the state officials might have violated the Sherman Act; that question was first raised by this Court." *Id.*, at 601, n. 42.

See *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 361 ("[O]bviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party").

answer to that question may depend on factual and legal issues that must and should be resolved in the first instance by the District Court. In accordance with my belief that "the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies," 428 U. S., at 603 (opinion of STEVENS, J.), I offer no gratuitous advice about the questions I think might be relevant. My only observation is that the violation issue is not nearly as simple as the dissenting opinion implies.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U. S. C. § 1 *et seq.* First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman Act under our decision in *Parker* v. *Brown*, 317 U. S. 341 (1943). The question addressed in *Parker* and in this case is not whether state and local governments are *exempt* from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are *pre-empted* by the Sherman Act under the operation of the Supremacy Clause. Second, in holding that a municipality's ordinances can be "exempt" from antitrust scrutiny only if the enactment furthers or implements a "clearly articulated and affirmatively expressed state policy," *ante*, at 52, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated.

I

Pre-emption and exemption are fundamentally distinct concepts. Pre-emption, because it involves the Supremacy Clause, implicates our basic notions of federalism. Pre-emption analysis is invoked whenever the Court is called upon to examine "the interplay between the enactments of two *different* sovereigns—one federal and the other state." Handler, Antitrust—1978, 78 Colum. L. Rev. 1363, 1379 (1978). We are confronted with questions under the Supremacy Clause when we are called upon to resolve a purported conflict between the enactments of the Federal Government and those of a state or local government, or where it is claimed that the Federal Government has occupied a particular field exclusively, so as to foreclose any state regulation. Where pre-emption is found, the state enactment must fall without any effort to accommodate the State's purposes or interests. Because pre-emption treads on the very sensitive area of federal-state relations, this Court is "reluctant to infer pre-emption," *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 132 (1978), and the presumption is that pre-emption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978).

In contrast, exemption involves the interplay between the enactments of a single sovereign—whether one enactment was intended by Congress to relieve a party from the necessity of complying with a prior enactment. See, *e. g.*, *National Broiler Marketing Assn.* v. *United States*, 436 U. S. 816 (1978) (Sherman Act and Capper-Volstead Act); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–355 (1963) (Clayton Act and Bank Merger Act of 1960); *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357–361 (1963) (Sherman Act and Securities Exchange Act). Since the enactments of only one sovereign are involved, no problems of federalism are present. The court interpreting the

statute must simply attempt to ascertain congressional intent, whether the exemption is claimed to be express or implied. The presumptions utilized in exemption analysis are quite distinct from those applied in the pre-emption context. In examining exemption questions, "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *New York Stock Exchange*, *supra*, at 357.

With this distinction in mind, I think it quite clear that questions involving the so-called "state action" doctrine are more properly framed as being ones of pre-emption rather than exemption. Issues under the doctrine inevitably involve state and local regulation which, it is contended, are in conflict with the Sherman Act.

Our decision in *Parker* v. *Brown*, *supra*, was the genesis of the "state action" doctrine. That case involved a challenge to a program established pursuant to the California Agricultural Prorate Act, which sought to restrict competition in the State's raisin industry by limiting the producer's ability to distribute raisins through private channels. The program thus sought to maintain prices at a level higher than those maintained in an unregulated market. This Court assumed that the program would violate the Sherman Act were it "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," and that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce." 317 U. S., at 350. In this regard, we noted that "[o]ccupation of a legislative field by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." *Ibid.* We then held, however, that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government

in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 350–351.

This is clearly the language of federal pre-emption under the Supremacy Clause. This Court decided in *Parker* that Congress did not intend the Sherman Act to override state legislation designed to regulate the economy. There was no language of "exemption," either express or implied, nor the usual incantation that "repeals by implication are disfavored." Instead, the Court held that state regulation of the economy is not necessarily pre-empted by the antitrust laws even if the same acts by purely private parties would constitute a violation of the Sherman Act. The Court recognized, however, that some state regulation is pre-empted by the Sherman Act, explaining that "a state does got give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." *Id.*, at 351.

Our two most recent *Parker* doctrine cases reveal most clearly that the "state action" doctrine is not an exemption at all, but instead a matter of federal pre-emption.

In *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978), we examined the contention that the California Automobile Franchise Act conflicted with the Sherman Act. That Act required a motor vehicle manufacturer to secure the approval of the California New Motor Vehicle Board before it could open a dealership within an existing franchisee's market area, if the competing franchisee objected. By so delaying the opening of a new dealership whenever a competing dealership protested, the Act arguably gave effect to privately initiated restraints of trade, and thus was invalid under *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951). We held that the Act was outside the purview of the Sherman Act because it con-

templated "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." 439 U. S., at 109. We also held that a state statute is not invalid under the Sherman Act merely because the statute will have an anticompetitive effect. Otherwise, if an adverse effect upon competition were enough to render a statute invalid under the Sherman Act, "'the States' power to engage in economic regulation would be effectively destroyed.'" *Id.*, at 111 (quoting *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 133). In *New Motor Vehicle Bd.*, we held that a state statute could stand in the face of a purported conflict with the Sherman Act.

In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), we invalidated California's wine-pricing system in the face of a challenge under the Sherman Act. We first held that the price-setting program constituted resale price maintenance, which this Court has consistently held to be a "*per se*" violation of the Sherman Act. *Id.*, at 102–103. We then concluded that the program could not fit within the *Parker* doctrine. Although the restraint was imposed pursuant to a clearly articulated and affirmatively expressed state policy, the program was not actively supervised by the State itself. The State merely authorized and enforced price fixing established by private parties, instead of establishing the prices itself or reviewing their reasonableness. In the absence of sufficient state supervision, we held that the pricing system was invalid under the Sherman Act. 445 U. S., at 105–106.

Unlike the instant case, *Parker*, *Midcal*, and *New Motor Vehicle Bd.* involved challenges to a state statute. There was no suggestion that a State *violates* the Sherman Act when it enacts legislation not saved by the *Parker* doctrine from invalidation under the Sherman Act. Instead, the statute is simply unenforceable because it has been pre-empted by the Sherman Act. By contrast, the gist of the Court's

opinion is that a municipality may actually violate the antitrust laws when it merely enacts an ordinance invalid under the Sherman Act, unless the ordinance implements an affirmatively expressed state policy.[1] According to the majority, a municipality may be liable under the Sherman Act for enacting anticompetitive legislation, unless it can show that it is acting simply as the "instrumentality" of the State.

Viewing the *Parker* doctrine in this manner will have troubling consequences for this Court and the lower courts who must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy. The majority suggests as much in footnote 20. Among the many problems to be enccuntered will be whether the "*per se*" rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants. Another is the question of remedies. The Court understandably leaves open the question whether municipalities may be liable for treble damages for enacting anticompetitive ordinances which are not protected by the *Parker* doctrine.[2]

Most troubling, however, will be questions regarding the factors which may be examined by the Court pursuant to the Rule of Reason. In *National Society of Professional Engi-*

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[1] Most challenges to municipal ordinances undoubtedly will be made pursuant to § 1. One of the elements of a § 1 violation is proof of a contract, combination, or conspiracy. It may be argued that municipalities will not face liability under § 1, because it will be difficult to allege that the enactment of an ordinance was the product of such a contract, combination, or conspiracy. The ease with which the ordinance in the instant case has been labeled a "contract" will hardly give municipalities solace in this regard.

[2] It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person "injured in his business or property." Section 4 of the Clayton Act, 15 U. S. C. § 15, is mandatory: "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained." See *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 442–443 (1978) (BLACKMUN, J., dissenting).

neers v. *United States*, 435 U. S. 679, 695 (1978), we held that an anticompetitive restraint could not be defended on the basis of a private party's conclusion that competition posed a potential threat to public safety and the ethics of a particular profession. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.*, at 696. *Professional Engineers* holds that the decision to replace competition with regulation is not within the competence of private entities. Instead, private entities may defend restraints only on the basis that the restraint is not unreasonable in its effect on competition or because its procompetitive effects outweigh its anticompetitive effects. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977).

Applying *Professional Engineers* to municipalities would mean that an ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects. A local government would be disabled from displacing competition with regulation. Thus, a municipality would violate the Sherman Act by enacting restrictive zoning ordinances, by requiring business and occupational licenses, and by granting exclusive franchises to utility services, even if the city determined that it would be in the best interests of its inhabitants to displace competition with regulation. Competition simply does not and cannot further the interests that lie behind most social welfare legislation. Although state or local enactments are not invalidated by the Sherman Act merely because they may have anticompetitive effects, *Exxon Corp.* v. *Governor of Maryland*, *supra*, at 133, this Court has not hesitated to invalidate such statutes on the basis that such a program would violate the antitrust laws if engaged in by private parties. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, *supra*, at 102–103 (resale price maintenance); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) (same). Cf. *Parker* v. *Brown*, 317 U. S., at 350

(Court assumed the stabilization program would violate the Sherman Act if organized and effected by private persons). Unless the municipality could point to an affirmatively expressed state policy to displace competition in the given area sought to be regulated, the municipality would be held to violate the Sherman Act and the regulatory scheme would be rendered invalid. Surely, the Court does not seek to require a municipality to justify every ordinance it enacts in terms of its procompetitive effects. If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 133. This country's municipalities will be unable to experiment with innovative social programs. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

On the other hand, rejecting the rationale of *Professional Engineers* to accommodate the municipal defendant opens up a different sort of Pandora's Box. If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of "liberty of contract" and "substantive due process," the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined.[3] Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate

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[3] During the *Lochner* era, this Court's interpretation of the Due Process Clause complemented its antitrust policies. This Court sought to compel competitive behavior on the part of private enterprise and generally for-

local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). The federal courts have not been appointed by the Sherman Act to sit as a "superlegislature to weigh the wisdom of legislation." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 535 (1949).

Before this Court leaps into the abyss and holds that municipalities may *violate* the Sherman Act by enacting economic and social legislation, it ought to think about the consequences of such a decision in terms of its effect both upon the very antitrust principles the Court desires to apply to local governments and on the role of the federal courts in examining the validity of local regulation of the economy.

Analyzing this problem as one of federal pre-emption rather than exemption will avoid these problems. We will not be confronted with the anomaly of holding a municipality liable for enacting anticompetitive ordinances.[4] The federal courts will not be required to engage in a standardless review of the reasonableness of local legislation. Rather, the question simply will be whether the ordinance enacted is pre-empted by the Sherman Act. I see no reason why a different rule of pre-emption should be applied to testing the validity of municipal ordinances than the standard we presently apply in assessing state statutes. I see no reason why a municipal ordinance should not be upheld if it satisfies the

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bade government interference with competitive forces in the marketplace. See Strong, The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation, 15 Ariz. L. Rev. 419, 435 (1973).

[4] Since a municipality does not violate the antitrust laws when it enacts legislation pre-empted by the Sherman Act, there will be no problems with the remedy. Pre-empted state or local legislation is simply invalid and unenforceable.

Midcal criteria: the ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy.[5] As with the case of the State, I agree that a city may not simply authorize private parties to engage in activity that would violate the Sherman Act. See *Parker* v. *Brown*, 317 U. S., at 351. As in the case of a State, a municipality may not become "a participant in a private agreement or combination by others for restraint of trade." *Id.*, at 351–352.

Apart from misconstruing the *Parker* doctrine as a matter of "exemption" rather than pre-emption, the majority comes to the startling conclusion that our federalism is in no way implicated when a municipal ordinance is invalidated by the Sherman Act. I see no principled basis to conclude, as does the Court, that municipal ordinances are more susceptible to invalidation under the Sherman Act than are state statutes. The majority concludes that since municipalities are not States, and hence are not "sovereigns," our notions of federalism are not implicated when federal law is applied to invalidate otherwise constitutionally valid municipal legislation. I find this reasoning remarkable indeed. Our notions of federalism are implicated when it is contended that a municipal ordinance is pre-empted by a federal statute. This Court has made no such distinction between States and their subdivisions with regard to the pre-emptive effects of federal law.

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[5] The *Midcal* standards are not applied until it is either determined or assumed that the regulatory program would violate the Sherman Act if it were conceived and operated by private persons. See *Parker* v. *Brown*, 317 U. S., at 350; *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 102–103 (1980). A statute is not pre-empted simply because some conduct contemplated by the statute might violate the antitrust laws. See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 45–46 (1966). Conversely, reliance on a state statute does not insulate a private party from liability under the antitrust laws unless the statute satisfies the *Midcal* criteria.

The standards applied by this Court are the same regardless of whether the challenged enactment is that of a State or one of its political subdivisions. See, *e. g.*, *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960). I suspect that the Court has not intended to so dramatically alter established principles of Supremacy Clause analysis. Yet, this is precisely what it appears to have done by holding that a municipality may invoke the *Parker* doctrine only to the same extent as can a private litigant. Since the *Parker* doctrine is a matter of federal pre-emption under the Supremacy Clause, it should apply in challenges to municipal regulation in similar fashion as it applies in a challenge to a state regulatory enactment. The distinction between cities and States created by the majority has no principled basis to support it if the issue is properly framed in terms of pre-emption rather than exemption.

As with the States, the *Parker* doctrine should be employed to determine whether local legislation has been pre-empted by the Sherman Act. Like the State, a municipality should not be haled into federal court in order to justify its decision that competition should be replaced with regulation. The *Parker* doctrine correctly holds that the federal interest in protecting and fostering competition is not infringed so long as the state or local regulation is so structured to ensure that it is truly the government, and not the regulated private entities, which is replacing competition with regulation.

II

By treating the municipal defendant as no different from the private litigant attempting to invoke the *Parker* doctrine, the Court's decision today will radically alter the relationship between the States and their political subdivisions. Municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed state policy

to displace competition.[6] The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern.[7] The municipalities that stand most to lose by the decision today are those with the most autonomy. Where the State is totally disabled from enacting legislation dealing with matters of local concern, the municipality will be defenseless from challenges to its regulation of the local economy. In such a case, the State is disabled from articulating a policy to displace competition with regulation. Nothing short of altering the relationship between the municipality and the State will enable the local government to legislate on matters important to its inhabitants. In order to defend itself from Sherman Act attacks, the home rule municipality will have to cede its authority back to the State. It is unfortunate enough that the Court today holds that our federalism is not implicated when municipal legislation is invalidated by a federal statute. It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions.

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[6] The Court understandably avoids determining whether local ordinances must satisfy the "active state supervision" prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.

[7] Seeing this opportunity to recapture the power it has lost over local affairs, the State of Colorado, joined by 22 other States, has supported petitioner as *amicus curiae*. It is curious, indeed, that these States now seek to use the Supremacy Clause as a sword, when they so often must defend their own enactments from its invalidating effects.

KAISER STEEL CORP. *v.* MULLINS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1345. Argued November 10, 1981—Decided January 13, 1982

Petitioner coal producer, as a party to a collective-bargaining agreement between the United Mine Workers of America and hundreds of coal producers, agreed to contribute to specified employee health and retirement funds on the basis of each ton of coal it produced and each hour worked by its covered employees. The agreement also required an employer to report its purchases of coal from producers not under contract with the union and to make contributions to the union welfare funds on the basis of such purchases. After petitioner failed to report and make contributions as required by the "purchased-coal" clause, respondents, the trustees of the union trust funds, filed suit in Federal District Court to enforce the collective-bargaining agreement. Petitioner admitted its failure to comply with the purchased-coal clause, but contended that the clause was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act and § 8(e) of the National Labor Relations Act (NLRA), which forbids collective-bargaining agreements whereby the employer agrees to cease doing business with, or to cease handling the products of, another employer (hot-cargo provision). The District Court entered summary judgment for respondents, and the Court of Appeals affirmed. Both courts rejected petitioner's defense without passing on the legality of the purchased-coal clause under either the Sherman Act or the NLRA.

Held: Petitioner was entitled to plead and have adjudicated its defense based on the alleged illegality of the purchased-coal clause. Pp. 77–88.

(a) Illegal promises will not be enforced in cases controlled by federal law. This rule is not rendered inapplicable here on the asserted grounds that employers' contributions to union funds are not, in themselves and standing alone, illegal acts and ordering petitioner to pay would therefore not command conduct that is inherently contrary to public policy. Petitioner's obligation to pay money to the union funds arose from and was measured by its purchases from other producers who did not contribute to the union funds, and if this obligation is illegal under the antitrust or labor laws, to order petitioner to pay would command unlawful conduct. Pp. 77–83.

(b) Although as a general rule federal courts do not have jurisdiction over activity that is arguably subject to § 8 of the NLRA and must defer to the exclusive competence of the National Labor Relations Board to determine what is and is not an unfair labor practice, a federal court has a duty to determine whether a contract violates federal law before enforcing it. Section 8(e) renders hot cargo clauses void at their inception and at all times unenforceable by federal courts. Thus, where a § 8(e) defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense. Pp. 83–86.

(c) Assuming, *arguendo*, that § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980—which requires employers to make contributions to a multiemployer pension plan in accordance with the employer's obligation under the terms of the plan or a collective-bargaining agreement—is applicable to this case, it does not alter the result. Section 306(a) does not abolish all illegality defenses but explicitly requires employers to contribute to pension funds only where doing so would not be "inconsistent with law," and it was intended to simplify collection actions by precluding only defenses that are "unrelated" or "extraneous" to the employer's promise to make contributions. Nor does the statute's language or history indicate that Congress intended to implicitly repeal the antitrust laws, the labor laws, or any other statute which might be raised as a defense to a provision in a collective-bargaining agreement requiring an employer to contribute to a pension fund. Pp. 86–88.

206 U. S. App. D. C. 334, 642 F. 2d 1302, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 89.

A. Douglas Melamed argued the cause for petitioner. With him on the briefs was *Lynn Bregman*.

Stephen J. Pollak argued the cause for respondents. With him on the brief were *Ralph J. Moore, Jr.*, *Wendy S. White*, and *E. Calvin Golumbic*.

Barbara E. Etkind argued for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy*

Solicitor General Wallace, Robert B. Nicholson, Rebert J. Wiggers, and *T. Timothy Ryan, Jr.**

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a coal producer, when it is sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, is entitled to plead and have adjudicated a defense that the promise is illegal under the antitrust and labor laws.

I

The National Bituminous Coal Wage Agreement of 1974 is a collective-bargaining agreement between the United Mine Workers of America (UMW) and hundreds of coal producers, including steel companies such as petitioner Kaiser Steel Corp. The agreement required signatory employers to contribute to specified employee health and retirement funds. Section (d)(1) of Article XX required employers to pay specified amounts for each ton of coal produced and for each hour worked by covered employees. In addition, the section included a purchased-coal clause requiring employers to contribute to the trust specified amounts on "each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by [the employer]

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*Briefs of *amici curiae* urging reversal were filed by *James D. Hutchinson* and *John M. Cannon* for the Mid-America Legal Foundation; and by *Steven L. Friedman* and *John L. Kilcullen* for the Pennsylvania Coal Mining Association.

Briefs of *amici curiae* urging affirmance were filed by *Alan M. Levy* for the Central States, Southeast and Southwest Areas Pension Fund; by *James P. Watson, George M. Cox, John S. Miller, Jr.,* and *Lionel Richman* for the Construction Laborers Trust Funds for Southern California et al.; by *Gerald M. Feder* and *Denis F. Gordon* for the National Coordinating Committee for Multiemployer Plans; by *Wayne Jett* and *Julius Reich* for the Operating Engineers Pension Trust et al.; and by *Harrison Combs* and *Willard P. Owens* for the United Mine Workers of America.

for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made. . . ."[1] Section (d) also provided that employers would furnish the trustees with monthly statements showing the full amounts due the trust funds as well as the tons of coal produced, procured, or acquired for use or for sale. The parties agreed that if the clause requiring contributions based on purchased coal was held illegal by any court or agency, the union could demand negotiations with respect to a replacement for the invalidated provision.[2]

Kaiser operates a steel mill in California and coal mines in Utah and New Mexico. Its mines produce only high-volatile coal, so it must purchase mid-volatile coal used in steel manufacturing from another producer. Since 1959, Kaiser has purchased virtually all of its mid-volatile coal requirements from Mid-Continent Coal and Coke Co. Mid-Continent's employees are represented by the Redstone Workers' Association, and their wages and benefits during the period covered by the 1974 Agreement were equal or superior to those required by the UMW contract. Nevertheless, the UMW has repeatedly attempted to become the collective-bargaining representative for Mid-Continent's employees. According to affidavits submitted by Kaiser, the purchased-coal clause was not taken into account in calculating the needs and

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[1] Kaiser has been a UMW signatory since the 1940's. The purchased-coal clause was first included in the 1964 Agreement, although the UMW agreements left steel companies such as Kaiser free to purchase non-UMW coal for use in steel production until 1971 without penalty.

[2] The 1971 purchased-coal clause and its predecessors have been subject to litigation on the grounds that the clause is an illegal "hot cargo" agreement under § 8(e) of the National Labor Relations Act (NLRA), 29 U. S. C. § 158(e), see, *e. g.*, *Riverton Coal Co.* v. *UMW*, 453 F. 2d 1035 (CA6), cert. denied, 407 U. S. 915 (1972), and that it constitutes a group boycott in violation of the antitrust laws. See, *e. g.*, *UMW* v. *Pennington*, 381 U. S. 657 (1965); *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F. 2d 767 (CA6 1970), cert. denied, 402 U. S. 983 (1971).

revenues of the various UMW trust funds during the negotiation of the 1974 Agreement.[3]

Kaiser complied with its obligation under the 1974 contract to make contributions based on the coal it produced and the hours worked by its miners. It did not, however, report the coal that it acquired from others or make contributions based on such purchased coal. After the expiration of the 1974 contract, the trustees of the UMW Health and Retirement Funds, respondents here, sued Kaiser seeking to enforce the latter's obligation to report and contribute with respect to coal not produced by Kaiser but acquired from others. Jurisdiction was asserted under § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185, and § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, 29 U. S. C. § 1132. Kaiser admitted its failure to report and contribute but defended on the ground, among others, that the agreement in these respects was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2, and § 8(e) of the NLRA, 73 Stat. 543, 29 U. S. C. § 158(e). The District Court did not pass on the legality of the purchased-coal agreement under either the Sherman Act or the NLRA. It nevertheless rejected Kaiser's defense of illegality and granted the trustees' motion for summary judgment. 466 F. Supp. 911 (1979). The Court of Appeals affirmed, 206 U. S. App. D.C. 334, 642 F. 2d 1302 (1980), also rejecting Kaiser's defense without adjudicating the legality of the purchased-coal clause.

We granted Kaiser's petition for certiorari raising the question, among others, whether the Court of Appeals had

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[3] If Kaiser had purchased its mid-volatile coal requirements from a UMW producer, it would not be required to make any payments under the purchased-coal clause. The producer of mid-volatile coal would increase its contributions to the trust funds based on the amount of coal mined and the number of hours worked by employees, but in turn the trust funds' obligations to UMW members would increase.

properly foreclosed its defense based on the illegality of its promise to report and contribute in connection with coal purchased from other producers. 451 U. S. 969 (1981). We now reverse.

II

There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it . . . .
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> . . . .
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> [T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. *Id.*, at 654, 669.

The rule was confirmed in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it

should be denied without regard to the interests of individual parties." *Id.*, at 262.[4]

Kaiser's position is that to require it to make contributions based on purchased coal would be to enforce a bargain that violates two different federal statutes, the Sherman Act and the NLRA. Sections 1 and 2 of the Sherman Act prohibit contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize. Kaiser urges that the purchased-coal clause is illegal under these sections because it puts non-UMW producers at a disadvantage in competing for sales to concerns like Kaiser and because it penalizes Kaiser for shopping among sellers for the lowest available price.[5]

Section 8(e) of the NLRA forbids contracts between a union and an employer whereby the employer agrees to cease doing business with or to cease handling the products of another employer. Kaiser submits that being forced to contribute based on its purchases of coal from other employers violates § 8(e), the hot-cargo provision, because it penalizes Kaiser for dealing with other employers who do not have a contract with the union and because the major purpose of prohibiting hot cargo agreements is to protect employers like Kaiser from being coerced into aiding the union in its organizational or other objectives with respect to other employers.

The Court of Appeals, like the District Court, declined to pass on the legality of the purchased-coal clause under either the Sherman Act or the NLRA. It was apparently of the

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[4] See also *Hurd* v. *Hodge*, 334 U. S. 24, 34–35 (1948); *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 177 (1915); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88 (1902); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548–549 (1902).

[5] In order to sell coal to Kaiser, a non-UMW producer must lower its price such that when added to the amount Kaiser must pay under the purchased-coal clause, the price is still competitive with those charged by UMW producers.

view that even if the agreement was unlawful, the illegality defenses should not be sustained in this case. We disagree. None of the grounds offered by the Court of Appeals or by the respondents for rejecting Kaiser's defenses are persuasive.

We do not agree, in the first place, that if Kaiser's agreement to contribute based on purchased coal is assumed to be illegal under either the Sherman Act or the NLRA, its promise to contribute could be enforced without commanding unlawful conduct. The argument is that employers' contributions to union welfare funds are not, in themselves and standing alone, illegal acts and that ordering Kaiser to pay would therefore not demand conduct that is inherently contrary to public policy. Kaiser, however, did not make a naked promise to pay money to the union funds. The purchased-coal provision obligated it to pay only if it purchased coal from other employers and then only if contributions to the UMW funds had not been made with respect to that coal. Kaiser's obligation arose from and was measured by its purchases from other producers. If Kaiser's undertaking is illegal under the antitrust or the labor laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes.

We do not agree that *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), compels or even supports a contrary result. In that case, both petitioner and respondent were engaged in marketing onions. Petitioner agreed to buy a substantial portion of the onions owned by respondent. Petitioner and respondent mutually agreed that neither would deliver any onions to the futures market for the balance of the trading season. The agreement was for the purpose of fixing the price and limiting the amount of onions sold in the State of

Illinois, thereby "creating a false and a fictitious market" for that produce. *Id.*, at 517. After petitioner defaulted on the payments due under the contract, respondent sued for the balance of the purchase price and was awarded summary judgment. Both the District Court and the Court of Appeals rejected petitioner's claim that his undertaking was unenforceable because part of the agreement violated the Sherman Act. This Court affirmed. The Court said that "[a]s a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor," *id.*, at 518, particularly where the plea is made by a purchaser in an action to recover from him the agreed price for goods sold. Various cases in this Court were cited to support the observation, and *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), where the defense was sustained, was distinguished as a case where a judgment for an excessive purchase price "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kelly* v. *Kosuga*, *supra*, at 520. The Court went on to say that "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" 358 U. S., at 520–521 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, at 271). Applying this approach to the facts before it, the Court observed:

> "[W]hile the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. . . . [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent

of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." 358 U. S., at 521.

Respondents construe *Kosuga* as standing for two general propositions: first, that when a contract is wholly performed on one side, the defense of illegality to enforcing performance on the other side will not be entertained;[6] and second, that the express remedies provided by the Sherman Act are not to be added to by including the avoidance of contracts as a sanction.[7] It is apparent from the opinion in that case, however, that both propositions were subject to the limitation that the illegality defense should be entertained in those circum-

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[6] The contention is that since the contract has expired, enforcing the promise to contribute will not bring about any of the evils that the antitrust or labor laws are designed to prevent. But if a promise is illegal at its inception and cannot be enforced during the term of the contract, it does not spring to life and become enforceable when the contract expires. If penalizing Kaiser for purchasing coal from producers without contracts with the UMW is illegal, it is not less so if the penalty is extracted after the termination of the promise. The suit is still a suit on a presumptively illegal undertaking. If a promisee need only wait until a contract expires to enforce an illegal provision, the defense of illegality would obviously be ephemeral. Cases such as *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), and *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), confound such a rule. And if it be suggested that Kaiser should not have waited so long to assert its defense, the Court has held that "rules of estoppel will not be permitted to thwart the purposes of statutes of the United States." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).

[7] Refusing to enforce a promise that is illegal under the antitrust or labor laws is not providing an additional remedy contrary to the will of Congress. A defendant proffering the defense seeks only to be relieved of an illegal obligation and does not ask any affirmative remedy based on the antitrust or labor laws. "[A]ny one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action. . . . The act . . . gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence, and we think when

stances where its rejection would be to enforce conduct that the antitrust laws forbid. In *Kosuga*, there were two promises, one to pay for purchased onions and the other to withhold onions from the market. The former was legal and could be enforced, the latter illegal and unenforceable.

Kosuga thus contemplated that the defense of illegality would be entertained in a case such as this. If the purchased-coal agreement is illegal, it is precisely because the promised contributions are linked to purchased coal and are a penalty for dealing with producers not under contract with the UMW. In *Kosuga*, withholding onions from the market was not in itself illegal and could have been done unilaterally. But the agreement to do so, as the Court recognized, was unenforceable. Here, employer contributions to union welfare funds may be quite legal more often than not, but an agreement linking contributions to purchased coal, if illegal, is subject to the defense of illegality.

Respondents' reliance on *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960), is no more persuasive. There, as here, a collective-bargaining contract bound the coal company to contribute to an employee trust fund. When sued by the trustees for delinquent contributions, the employers defended on the ground that the union had violated the no-strike clause contained in the contract. Although the strikes were illegal, the Court held that the company's promise to contribute to the fund was independent of and not conditioned on the union's performance of its promise not to strike. Furthermore, the company was not entitled to a setoff

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proved it is a valid defence to any claim made under a contract thus denounced as illegal." *Bement* v. *National Harrow Co.*, 186 U. S., at 88.

As is evident from the text, *Kelly* v. *Kosuga* did not hold that the promisor may be forced to perform an illegal contract because he has another remedy that would make him whole. The case did hold that the promisor may not avoid performing a perfectly legal promise because he has also made a separate, illegal undertaking. In doing so, *Kosuga* conforms to a common-law exception to the rule that courts will not enforce illegal contracts. See 6A A. Corbin on Contracts §§ 1518–1531 (1962 ed. and Supp. 1964); Comment, 27 U. Chi. L. Rev. 758, 758–759, n. 2 (1959–1960).

against the trustees, who were innocent third parties, at least in the absence of some indication in the contract that the parties had intended to permit the employer to reduce its contributions by the amount of his damages caused by the striking unions. Just as in *Kosuga*, however, the promise that was enforced was not an illegal undertaking. Aside from the defense based on the union's default, there was no claim that the employer's promise to pay was illegal and unenforceable. The decision in no respect suggests that trustees could collect payments pursuant to a promise that itself violates the antitrust laws or the NLRA.[8]

III

We also do not agree that the question of the legality of the purchased-coal clause under § 8(e) of the NLRA was within the exclusive jurisdiction of the National Labor Relations Board (Board) and that the District Court was therefore without authority to adjudicate Kaiser's defense in this respect. The Board is vested with primary jurisdiction to determine what is or is not an unfair labor practice. As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959). See also *Garner* v. *Teamsters*, 346 U. S. 485, 490–491 (1953). It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the re-

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[8] As the Court of Appeals recognized, "third-party beneficiaries, like the Trustees here, are subject to the contract defenses of nonperforming promisors." 206 U. S. App. D.C. 334, 344, 642 F. 2d 1302, 1312. In this respect, pension fund trustees have no special status which exempts them from the general rule that courts do not enforce illegal contracts. Only Congress could create such an exemption and, as discussed in Part IV, it has not done so.

strictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd* v. *Hodge*, 334 U. S. 24, 34–35 (1948) (footnotes omitted).

The "touchstone" and "central theme" of § 8(e) is the protection of neutral employers, such as Kaiser, which are caught in the middle of a union's dispute with a third party. *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 624–626, 645 (1967). Section 8(e) provides not only that "it shall be an unfair labor practice" to enter an agreement containing a hot-cargo clause, but also that "any contract or agreement entered into heretofore or hereafter containing [a hot-cargo clause] shall be to such extent unenforcible and void." This strongly implies that a court must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place.

That § 8(e) renders hot-cargo clauses void at their inception and at all times unenforceable by federal courts is also evident from its legislative history. It was enacted to close a loophole created by *Carpenters* v. *NLRB*, 357 U. S. 93 (1958) *(Sand Door)*. There the Court held that the existence of a hot-cargo clause was not a defense to an unfair labor practice charge brought by a union against an employer, emphasizing that observance of the clause was not unlawful. "Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful. The *Sand Door* decision was believed by Congress . . . to create the possibility of damage actions against employers for breaches of 'hot cargo' clauses . . . ." *National Woodwork Manufacturers Assn.* v. *NLRB*, *supra*, at 634. If a union may not maintain a damages action for violation of a hot-cargo clause, it also may not enforce a hot-cargo clause in an action for specific performance.

That a federal court may determine the merits of Kaiser's § 8(e) defense is further supported by *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975). There the petitioner filed suit claiming that an agreement between it and the respondent union violated §§ 1 and 2 of the Sherman Act. Respondent contended that the agreement was exempt from the antitrust laws because it was authorized by § 8(e). The Court of Appeals refused to decide whether § 8(e) permitted the agreement or whether the agreement constituted an unfair labor practice under § 8(e), holding that the NLRB "has exclusive jurisdiction to decide in the first instance what Congress meant in 8(e) and 8(b)(4)." *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, 483 F. 2d 1154, 1174 (CA5 1973) (footnote omitted). This Court reversed on the ground that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U. S., at 626 (footnote omitted). See also *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 684–688 (1965). The Court then addressed the § 8(e) issue on the merits and found that § 8(e) did not allow the agreement at issue. 421 U. S., at 633. As a result, the agreement was subject to the antitrust laws, for the majority was persuaded that the legislative history did not suggest "labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA." *Id.*, at 634 (footnote omitted).

In *Connell*, we decided the § 8(e) issue in the first instance. It was necessary to do so to determine whether the agreement was immune from the antitrust laws. Here a court must decide whether the purchased-coal clause violates § 8(e) in order to determine whether to enforce the clause. As the Court recently stated with respect to a statute which also provides that contracts which violate it are "void," "[a]t the

very least Congress must have assumed that [the statute] could be raised defensively in private litigation to preclude the enforcement of . . . [a] contract." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18 (1979). Therefore, where a § 8(e) defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.

IV

On September 26, 1980, nine days after the Court of Appeals issued the decision under review, Congress enacted legislation which respondents argue established a special rule governing the availability of illegality defenses in actions for delinquent contributions brought by pension fund trustees. It is urged that Congress intended to preclude employers from raising defenses such as those Kaiser has attempted to raise here. Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1295, added § 515 to ERISA, which provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U. S. C. A. § 1145 (Supp. 1981).[9]

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[9] The dissent rests entirely on § 306(a). It does not suggest that absent § 306(a), the purchased-coal clause would not be subject to the defense that its enforcement is forbidden by both the antitrust and labor laws.

The provision which was eventually enacted as § 306(a) was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson[10] explained the purpose and meaning of § 306(a) in the same language used in the Senate Labor Committee Print. Both Congressmen also stated that they endorsed cases such as *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960); *Huge* v. *Long's Hauling Co.*, 590 F. 2d 457 (CA3 1978), cert. denied, 442 U. S. 918 (1979), *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F. 2d 552 (CA6 1962); and disapproved cases such as *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (DC 1980), appeal pending, No. 80–1501 (CADC), and *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell*, 103 LRRM 2219 (WD Wash. 1979), appeal pending, No. 80–3024 (CA9).[11]

Assuming, *arguendo*, that the 1980 Amendments are applicable to this case, they do not alter the result. Far from abolishing illegality defenses, § 306(a) explicitly requires employers to contribute to pension funds only where doing so

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[10] Senator Williams was Chairman of the Senate Committee on Labor and Human Resources and floor manager of S. 1076, the Senate counterpart of H. R. 3904, which became the Multiemployer Pension Plan Amendments Act of 1980. Similarly, Representative Thompson was Chairman of the House Education and Labor Committee and floor manager of H. R. 3904.

[11] 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.*, at 23288 (remarks of Sen. Williams).

would not be "inconsistent with law." Even if § 306(a) were construed as completely embracing the views expressed by Senator Williams and Representative Thompson, the statute would not require prohibiting Kaiser from raising defenses to the purchased-coal clause. The Congressmen did not say that employers should be prevented from raising all defenses; rather they spoke in terms of "unrelated" and "extraneous" defenses.[12] As the United States points out in its brief, none of the cases the Congressmen endorsed "involved the enforcement of a contribution clause that itself was alleged to violate the law." Brief for United States as *Amicus Curiae* 28 (footnote omitted). Neither *Lewis* v. *Benedict Coal Corp.*, *supra*, *Huge* v. *Long's Hauling Co.*, *supra*, nor *Lewis* v. *Mill Ridge Coals, Inc.*, *supra*, involved a defense based on the illegality of the very promise sought to be enforced.

Respondents' contention that § 306(a) permits only one defense to be raised in suits to recover delinquent contributions—that the making of the payment itself violates § 302(a) of the LMRA—must be rejected for another reason. Respondents' argument necessarily assumes that in enacting § 306(a), Congress implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective-bargaining agreement requiring an employer to contribute to a pension fund. Since "repeals by implication are disfavored," *Allen* v. *McCurry*, 449 U. S. 90, 99 (1980), "the intention of the legislature to repeal must be clear and manifest." *TVA* v. *Hill*, 437 U. S. 153, 189 (1978), quoting *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). The statutory language provides no basis for implying such a repeal, and nowhere in the legislative history is there any mention that § 306(a) might conflict with other laws.[13]

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[12] *Ibid.* (remarks of Sen. Williams); *id.*, at 23039 (remarks of Rep. Thompson); *id.*, at 20180 (colloquy between Sen. Williams and Sen. Matsunaga). See also 1980 Senate Labor Committee Print, at 44.

[13] According to the dissent, Congress intended to permit a union to extract a promise from an employer that would be illegal under the antitrust

The judgment of the Court of Appeals is reversed,[14] and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The salient facts of this case are not sufficiently stressed in the Court's opinion, and thus bear repeating. Kaiser Steel Corporation and the United Mine Workers (UMW) entered into a collective-bargaining agreement in 1974. As a part of that agreement, Kaiser promised to make contributions to certain UMW-designated employee health and retirement plan funds, based in part upon the amount of coal purchased by Kaiser from non-UMW mines. This purchased-coal

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and labor laws as long as the promise is to pay money to pension fund trustees. Under this view, the defense of illegality would be unavailable during the life of the contract; it would be of no avail to the employer to secure a declaratory judgment that its promise violated federal statutes. The promise would still be enforceable, the effect being that the antitrust and labor laws would be suspended for the life of the contract. The dissent concedes that § 306(a) itself does not support this result. It instead relies on scraps of legislative history to work its partial repeal of the antitrust and labor laws. We are unconvinced that Congress intended any such result.

It should also be pointed out that Kaiser paid all sums that were anticipated in calculating the needs of the trust funds. The purchased-coal clause was not taken into account in providing trust-fund revenues. We are unpersuaded that Congress intended to give pension fund trustees the benefit of illegal bargains that were not, and should not have been, relied upon to ensure the solvency of the trust funds.

[14] Because attorney's fees are normally awarded only to prevailing parties, the award of attorney's fees to respondents is also reversed. The Court of Appeals held that the District Court had jurisdiction over this action pursuant to § 502 of ERISA and did not abuse its discretion in awarding attorney's fees under § 502(g). That section permits a court to "allow a reasonable attorney's fee and costs of action to either party" in an action brought under § 502. Petitioners contend that this is not a suit to enforce ERISA, it cannot be brought under § 502, and therefore there is no authority for an award of attorney's fees. It is unnecessary to reach this issue.

clause obviously had value to Kaiser's UMW employees, because the agreement provided that if that clause were adjudged illegal, then the union could demand renegotiation of the contract in order to secure a *quid pro quo* for the invalidated clause. During the life of the contract, from 1974 to 1977, Kaiser's UMW employees fully performed their obligations under the contract. Kaiser, in contrast, did not pay a penny of the money that it had promised to pay under the purchased-coal clause. Instead, Kaiser failed to disclose the fact that it had purchased outside coal to which the clause applied, in plain violation of the reporting requirements of the 1974 agreement. In 1978—after Kaiser's UMW employees had lost their opportunity to renegotiate the 1974 agreement, and after they had fully performed their part of that bargain—Kaiser for the first time interposed its claim of illegality as a defense to respondent trustees' suit to recover the moneys promised to their plan under the purchased-coal clause.

"'It has been often stated in similar cases that the defence [of illegality] is a very dishonest one, and it lies ill in the mouth of the defendant to allege it . . . .'" *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959), quoting *McMullen* v. *Hoffman*, 174 U. S. 639, 669 (1899). This observation is peculiarly apt in the present case. The defense of illegality lies ill indeed in the mouth of the Kaiser Steel Corporation. In my view, this case exemplifies the very sort of abuse that Congress intended to stop with the enactment of § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980.[1]

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[1] 94 Stat. 1295.

The Court expresses doubt that § 306(a) is applicable to this case. *Ante*, at 87. But there is no basis for such doubt. Ever since *United States* v. *Schooner Peggy*, 1 Cranch 103, 109 (1801), we have recognized that "the court must decide according to existing laws." Recently, in *Bradley* v. *Richmond School Board*, 416 U. S. 696, 711 (1974), we reaffirmed our adherence to that rule, holding that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to

I

Section 306(a) of the 1980 Amendments reads as follows:

"DELINQUENT CONTRIBUTIONS

"Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." Pub. L. 96–364, 94 Stat. 1295.

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the contrary." Because there is no dispute that § 306(a) is now "in effect," we must apply that provision here, unless Congress intended to the contrary or unless doing so would be manifestly unjust.

There is absolutely nothing to indicate any legislative intention that § 306(a) was not to be applied to cases on appeal at the time of its enactment. Indeed, § 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, made § 306(a) effective as of the date of enactment, indicating that Congress intended that provision to become applicable as soon as possible. Moreover, the legislative history of the Amendments suggests a congressional intention that § 306(a) *would* apply to pending appeals. The sponsors of the Amendments in both the Senate and the House, in explaining the intended effect of § 306(a), specifically disapproved of certain holdings that had been reached by lower federal courts and that were on appeal while the bill was pending. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.*, at 23039 (remarks of Rep. Thompson).

Nor would application of § 306(a) to the present case work any "manifest injustice" upon Kaiser, in the sense in which that term was used in *Bradley, supra.* The sort of "injustice" discussed in *Bradley* is that which "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley, supra*, at 720. Application of § 306(a) would hardly impose any "new and unanticipated obligations" upon Kaiser. On the contrary, application of § 306(a) could at most require Kaiser to make payments that it knew of, and indeed *agreed* to make, back in 1974, as part of a collective-bargaining agreement that has been fully performed by the other side. In my view, it would be a manifest injustice to *respondents*—and, more importantly, to Kaiser's UMW employees who are the intended beneficiaries of the purchased-coal clause—if this Court *failed* to apply § 306(a) to the case before it.

The statutory language evinces an unmistakable congressional intention that obligatory payments shall be made, except when those payments are inconsistent with law. It is upon the construction of the phrase, "inconsistent with law," that the application of § 306(a), and the outcome of this case, obviously depend. The Court construes cases decided before the enactment of § 306(a) as suggesting that courts would not enforce collectively bargained payment obligations tainted by "consequential" illegality—payments that would "lead to" situations condemned by law, or that would allow a party to "reap the fruits" of illegal collective-bargaining provisions. *Ante*, at 81–83. Thus *Kelly* v. *Kosuga*, *supra*, is read to require that an illegality defense should be entertained when "its rejection would be to enforce conduct that the antitrust laws forbid." *Ante*, at 82. In the Court's view, § 306(a) constitutes no more than a statutory endorsement of these earlier cases, calling for a broad construction of the "inconsistent with law" phrase that would comport with those cases.

The Court's view is plausible only if the legislative history of § 306(a) is ignored. That history demonstrates beyond dispute that Congress was deeply concerned about the pre-1980 financial instability of employee benefit plans, and that this undesirable state of affairs was largely attributed to delinquent contributions by employers to those plans. The legislative history also demonstrates that Congress expressly intended § 306(a) to simplify and expedite plan trustees' suits to recover contractually required but delinquent employers' contributions, and that Congress chose to do so by, *inter alia*, substantially narrowing the scope of illegality defenses available to employers sued by plan trustees for delinquent contributions. With the benefit of the legislative history, it is apparent that § 306(a) was designed to allow an employer to be relieved of a plan contribution obligation *only* when the payment at issue is *inherently* illegal—for example, when the payment is in the nature of a bribe. In sum, illegality defenses, once arguably available whenever the payment in

question could be connected with illegal activities or results, are now meant by Congress to be available only when the payment in question itself constitutes an illegal act. An examination of the legislative history of § 306(a) makes this narrowing intention crystal clear.

II

The Court construes § 306(a) as merely declaratory of preexisting case law. This construction implicitly assumes that Congress was on the whole satisfied with the pre-1980 condition of employee benefit plan funds. But that assumption is clearly erroneous. Congress was seriously troubled by a perception that employee benefit plans were highly vulnerable to financial instability,[2] and it identified employers' delinquent contributions as a principal cause of that vulnerability. The Senate Committee on Labor and Human Resources concluded:

> "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily

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[2] The Senate Committee on Labor and Human Resources explained these concerns as follows:

"*Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans.* Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

"These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., 43–44 (unnumbered Comm. Print 1980) (emphasis added).

> cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case.* Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., 44 (Comm. Print 1980) (emphasis added).[3]

Thus Congress' paramount concern in enacting § 306(a) was to expedite and simplify the collection of delinquent contributions by plan trustees—in other words, to expedite and simplify the very kind of suit brought by respondents in the present case. To solve this problem, Congress decided, among other things, to narrow the legal defenses available to employers sued by plan trustees seeking to recover delinquent plan contributions. The comments of the sponsors of § 306(a) in both the Senate and the House bear out this interpretation.

In the House, Representative Thompson stated that "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, *and without regard to issues which might arise under labor-management relations*

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[3] The Committee went on to stress that:

"The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans. . . . The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." *Ibid.*

law—other than 29 U. S. C. 186." 126 Cong. Rec. 23039 (1980) (emphasis added). Title 29 U. S. C. § 186, entitled "Restrictions on financial transactions," essentially prohibits an employer from paying bribes to his employees, their representatives, or their union.[4] In sum, the comments of Representative Thompson evince a congressional intention that employers sued by plan trustees should be able to interpose an illegality defense only if the claimed illegality resided *in the payment itself.*

In the Senate, Senator Williams stressed the same theme:

> "It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises. [P]lan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor *are entitled to rely on their employer's promises.* The bill clarifies the law in this regard by providing a direct ERISA cause of action against a delinquent employer *without regard to extraneous claims or defenses.*" 126 Cong. Rec., at 20180 (emphasis added).

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[4] Section 186 reads in pertinent part:

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of his employees . . . ; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . ; or

"(3) to any employee or group or committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization . . . with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization."

Senator Williams later restated his view of the defenses available to an employer under § 306(a), and implicitly defined his understanding of the term, "extraneous," by using precisely the same words as Representative Thompson had. *Id.*, at 23288.

The sponsors of § 306(a) thus intended to cut off all illegality defenses that an employer might previously have interposed against a plan trustee, except those that claimed an illegality falling within the prohibition of 29 U. S. C. § 186. Congress perceived that a plan trustee is merely a third-party beneficiary of the collective-bargaining agreement reached by an employer and its employees. Such a trustee does not take part in the negotiations that give rise to the employer's contribution obligation. Nor does that trustee have any influence over the performance of other aspects of the collective-bargaining agreement, which are —as § 306(a)'s sponsors put it—"*extraneous*" or "*unrelated to*" the employer's promise to contribute to the plan. From the trustee's point of view, the employer's promise to make contributions to the designated plan is distinct and severable from all the other clauses of the collective-bargaining agreement, and failure of the agreement in any other respect is wholly irrelevant to the employer's contribution obligation. In order to achieve its goal of expediting and simplifying delinquent-contribution suits brought by plan trustees, Congress through § 306(a) essentially adopted the trustee's point of view on this issue. To ensure the full funding of employee benefit plans, Congress provided that when an employer is sued for plan contributions due and owing under a collective-bargaining agreement, the only defenses that will be permitted are those, arising under 29 U. S. C. § 186, involving a claim of illegality inherent in the payment itself.

III

The Court ignores this legislative prescription, thereby rendering § 306(a) a nullity and frustrating Congress' desire

to protect the economic integrity of the retirement, health, and unemployment plans upon which so many working people rely. The majority devotes little time or effort to its analysis of § 306(a), and its conclusion that that provision was intended merely to be declaratory of pre-existing law conflicts with the legislative history of § 306(a) in significant respects.

The Court does not explain why the modest, declaratory intention that it attributes to Congress is nowhere expressed in the legislative history of § 306(a). Nor does the Court even begin to reconcile its view of the limited purpose of § 306(a) with Congress' manifest concern for the financial vulnerability of employee benefit plans, or with Congress' express desire to simplify and expedite suits brought by plan trustees. The Court's position apparently is that Congress expected a mere statutory endorsement of existing case law to remedy the serious problems to which the 1980 Amendments were explicitly addressed. But simply to state this position is to expose its incredibility. The very fact that Congress perceived difficulties in the status quo, and sought to remedy them with § 306(a), demonstrates that that provision was *not* intended merely to express satisfaction with existing law, but rather was designed to narrow substantially the scope of defenses available to employers.

This conclusion naturally leads to, and in turn explains, Senator Williams' and Representative Thompson's explicit limitation of the defenses available under the new provision to those arising under 29 U. S. C. § 186. The Court, however, disregards these explicit limiting statements on the ground that "repeals by implication are disfavored," and that therefore "the intention of the legislature to repeal must be clear and manifest." The Court's reasoning is not even superficially persuasive. It is obvious that the Sherman Act is not "repealed" by § 306(a). The new provision merely channels the availability of the antitrust laws into employers' suits for declaratory and injunctive relief or for damages, the remedies normally afforded by those laws. See *Huge* v. *Long's*

Hauling Co., Inc., 590 F. 2d 457, 465 (CA3 1978) (concurring opinion). And—with respect to § 8(e) of the National Labor Relations Act—even if § 306(a) is construed as a partial repealer, the record before us presents plenty of "clear and manifest" evidence that Congress intended to effect such a repeal: if the Court would only address that evidence. There is Congress' express dissatisfaction with the current state of affairs respecting employers' contributions to employee benefit plans; there is Congress' express intention to simplify and expedite trustees' suits to recover contractually required but delinquent employers' contributions; and there is explicit legislative history, offered by the sponsors of the legislation, disclosing the limiting device—a cross-reference to 29 U. S. C. § 186—actually chosen by Congress in order to effect its stated purpose. By demanding more evidence than this, the Court simply imposes its own view of the wisdom of § 306(a) upon Congress and upon respondents, in the guise of judicial restraint.

IV

The legislative history of § 306(a) makes it plain that the judgment of the Court of Appeals below, affirming the District Court's rejection of the illegality defenses proffered by petitioner Kaiser, should be affirmed by this Court. Kaiser's defenses do not attack the legality of the delinquent plan contributions themselves. Indeed, Kaiser does not even attempt to argue that the overdue payments sought by respondent trustees are inherently illegal. Rather, Kaiser contends that the making of those payments would "lead to" an illegal restraint of trade, or would allow the trustees to "reap the fruits" of an illegal "hot cargo" clause. Whatever the merits of these contentions of consequential illegality, § 306(a) renders them quite irrelevant to Kaiser's obligation to make its promised contributions to the designated employee benefit plan funds. That was the very purpose of § 306(a).

This conclusion does not impair Kaiser's rights vis-à-vis the UMW, nor does it undercut the important national policies embodied in the Sherman Act and § 8(e) of the National Labor Relations Act. Kaiser can easily transform both of its illegality claims into causes of action brought directly against the union. "The employer may still have its claims adjudicated by bringing, in the proper forum, a timely suit against the union for rescission of the contract, antitrust damages, or a declaration that an unfair labor practice has been committed . . . ." *Huge, supra*, at 465 (concurring opinion).[5] Section 306(a) simply distinguishes Kaiser's rights against the union from its rights against respondents. In its effort to assure financial stability to employee benefit plans, § 306(a) prescribes the insulation of plan trustees—such as respondents—from the potentially never-ending disputes between labor and management.

Because I believe that § 306(a) of the 1980 Amendments requires affirmance of the judgment of the Court of Appeals, I dissent.

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[5] The *Huge* decision was specifically endorsed by the sponsors of § 306(a) in both the Senate and the House. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.*, at 23039 (remarks of Rep. Thompson).

PRINCETON UNIVERSITY ET AL. *v.* SCHMID

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 80-1576. Argued November 10, 1981—Decided January 13, 1982

Appellee, who was not a student at Princeton University, was arrested for criminal trespass while distributing political materials on the University's campus without having first received permission from University officials, as required by a University regulation. Appellee was convicted in state court, but the New Jersey Supreme Court reversed, holding that his rights of speech and assembly under the State Constitution had been violated. The University, which had intervened in the State Supreme Court proceedings, filed a jurisdictional statement (joined by the State) in this Court, claiming that the judgment below deprived it of its rights under the First, Fifth, and Fourteenth Amendments of the Federal Constitution.

Held: The appeal is dismissed for want of jurisdiction.

(a) The State, in its brief, asked that the issues be decided but declined to take a position on the merits. Thus, if the State were the sole appellant, the appeal would be dismissed for want of a case or controversy. Accordingly, the State's presence in the case does not provide a sound jurisdictional basis for undertaking to decide the constitutional issues.

(b) Nor does this Court have jurisdiction with respect to the University. While the case was pending on appeal, the University substantially amended its pertinent regulations, and the New Jersey Supreme Court did not pass on the validity of the revised regulations. The issue of the old regulation's validity is thus moot. Since the University is not prevented by the judgment below from having the validity of its new regulation ruled upon in another enforcement action, it is without standing to invoke this Court's jurisdiction.

Appeal dismissed. Reported below: 84 N. J. 535, 423 A. 2d 615.

Nicholas deB. Katzenbach argued the cause for appellants. With him on the briefs for appellant Princeton University were *Thomas H. Wright, Jr.*, and *Margaret B. G. Freiberg*. *James R. Zazzali*, Attorney General, and *Michael R. Cole*, Assistant Attorney General, filed a brief for appellant State of New Jersey.

Sanford Levinson argued the cause for appellee. With him on the brief were *Jerrold Kamensky* and *Douglas Laycock*.*

PER CURIAM.

I

Appellee Schmid was arrested and charged with criminal trespass while distributing political materials on the campus of Princeton University. Schmid was not a student at Princeton University. Under University regulations then in effect, members of the public who wished to distribute materials on the campus were required to receive permission from University officials. Appellee was tried in Princeton Borough Municipal Court and on October 20, 1978, the trial judge issued an opinion convicting appellee and fining him $15 plus $10 costs. A *de novo* trial in the New Jersey Superior Court, Law Division, also resulted in conviction and the same fine was imposed. While appeal was pending to the Superior Court, Appellate Division, the case was certified for review by the New Jersey Supreme Court. That court invited the University to intervene and participate as a party, which it did.

The New Jersey Supreme Court reversed the judgment of conviction, holding that appellee's rights of speech and assembly under the New Jersey Constitution had been violated. *State* v. *Schmid*, 84 N. J. 535, 423 A. 2d 615 (1980). The University filed a notice of appeal and jurisdictional statement. Its claim is that the judgment below deprives it

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*Briefs of *amici curiae* urging reversal were filed by *R. Claire Guthrie* and *Christine Topping Milliken* for the American Council on Education et al.; and by *James Roosevelt, Jr.*, and *Kay H. Hodge* for the Massachusetts Institute of Technology.

Matthew W. Finkin filed a brief for the American Association of University Professors as *amicus curiae* urging affirmance.

Michael F. Spicer filed a brief for the Association of Independent Colleges and Universities in New Jersey as *amicus curiae*.

of its rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution. The State of New Jersey did not file a separate jurisdictional statement but joined in that of the University. We postponed jurisdiction, 451 U. S. 982 (1981), and now dismiss the appeal for want of jurisdiction.

II

The State of New Jersey has filed a brief in this Court asking us to review and decide the issues presented, but stating that it "deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action." Brief for Appellant State of New Jersey 4. Had the University not been a party to this case in the New Jersey Supreme Court and had the State filed a jurisdictional statement urging reversal, the existence of a case or controversy—and of jurisdiction in this Court—could not be doubted. However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy. We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. See, *e. g.*, *Sierra Club* v. *Morton*, 405 U. S. 727, 731–732 (1972); *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968). Thus the presence of the State of New Jersey in this case does not provide a sound jurisdictional basis for undertaking to decide difficult constitutional issues.

Princeton defends its own standing and our jurisdiction on the grounds that it was a party to the case in the New Jersey Supreme Court,* that it is bound by the judgment of that

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*That Princeton had standing in state court does not determine the power of this Court to consider the issue. Any determination of who has standing to assert constitutional rights is a federal question to be decided by the Court itself. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 282 (1961); *United States* v. *Raines*, 362 U. S. 17, 23, n. 3 (1960).

court with respect to the validity of its regulations, and that no other forum is available in which to challenge the judgment on federal constitutional grounds. We have determined, however, that we lack jurisdiction with respect to Princeton. The New Jersey Supreme Court noted that while the case was pending on appeal, the University substantially amended its regulations governing solicitation, distribution of literature, and similar activities on University property by those not affiliated with the University. 84 N. J., at 539–541, n. 2, 568, 423 A. 2d, at 617–618, n. 2, 633. The opinion below rested on the absence of a reasonable regulatory scheme governing expressional activity on University property, but the regulation at issue is no longer in force. Furthermore, the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution. Thus the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) (*per curiam*).

Princeton does not claim standing on the ground that a private party may intervene and challenge the reversal of a criminal conviction of another party. See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973). Its alleged standing in this Court rests on its claim that the judgment below would be res judicata against it and that it has thus finally been deprived of the authority to enforce the regulation as it stood prior to amendment. Since the judgment, however, does not prevent it from having the validity of its new regulation ruled upon in another enforcement action, the University is without standing to invoke our jurisdiction. Accordingly, we dismiss the appeal.

So ordered.

JUSTICE BRENNAN took no part in the consideration or decision of this case.

EDDINGS *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 80-5727. Argued November 2, 1981—Decided January 19, 1982

Petitioner was convicted in an Oklahoma trial court of first-degree murder for killing a police officer and was sentenced to death. At the time of the offense petitioner was 16 years old, but he was tried as an adult. The Oklahoma death penalty statute provides that in a sentencing proceeding evidence may be presented as to "any mitigating circumstances" or as to any of certain enumerated aggravating circumstances. At the sentencing hearing, the State alleged certain of the enumerated aggravating circumstances, and petitioner, in mitigation, presented substantial evidence of a turbulent family history, of beatings by a harsh father, and of serious emotional disturbance. In imposing the death sentence, the trial judge found that the State had proved each of the alleged aggravating circumstances. But he refused, as a matter of law, to consider in mitigation the circumstances of petitioner's unhappy upbringing and emotional disturbance, and found that the only mitigating circumstance was petitioner's youth, which circumstance was held to be insufficient to outweigh the aggravating circumstances. The Oklahoma Court of Criminal Appeals affirmed.

Held: The death sentence must be vacated as it was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett* v. *Ohio*, 438 U. S. 586, 606. Pp. 110–116.

(a) "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, *supra*, at 604. This rule follows from the requirement that capital punishment be imposed fairly and with reasonable consistency or not at all, and recognizes that a consistency produced by ignoring individual differences is a false consistency. Pp. 110–112.

(b) The limitation placed by the courts below upon the mitigating evidence they would consider violated the above rule. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. The sentencer and the review-

ing court may determine the weight to be given relevant mitigating evidence but may not give it no weight by excluding it from their consideration. Here, the evidence of a difficult family history and of emotional disturbance petitioner offered at the sentencing hearing should have been duly considered in sentencing. Pp. 112–116.

616 P. 2d 1159, reversed in part and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., *post*, p. 117, and O'CONNOR, J., *post*, p. 117, filed concurring opinions. BURGER, C. J., filed a dissenting opinion, in which WHITE, BLACKMUN, and REHNQUIST, JJ., joined, *post*, p. 120.

Jay C. Baker, by appointment of the Court, 451 U. S. 981, argued the cause and filed a brief for petitioner.

David W. Lee, Assistant Attorney General of Oklahoma, argued the cause for respondent. With him on the brief were *Jan Eric Cartwright*, Attorney General, and *Tomilou Gentry Liddell*, Assistant Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Monty Lee Eddings was convicted of first-degree murder and sentenced to death. Because this sentence was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett* v. *Ohio*, 438 U. S. 586, 606 (1978) (opinion of BURGER, C. J.), we reverse.

I

On April 4, 1977, Eddings, a 16-year-old youth, and several younger companions ran away from their Missouri homes. They traveled in a car owned by Eddings' brother, and drove

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*Briefs of *amici curiae* urging reversal were filed by *M. Gail Robinson*, *Kevin Michael McNally*, and *J. Vincent Aprile II* for Kentucky Youth Advocates et al.; and by *Robert L. Walker* for the National Council on Crime and Delinquency et al.

Daniel J. Popeo and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation as *amicus curiae*.

without destination or purpose in a southwesterly direction eventually reaching the Oklahoma Turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the officer.

Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the juvenile system, the trial court granted the motion. The ruling was affirmed on appeal. *In re M. E.*, 584 P. 2d 1340 (Okla. Crim. App.), cert. denied *sub nom. Eddings* v. *Oklahoma*, 436 U. S. 921 (1978). Eddings was then charged with murder in the first degree, and the District Court of Creek County found him guilty upon his plea of *nolo contendere*.

The Oklahoma death penalty statute provides in pertinent part:

> "Upon conviction . . . of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. . . . In the sentencing proceeding, evidence may be presented as to *any mitigating circumstances* or as to any of the aggravating circumstances enumerated in this act." Okla. Stat., Tit. 21, § 701.10 (1980) (emphasis added).

Section 701.12 lists seven separate aggravating circumstances; the statute nowhere defines what is meant by "any mitigating circumstances."

At the sentencing hearing, the State alleged three of the aggravating circumstances enumerated in the statute: that the murder was especially heinous, atrocious, or cruel, that the crime was committed for the purpose of avoiding or pre-

venting a lawful arrest, and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. §§ 701.12(4), (5), and (7) (1980).

In mitigation, Eddings presented substantial evidence at the hearing of his troubled youth. The testimony of his supervising Juvenile Officer indicated that Eddings had been raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14 Eddings lived with his mother without rules or supervision. App. 109. There is the suggestion that Eddings' mother was an alcoholic and possibly a prostitute. *Id.*, at 110–111. By the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father. But neither could the father control the boy. Attempts to reason and talk gave way to physical punishment. The Juvenile Officer testified that Eddings was frightened and bitter, that his father overreacted and used excessive physical punishment: "Mr. Eddings found the only thing that he thought was effectful with the boy was actual punishment, or physical violence—hitting with a strap or something like this."[1] *Id.*, at 121.

Testimony from other witnesses indicated that Eddings was emotionally disturbed in general and at the time of the crime, and that his mental and emotional development were at a level several years below his age. *Id.*, at 134, 149, and 173. A state psychologist stated that Eddings had a sociopathic or antisocial personality and that approximately 30% of youths suffering from such a disorder grew out of it as they aged. *Id.*, at 137 and 139. A sociologist specializing in juvenile offenders testified that Eddings was treatable. *Id.*, at 149. A psychiatrist testified that Eddings could be rehabilitated by intensive therapy over a 15- to 20-year period.

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[1] There was evidence that immediately after the shooting Eddings said: "I would rather have shot an Officer than go back to where I live." App. 93.

Id., at 181. He testified further that Eddings "did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it."[2] The psychiatrist suggested that, if treated, Eddings would no longer pose a serious threat to society. *Id.*, at 180–181.

At the conclusion of all the evidence, the trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the State had proved each of the three alleged aggravating circumstances beyond a reasonable doubt.[3] Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight: "I have given very serious consideration to the youth of the Defendant when this particular

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[2] The psychiatrist suggested that, at the time of the murder, Eddings was in his own mind shooting his stepfather—a policeman who had been married to his mother for a brief period when Eddings was seven. The psychiatrist stated: "I think that given the circumstances and the facts of his life, and the facts of his arrested development, he acted as a seven year old seeking revenge and rebellion; and the act—he did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it." *Id.*, at 172.

[3] The trial judge found first that the crime was "heinous, atrocious, and cruel" because "designed to inflict a high degree of pain . . . in utter indifference to the rights of Patrolman Crabtree." *Id.*, at 187. Second, the judge found that the crime was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." *Id.*, at 187–188. The evidence was sufficient to indicate that at the time of the offense Eddings did not wish to be returned to Missouri and that in stopping the car the officer's intent was to make a lawful arrest. Finally, the trial judge found that Eddings posed a continuing threat of violence to society. There was evidence that at one point on the day of the murder, after Eddings had been taken to the county jail, he told two officers that "if he was loose . . . he would shoot" them all. *Id.*, at 77. There was also evidence that at another time, when an officer refused to turn off the light in Eddings' cell, Eddings became angry and threatened the officer: "Now I have shot one of you people, and I'll get you too if you don't turn this light out." *Id.*, at 103. Based on these two "spontaneous utterances," *id.*, at 188, the trial judge found a strong likelihood that Eddings would again commit a criminal act of violence if released.

crime was committed. Should I fail to do this, I think I would not be carrying out my duty." *Id.*, at 188–189. But he would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance: "[T]he Court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. *Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.*" *Id.*, at 189 (emphasis added). Finding that the only mitigating circumstance was Eddings' youth and finding further that this circumstance could not outweigh the aggravating circumstances present, the judge sentenced Eddings to death.

The Court of Criminal Appeals affirmed the sentence of death. 616 P. 2d 1159 (1980). It found that each of the aggravating circumstances alleged by the State had been present.[4] It recited the mitigating evidence presented by Eddings in some detail, but in the end it agreed with the trial court that only the fact of Eddings' youth was properly considered as a mitigating circumstance:

> "[Eddings] also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised. There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility

[4] We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute. See *Roberts* v. *Louisiana*, 431 U. S. 633, 636 (1977). However, we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). See n. 3, *supra*.

in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior." *Id.*, at 1170 (citation omitted).

II

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), CHIEF JUSTICE BURGER, writing for the plurality, stated the rule that we apply today:[5]

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original).

Recognizing "that the imposition of death by public authority is . . . profoundly different from all other penalties," the plurality held that the sentencer must be free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation . . . ." *Id.*, at 605. Because the Ohio death penalty statute only permitted consideration of three mitigating circumstances, the Court found the statute to be invalid.

As THE CHIEF JUSTICE explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. Since the early days of the common law, the legal system has struggled to accommodate these twin objectives. Thus, the common law began by treating all criminal homicides as capital offenses, with a

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[5] Because we decide this case on the basis of *Lockett* v. *Ohio*, we do not reach the question of whether—in light of contemporary standards—the Eighth Amendment forbids the execution of a defendant who was 16 at the time of the offense. Cf. *Bell* v. *Ohio*, 438 U. S. 637 (1978).

mandatory sentence of death. Later it allowed exceptions, first through an exclusion for those entitled to claim benefit of clergy and then by limiting capital punishment to murders upon "malice prepensed." In this country we attempted to soften the rigor of the system of mandatory death sentences we inherited from England, first by grading murder into different degrees of which only murder of the first degree was a capital offense and then by committing use of the death penalty to the absolute discretion of the jury. By the time of our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), the country had moved so far from a mandatory system that the imposition of capital punishment frequently had become arbitrary and capricious.

Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. Thus, in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), the principal opinion held that the danger of an arbitrary and capricious death penalty could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Id.*, at 195. By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to "the characteristics of the person who committed the crime . . . ." *Id.*, at 197.[6]

Similarly, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the plurality held that mandatory death sentencing was not a permissible response to the problem of arbitrary

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[6] "[T]he jury's attention is focused on the characteristics of the person who committed the crime: . . . Are there any special facts about this defendant that mitigate against imposing capital punishment (*e. g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)." 428 U. S., at 197.

jury discretion. As the history of capital punishment had shown, such an approach to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304.[7] See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633 (1977); *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976).

Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg* v. *Georgia*, *supra*, at 197, the rule in *Lockett* recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

III

We now apply the rule in *Lockett* to the circumstances of this case. The trial judge stated that "in following the law,"

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[7] "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings . . . ." 428 U. S., at 304.

he could not "consider the fact of this young man's violent background." App. 189. There is no dispute that by "violent background" the trial judge was referring to the mitigating evidence of Eddings' family history.[8] From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that *as a matter of law* he was unable even to consider the evidence.

The Court of Criminal Appeals took the same approach. It found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility. Thus the court conceded that Eddings had a "personality disorder," but cast this evidence aside on the basis that "he knew the difference between right and wrong . . . and that is the test of criminal responsibility." 616 P. 2d, at 1170. Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.

We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.[9] Just as the State may not by statute preclude

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[8] Brief for Respondent 55 ("the inference that can be drawn is that the court did not consider petitioner's juvenile record and family life to be a mitigating circumstance"); Tr. of Oral Arg. 36 ("the trial court did not consider the fact of his family background as a mitigating circumstance. . . . [T]he violent background, which I assume he meant was . . . [that Eddings] was subject to some slapping around and some beating by his father") (argument of respondent).

[9] Eddings argued to the Court of Criminal Appeals that imposition of the death penalty in the particular circumstances of his case, and in light of the mitigating factors present, was excessive punishment under the Eighth Amendment. But he did not specifically argue that the trial judge erred in refusing to consider relevant mitigating circumstances in the process of

the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may

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sentencing. In rejecting his claim of excessive punishment, the court examined the aggravating and mitigating circumstances and held that Eddings' family history and emotional disorder were *not* mitigating circumstances that ought to be weighed in the balance. The court's holding that these factors were irrelevant to an inquiry into excessiveness was also a holding that they need not have been considered by the sentencer in imposing capital punishment. Similarly, Eddings' argument in his petition for certiorari that imposition of the death penalty was excessive on the facts of this case comprises the argument that the sentencer erred in refusing to consider relevant mitigating circumstances proffered by him at the sentencing hearing. In short, although neither the opinion of the Court of Appeals nor Eddings' petition for certiorari spoke to our decision in *Lockett* by name, the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us. Our jurisdiction does not depend on citation to book and verse. See, *e. g.*, *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928).

Although Eddings' petition for certiorari did not expressly present the *Lockett* issue, his brief in this Court argued it, and the State responded to the argument. Brief for Petitioner 64–67; Brief for Respondent 55–57. The dissenting opinion of THE CHIEF JUSTICE, *post*, at 120, n. 1, states that the courts below were not afforded the opportunity to consider this issue. The fact is, however, that in his petition to the Court of Criminal Appeals for a rehearing, Eddings specifically presented the issue and at some considerable length. See Petition for Re-Hearing and Supporting Brief in No. C–78–325, p. 10 ("This Court, by its interpretation of mitigating circumstances, has effectively limited the scope of mitigation and that limitation renders the Oklahoma death penalty statute unconstitutional"). The Court of Criminal Appeals denied the petition, stating that it had given it full consideration and had been "fully advised in the premises." See Rule 1.18, Rules of the Court of Criminal Appeals (1980) (court will entertain new arguments upon a petition for rehearing). Cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476 (1975). See also *Wood* v. *Georgia*, 450 U. S. 261, 265, n. 5 (1981); *Beck* v. *Alabama*, 447 U. S. 625, 631, n. 6 (1980); *Vachon* v. *New Hampshire*, 414 U. S. 478, 479, n. 3 (1974).

determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.[10]

Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See *McGautha* v. *California*, 402 U. S. 183, 187–188, 193 (1971). In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.[11] Our history is replete with laws and judicial recognition that minors, especially in their earlier years, gener-

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[10] We note that the Oklahoma death penalty statute permits the defendant to present evidence "as to any mitigating circumstances." Okla. Stat., Tit. 21, § 701.10 (1980). *Lockett* requires the sentencer to listen.

[11] "Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967). "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

ally are less mature and responsible than adults.[12] Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979).

Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

We are not unaware of the extent to which minors engage increasingly in violent crime.[13] Nor do we suggest an absence of legal responsibility where crime is committed by a minor. We are concerned here only with the manner of the imposition of the ultimate penalty: the death sentence imposed for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity.

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[12] As Justice Frankfurter stated, "[c]hildren have a very special place in life which law should reflect." *May* v. *Anderson*, 345 U. S. 528, 536 (1953) (concurring opinion). And indeed the law does reflect this special place. Every State in the country makes some separate provision for juvenile offenders. See *In re Gault*, 387 U. S. 1, 14 (1967).

[13] See, *e. g.*, National Advisory Committee on Criminal Justice Standards and Goals, Task Force Report on Juvenile Justice and Delinquency Prevention 3 (1976).

On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion without, however, departing from my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion).

JUSTICE O'CONNOR, concurring.

I write separately to address more fully the reasons why this case must be remanded in light of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), which requires the trial court to consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history.*

Because sentences of death are "qualitatively different" from prison sentences, *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and

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*Despite THE CHIEF JUSTICE's argument that we may not consider the *Lockett* issue because it was never fairly presented to the court below, there is precedent for this Court to consider the merits of the issue. In *Wood* v. *Georgia*, 450 U. S. 261, 265, n. 5 (1981), this Court wrote:

"Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U. S. C. § 2106 (authorizing this Court to 'require such further proceedings to be had as may be just under the circumstances')."

Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.

STEVENS, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor. One example of the measures taken is in *Lockett* v. *Ohio, supra*, where a plurality of this Court wrote:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*, at 605 (opinion of BURGER, C. J.).

In order to ensure that the death penalty was not erroneously imposed, the *Lockett* plurality concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original) (footnote omitted).

In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. Stat., Tit. 21, § 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before *Lockett* was decided), the judge remarked that he could not "in following the law . . . consider

the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in *Lockett* compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U. S., at 605.

I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

THE CHIEF JUSTICE may be correct in concluding that the Court's opinion reflects a decision by some Justices that they would not have imposed the death penalty in this case had they sat as the trial judge. See *post*, at 127. I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16. Rather, by listing in detail some of the circumstances surrounding the petitioner's life, the Court has sought to emphasize the variety of mitigating information that may not have been considered by the trial court in deciding whether to impose the death penalty or some lesser sentence.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST join, dissenting.

It is important at the outset to remember—as the Court does not—the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old in 1977 at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied. 450 U. S. 1040 (1981). Yet the Court today goes beyond the issue on which review was sought—and granted—to decide the case on a point raised for the first time in petitioner's brief to this Court. This claim was neither presented to the Oklahoma courts nor presented to this Court in the petition for certiorari.[1] Relying on this "11th-hour" claim, the Court strains to construct a plausible legal theory to support its mandate for the relief granted.

I

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), we considered whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Lockett to death under a statute that "narrowly limit[ed] the sentencer's discretion to consider the

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[1] The Court struggles to demonstrate that "the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us." *Ante*, at 113–114, n. 9. It argues that petitioner's "*Lockett* claim" was somehow inherent in his general assertion that the death penalty was "excessive." However, it is obvious that petitioner not only failed to present to this Court the question which the Court now addresses, but also never "fairly presented" the *Lockett* argument to the state courts so as to have afforded them the first "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard* v. *Connor*, 404 U. S. 270, 275–277 (1971). Indeed, petitioner concedes as much, admitting that the "*Lockett* error was not enumerated or argued on appeal to the Oklahoma Court of Criminal Appeals . . . ." Brief for Petitioner 64.

circumstances of the crime and the record and character of the offender as mitigating factors." *Id.*, at 589. The statute at issue, Ohio Rev. Code §§ 2929.03–2929.04(B) (1975), required the trial court to impose the death penalty upon Lockett's conviction for "aggravated murder with specifications,"[2] unless it found "that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she 'was under duress, coercion, or strong provocation,' or (3) the offense was 'primarily the product of [Lockett's] psychosis or mental deficiency.'" 438 U. S., at 593–594. It was plain that although guilty of felony homicide under Ohio law, Lockett had played a relatively minor role in a robbery which resulted in a homicide actually perpetrated by the hand of another. Lockett had previously committed no major offenses; in addition, a psychological report described her "prognosis for rehabilitation" as "favorable." *Id.*, at 594. However, since she was not found to have acted under duress, did not suffer from "psychosis," and was not "mentally deficient," the sentencing judge concluded that he had "'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Ibid.*

We held in *Lockett* that the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original). We therefore found the Ohio statute flawed, be-

[2] In that case the evidence showed that while Lockett waited in a "getaway" car, her three companions robbed a store; during the robbery, the proprietor was fatally wounded. Lockett was charged with aggravated murder with two "specifications" of "aggravating circumstances": (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment" for aggravated robbery; and (2) that the murder was "committed while . . . committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery." See Ohio Rev. Code § 2929.04(A) (1975).

cause it did not permit individualized consideration of mitigating circumstances—such as the defendant's comparatively minor role in the offense, lack of intent to kill the victim, or age. *Id.*, at 606–608. We did not, however, undertake to dictate the *weight* that a sentencing court must ascribe to the various factors that might be categorized as "mitigating," nor did we in any way suggest that this Court may substitute its sentencing judgment for that of state courts in capital cases.

In contrast to the Ohio statute at issue in *Lockett*, the Oklahoma death penalty statute provides:

> "In the sentencing proceeding, evidence may be presented as to *any* mitigating circumstances or as to any of the aggravating circumstances enumerated in this act." Okla. Stat., Tit. 21, § 701.10 (1980) (emphasis added).

The statute further provides that

> "[u]nless at least one of the statutory aggravating circumstances enumerated in this act is [found to exist beyond a reasonable doubt] or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." § 701.11.

This provision, of course, instructs the sentencer to weigh the mitigating evidence introduced by a defendant against the aggravating circumstances proved by the State.[3]

The Oklahoma statute thus contains provisions virtually identical to those cited with approval in *Lockett*, as examples of proper legislation which highlighted the Ohio statute's "constitutional infirmities." 438 U. S., at 606–607. Indeed, the Court does not contend that the Oklahoma sentencing

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[3] It is ironic that in his Petition for Certiorari filed with the Oklahoma Court of Criminal Appeals, petitioner asserted that the Oklahoma sentencing scheme was constitutionally deficient, because "[t]he mitigating circumstances which may be considered are not statutorily defined *or limited*" (emphasis added).

provisions are inconsistent with *Lockett*. Moreover, the Court recognizes that, as mandated by the Oklahoma statute, Eddings was permitted to present "substantial evidence at the [sentencing] hearing of his troubled youth." *Ante*, at 107.[4]

In its attempt to make out a violation of *Lockett*, the Court relies entirely on a single sentence of the trial court's opinion delivered from the bench at the close of the sentencing hearing. After discussing the aggravated nature of petitioner's offense, and noting that he had "given very serious consideration to the youth of the Defendant when this particular crime was committed," the trial judge said that he could not

[4] Although I think it is immaterial to a correct decision of this case, it is worth noting that the Court overstates and oversimplifies the evidence presented by Eddings at the sentencing hearing. For example, it twice characterizes the testimony as indicating that, at the time of the crime, Eddings' "mental and emotional development were at a level several years below his age." *Ante*, at 107, 116. Dr. Dietsche, a psychologist, testified that if forced to extrapolate from the Wechsler Adult Intelligence Scale he would place petitioner's "mental age" at about 14 years, 6 months; however, he then said that this mental age would have "no meaning" since "the mental age concepts break down . . . between fourteen to sixteen years of age." He went on to state: "*My opinion is that [Eddings] has the intelligence of an adult.*" App. 134–136 (emphasis added). Describing a single interview with petitioner while he was awaiting trial on murder charges, Dr. Rettig, a sociologist, said that petitioner's "responses appeared to me to be several years below his chronological age"; he "qualif[ied]" this answer, however, by noting that petitioner was "under a great deal of constraint in the atmosphere in which I saw him." *Id.*, at 149. Finally, Dr. Gagliano, a psychiatrist, opined on the basis of a one-hour interview—during which petitioner's attorney was present and refused to allow questioning about petitioner's "mental status" on the day of the shooting, *id.*, at 177—that at the time petitioner pulled the trigger, "he acted as a seven year old seeking revenge and rebellion" against his stepfather, a policeman. *Id.*, at 172–173. Dr. Gagliano was also willing to state categorically, on the basis of this single interview, and without reference to the results of the psychological testing of Eddings, *id.*, at 174, that Eddings was "preordained" to commit the murder from the time his parents were divorced, when he was five. *Id.*, at 179–180. This sort of "determinist" approach is rejected by an overwhelming majority of psychiatrists.

> "be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background." App. 189.

From this statement, the Court concludes "it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that *as a matter of law* he was unable even to consider the evidence." *Ante*, at 113. This is simply not a correct characterization of the sentencing judge's action.

In its parsing of the trial court's oral statement, the Court ignores the fact that the judge was delivering his opinion extemporaneously from the bench, and could not be expected to frame each utterance with the specificity and precision that might be expected of a written opinion or statute. Extemporaneous courtroom statements are not often models of clarity. Nor does the Court give any weight to the fact that the trial court had spent considerable time listening to the testimony of a probation officer and various mental health professionals who described Eddings' personality and family history—an obviously meaningless exercise if, as the Court asserts, the judge believed he was barred "as a matter of law" from "considering" their testimony. Yet even examined in isolation, the trial court's statement is at best ambiguous;[5] it can just as easily be read to say that, while the court

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[5] It is not even clear what the trial court meant by Eddings' "violent background." For example, Eddings' probation officer testified that Eddings had "problems with fighting" while in school, and had once been charged with "Assault with intent to do great bodily harm." *Id.*, at 106–107. The State seems to concede, however, that the court was probably referring, at least in part, to Eddings' family history. See Brief for Respondent 55 ("the inference that can be drawn is that the court did not consider petitioner's *juvenile record and* family life to be a mitigating circumstance") (emphasis added). But cf. Tr. of Oral Arg. 35 ("the remark is

had taken account of Eddings' unfortunate childhood, it did not consider that either his youth or his family background was sufficient to offset the aggravating circumstances that the evidence revealed. Certainly nothing in *Lockett* would preclude the court from making such a determination.

The Oklahoma Court of Criminal Appeals independently examined the evidence of "aggravating" and "mitigating" factors presented at Eddings' sentencing hearing. 616 P. 2d 1159 (1980). After reviewing the testimony concerning Eddings' personality and family background, and after referring to the trial court's discussion of mitigating circumstances, it stated that while Eddings' "family history is useful in explaining why he behaved the way he did, . . . *it does not excuse his behavior.*" *Id.*, at 1170 (emphasis added). From this the Court concludes that "the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." *Ante*, at 113.[6] However, there is no reason to read that court's statements as reflecting anything more than a conclusion that Eddings' background was not a sufficiently mitigating factor to tip the scales, given the aggravating circumstances, including Eddings' statements immediately before the killing.[7] The Court of Criminal Appeals most assuredly did *not*, as the Court's opinion suggests, hold that this "evidence in mitigation was not relevant," see *ibid.;* indeed, had the Court of Criminal Appeals thought the evidence irrele-

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ambiguous. It could be interpreted to mean that [the trial court] was not going to consider the juvenile's previous juvenile record in Missouri, which ca 126censive . . .").

[6] On the other hand, the Court's opinion concedes that petitioner's *youth* was given serious consideration as a "mitigating circumstance," although his age at the time of the offense would not "tend to support a legal excuse from criminal responsibility."

[7] When Eddings' companions informed him that the officer's patrol car was approaching, Eddings responded that if the "mother . . . pig tried to stop him he was going to blow him away." App. 66.

vant, it is unlikely that it would have spent several paragraphs summarizing it. The Court's opinion offers no reasonable explanation for its assumption that the Court of Criminal Appeals considered itself bound by some unstated legal principle not to "consider" Eddings' background.

To be sure, neither the Court of Criminal Appeals nor the trial court labeled Eddings' family background and personality disturbance as "mitigating factors." It is plain to me, however, that this was purely a matter of semantics associated with the rational belief that "evidence in mitigation" must rise to a certain level of persuasiveness before it can be said to constitute a "mitigating circumstance." In contrast, the Court seems to require that any potentially mitigating evidence be described as a "mitigating factor"—regardless of its weight; the insubstantiality of the evidence is simply to be a factor in the process of weighing the evidence against aggravating circumstances. Yet if this is all the Court's opinion stands for, it provides scant support for the result reached. For it is clearly the choice of the Oklahoma courts—a choice not inconsistent with *Lockett* or any other decision of this Court—to accord relatively little weight to Eddings' family background and emotional problems as balanced against the circumstances of his crime and his potential for future dangerousness.[8]

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[8] Nor is this choice necessarily an unreasonable one. As the Court notes, "[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *Ante*, at 115. One might even be surprised if a person capable of a brutal and unprovoked killing of a police officer did not suffer from some sort of "personality disorder."

Indeed, Dr. Dietsche, who testified that Eddings had a "sociopathic or antisocial personality," see *ante*, at 107, estimated that 91% "of your criminal element" would test as sociopathic or antisocial. App. 136. Dr. Dietsche defined "antisocial personalities" as individuals without "the usual type of companions" or "loyalties," who are "[f]requently . . . selfish, . . . very impulsive," showing "little in the line of responsibility" or concern "for the needs or wants of others," and "hav[ing] little in the line of guilt or

II

It can never be less than the most painful of our duties to pass on capital cases, and the more so in a case such as this one. However, there comes a time in every case when a court must "bite the bullet."

Whether the Court's remand will serve any useful purpose remains to be seen, for petitioner has already been given an opportunity to introduce whatever evidence he considered relevant to the sentencing determination. Two Oklahoma courts have weighed that evidence and found it insufficient to offset the aggravating circumstances shown by the State. The Court's opinion makes clear that some Justices who join it would not have imposed the death penalty had they sat as the sentencing authority, see, *e. g.*, *ante*, at 115–116. In-

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remorse." *Id.*, at 137–138. Although the Court describes Dietsche's testimony as indicating that "approximately 30% of youths suffering from such a disorder grew out of it as they aged," *ante*, at 107, Dietsche was in fact describing a study which he thought had subsequently been discredited. App., at 139–141. Even that study, however, concluded that most of those who "grew out of" the disorder by the age of 35 or 40 were "more of a con-artist type" and "not . . . the assaultive type." *Ibid.* A more recent study estimated that only 20% of sociopathic persons were "treatable," *id.*, at 141; in this study, only 9 of 255 initial participants were successfully treated, after "literally . . . thousands of hours of therapy." *Id.*, at 142. Thus, characterization of Eddings as a "sociopath" may connote little more than that he is egocentric, concerned only with his own desires and unremorseful, has a propensity for criminal conduct, and is unlikely to respond well to conventional psychiatric treatment—hardly significant "mitigating" factors. See *Blocker* v. *United States*, 110 U. S. App. D. C. 41, 48–49, and nn. 11, 12, 288 F. 2d 853, 860–861, and nn. 11, 12 (1961) (Burger, J., concurring in result). While the Court speaks of Eddings' "severe emotional disturbance," *ante*, at 115; see also *ante*, at 116, it appears to be referring primarily to the testimony that Eddings was a sociopath, and to Dr. Gagliano's rather fantastic speculation concerning Eddings' dissociation at the time of the crime, see n. 4, *supra*. The Court's opinion exemplifies the proposition that the very occurrence of the crime functions as a powerful impetus to search for a theory to explain it. See Szasz, Psychiatry, Ethics, and the Criminal Law, 58 Colum. L. Rev. 183, 190–191 (1958).

deed, I am not sure I would have done so. But the Constitution does not authorize us to determine whether sentences imposed by state courts are sentences we consider "appropriate"; our only authority is to decide whether they are constitutional under the Eighth Amendment. The Court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed. In the last analysis, the Court is forced to conclude that it is "the state courts [which] must consider [petitioner's mitigating evidence] and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." *Ante*, at 117.

Because the sentencing proceedings in this case were in no sense inconsistent with *Lockett* v. *Ohio*, 438 U. S. 586 (1978), I would decide the sole issue on which we granted certiorari, and affirm the judgment.

COMMON CAUSE ET AL. v. SCHMITT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 80–847. Argued October 7, 1981—Decided January 19, 1982*

512 F. Supp. 489, affirmed by an equally divided Court.

Archibald Cox argued the cause for appellants in No. 80–847. With him on the briefs were *Michael L. Burack, Louis R. Cohen, Roger M. Whitten, Kenneth J. Guido, Jr.,* and *Ellen G. Block.*

Jan W. Baran argued the cause for appellees in both cases and filed a brief for appellees Schmitt et al. *Roderick M. Hills, Robert K. Burgess,* and *Edward Sonnenschein, Jr.,* filed a brief for Americans for an Effective Presidency, appellee in No. 80–847. *J. Curtis Herge* filed a brief for Fund for a Conservative Majority, appellee in No. 80–1067.

Charles N. Steele argued the cause for the Federal Election Commission, intervenor-appellee in No. 80–847 and appellant in No. 80–1067. With him on the briefs were *Kathleen Imig Perkins* and *Richard B. Bader.*†

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

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*Together with No. 80–1067, *Federal Election Commission* v. *Americans for Change,* also on appeal from the same court.

†Briefs of *amici curiae* urging affirmance were filed by *Phillip A. Lacovara, Gerald Goldman, Ronald A. Stern, Charles S. Sims,* and *Arthur B. Spitzer* for the American Civil Liberties Union; and by *Wayne T. Elliot* and *Allen R. Hirons* for the Southeastern Legal Foundation, Inc.

MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 80–11. Argued March 30, 1981—Reargued November 4, 1981—Decided January 25, 1982*

Respondent Indian Tribe, pursuant to its Revised Constitution (which had been approved by the Secretary of the Interior (Secretary) as required by the Indian Reorganization Act of 1934), enacted an ordinance (also approved by the Secretary) imposing a severance tax on oil and gas production on the tribal reservation land. Oil and gas received by the Tribe as in-kind royalty payments from lessees of mineral leases on the reservation are exempted from the tax. Petitioners, lessees under Secretary-approved long-term leases with the Tribe to extract oil and natural gas deposits on reservation land, brought separate actions in Federal District Court to enjoin enforcement of the tax. The District Court, consolidating the actions, entered a permanent injunction, ruling that the Tribe had no authority to impose the tax, that only state and local authorities had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause. The Court of Appeals reversed, holding that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or Act of Congress, and that there was no Commerce Clause violation.

Held:

1. The Tribe has the inherent power to impose the severance tax on petitioners' mining activities as part of its power to govern and to pay for the costs of self-government. Pp. 136–152.

(a) The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to receive revenues for its essential services. The power does not derive solely from the Tribe's power to exclude non-Indians from tribal lands but from the Tribe's general authority, as sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in such activities. Here, petitioners, who have availed themselves of

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*Together with No. 80–15, *Amoco Production Co. et al.* v. *Jicarilla Apache Tribe et al.*, also on certiorari to the same court.

the privilege of carrying on business on the reservation, benefit from police protection and other governmental services, as well as from the advantages of a civilized society assured by tribal government. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of such government. The mere fact that the Tribe enjoys rents and royalties as the lessor of the mineral lands does not undermine its authority to impose the tax. Pp. 137–144.

(b) Even if the Tribe's power to tax were derived solely from its power to exclude non-Indians from the reservation, the Tribe has the authority to impose the severance tax. Non-Indians who lawfully enter tribal lands remain subject to a tribe's *power* to exclude them, which power includes the lesser power to tax or place other conditions on the non-Indian's conduct or continued presence on the reservation. The Tribe's role as commercial partner with petitioners should not be confused with its role as sovereign. It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract. To presume that a sovereign forever waives the right to exercise one of its powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head. Pp. 144–148.

(c) The Federal Government did not deprive the Tribe of its authority to impose the severance tax by Congress' enactment of the 1938 Act establishing the procedures for leasing oil and gas interests on tribal lands. Such Act does not prohibit the Tribe from imposing the tax when both the tribal Constitution and the ordinance authorizing the tax were approved by the Secretary. Nor did the 1927 Act permitting state taxation of mineral leases on Indian reservations divest the Tribe of its taxing power. The mere existence of state authority to tax does not deprive an Indian tribe of its power to tax. Moreover, the severance tax does not conflict with national energy policies. To the contrary, the fact that the Natural Gas Policy Act of 1978 includes taxes imposed by an Indian tribe in its definition of costs that may be recovered under federal energy pricing regulations, indicates that such taxes would not contravene such policies and that the tribal authority to do so is not implicitly divested by that Act. Pp. 149–152.

2. The severance tax does not violate the "negative implications" of the Commerce Clause. Pp. 152–158.

(a) Courts are final arbiters under the Commerce Clause only when Congress has not acted. Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal

tax can take effect, and in this case the severance tax was enacted in accordance with this congressional scheme. Pp. 154–156.

(b) Even if judicial scrutiny under the Commerce Clause were necessary, the challenged tax would survive such scrutiny. The tax does not discriminate against interstate commerce since it is imposed on minerals either sold on the reservation or transported off the reservation before sale. And the exemption for minerals received by the Tribe as in-kind payments on the leases and used for tribal purposes merely avoids the administrative make-work that would ensue if the Tribe taxed the minerals that it, as a commercial partner, received in royalty payments, and thus cannot be deemed a discriminatory preference for local commerce. Pp. 156–158.

617 F. 2d 537, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 159.

Jason W. Kellahin reargued the cause for the petitioners in No. 80–11. With him on the briefs were *Bruce D. Black*, *Thomas H. Burton*, and *John Wimbish*. *John R. Cooney* reargued the cause for petitioners in No. 80–15. With him on the briefs were *Mark B. Thompson III*, *John H. Pickering*, *Samuel A. Stern*, *R. H. Landt*, and *Richard L. Marlar*.

Deputy Solicitor General Claiborne reargued the cause for respondent Secretary of the Interior in both cases. With him on the brief on reargument were *Acting Solicitor General Wallace* and *Assistant Attorney General Dinkins*. With him on the brief on the original argument were *Solicitor General McCree*, *Acting Assistant Attorney General Liotta*, *Edwin S. Kneedler*, *Jacques B. Gelin*, and *Martin W. Matzen*. *Robert J. Nordhaus* reargued the cause for respondents Jicarilla Apache Tribe et al. in both cases. With him on the briefs were *B. Reid Haltom* and *Terry D. Farmer*.†

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†Briefs of *amici curiae* urging reversal were filed by *Helena S. Maclay*, *Deirdre Boggs*, and *Bruce McEvoy*, Special Assistant Attorneys General, for the State of Montana; by *Bruce L. Herr*, *John B. Draper*, *Allen I.*

JUSTICE MARSHALL delivered the opinion of the Court.

Pursuant to long-term leases with the Jicarilla Apache Tribe, petitioners, 21 lessees, extract and produce oil and gas from the Tribe's reservation lands. In these two consolidated cases, petitioners challenge an ordinance enacted by the Tribe imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." See Oil and Gas Severance Tax No. 77-0-02, App. 38. We granted certiorari to determine whether the Tribe has the authority to impose this tax, and, if so, whether the tax imposed by the Tribe violates the Commerce Clause.

I

The Jicarilla Apache Tribe resides on a reservation in northwestern New Mexico. Established by Executive Order in 1887,[1] the reservation contains 742,315 acres, all of which are held as tribal trust property. The 1887 Executive

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Olson, Attorney General of North Dakota, *Albert R. Hausauer*, Special Assistant Attorney General, *Robert B. Hansen*, Attorney General of Utah, *Richard L. Dewsnup* and *Michael Quealy*, Assistant Attorneys General, *John D. Troughton*, Attorney General of Wyoming, and *Ron Arnold*, Assistant Attorney General, for the States of New Mexico et al.; by *Slade Gorton*, Attorney General, and *Timothy Malone*, Assistant Attorney General, for the State of Washington; by *James G. Watt* and *William H. Mellor III* for the Mountain States Legal Foundation; by *Frederick J. Martone* for the Salt River Project Agricultural Improvement and Power District et al.; by *Edward L. Barrett, Jr.*, *Richard C. Cahoon*, *Dennis McCarthy*, and *Arthur H. Nielsen*, for Shell Oil Co. et al.; and by *George J. Miller* for Westmoreland Resources, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Harry R. Sachse*, *Reid Peyton Chambers*, *Charles A. Hobbs*, *Robert A. Warden*, *Lawrence White*, and *Steven S. Anderson* for the Council of Energy Resource Tribes et al.; and by *George P. Vlassis* for the Navajo Tribe of Indians.

[1] See 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904) (Order of President Cleveland). Two earlier Orders setting aside land for the Tribe had been canceled. See *id.*, at 874–875 (Orders of Presidents Hayes and Grant). The boundaries of the reservation were redefined or clarified by Executive Orders issued by President Theodore Roosevelt on Novem-

Order set aside public lands in the Territory of New Mexico for the use and occupation of the Jicarilla Apache Indians, and contained no special restrictions except for a provision protecting pre-existing rights of bona fide settlers.[2] Approximately 2,100 individuals live on the reservation, with the majority residing in the town of Dulce, N. M., near the Colorado border.

The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, which authorizes any tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior (Secretary).[3] The Tribe's first Constitution, approved by the Secretary on August 4, 1937, preserved all powers conferred by § 16 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987, 25 U. S. C. § 476. In 1968, the Tribe revised its Constitution to specify:

> "The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of

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ber 11, 1907, and January 28, 1908, and by President Taft on February 17, 1912. See 3 C. Kappler, Indian Affairs, Laws and Treaties 681, 682, 684, 685 (1913).

The fact that the Jicarilla Apache Reservation was established by Executive Order rather than by treaty or statute does not affect our analysis; the Tribe's sovereign power is not affected by the manner in which its reservation was created. *E. g.*, *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980) (*Colville*).

[2] The proviso reads as follows: "this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain." 1 Kappler, *supra*, at 875.

[3] The Tribe is also chartered under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 988, 25 U. S. C. § 477, which permits the Secretary to issue to an Indian tribe a charter of incorporation that may give the tribe the power to purchase, manage, operate, and dispose of its property.

the Department of the Interior, and the restrictions established by this revised constitution." Revised Constitution of the Jicarilla Apache Tribe, Art. XI, § 1.

The Revised Constitution provides that "[t]he tribal council may enact ordinances to govern the development of tribal lands and other resources," Art. XI, § 1(a)(3). It further provides that "[t]he tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation," Art. XI, § 1(e). The Revised Constitution was approved by the Secretary on February 13, 1969.

To develop tribal lands, the Tribe has executed mineral leases encompassing some 69% of the reservation land. Beginning in 1953, the petitioners entered into leases with the Tribe. The Commissioner of Indian Affairs, on behalf of the Secretary, approved these leases, as required by the Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U. S. C. §§ 396a–396g (1938 Act). In exchange for a cash bonus, royalties, and rents, the typical lease grants the lessee "the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under" the leased land for as long as the minerals are produced in paying quantities. App. 22. Petitioners may use oil and gas in developing the lease without incurring the royalty. *Id.*, at 24. In addition, the Tribe reserves the rights to use gas without charge for any of its buildings on the leased land, and to take its royalties in kind. *Id.*, at 27–28. Petitioners' activities on the leased land have been subject to taxes imposed by the State of New Mexico on oil and gas severance and on oil and gas production equipment. *Id.*, at 129. See Act of Mar. 3, 1927, ch. 299, § 3, 44 Stat. 1347, 25 U. S. C. § 398c (permitting state taxation of mineral production on Indian reservations) (1927 Act).

Pursuant to its Revised Constitution, the Tribal Council adopted an ordinance imposing a severance tax on oil and gas

production on tribal land. See App. 38. The ordinance was approved by the Secretary, through the Acting Director of the Bureau of Indian Affairs, on December 23, 1976. The tax applies to "any oil and natural gas severed, saved and removed from Tribal lands . . . ." *Ibid.* The tax is assessed at the wellhead at $0.05 per million BTU of gas produced and $0.29 per barrel of crude oil or condensate produced on the reservation, and it is due at the time of severance. *Id.*, at 38–39. Oil and gas consumed by the lessees to develop their leases or received by the Tribe as in-kind royalty payments are exempted from the tax. *Ibid.;* Brief for Respondent Jicarilla Apache Tribe 59, n. 42.

In two separate actions, petitioners sought to enjoin enforcement of the tax by either the tribal authorities or the Secretary. The United States District Court for the District of New Mexico consolidated the cases, granted other lessees leave to intervene, and permanently enjoined enforcement of the tax. The District Court ruled that the Tribe lacked the authority to impose the tax, that only state and local authorities had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause.

The United States Court of Appeals for the Tenth Circuit, sitting en banc, reversed. 617 F. 2d 537 (1980).[4] The Court of Appeals reasoned that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or Act of Congress, including the 1927 Act, 25 U. S. C. § 398c. The court also found no Commerce Clause violation. We granted certioriari, 449 U. S. 820 (1980), and we now affirm the decision of the Court of Appeals.

II

Petitioners argue, and the dissent agrees, that an Indian tribe's authority to tax non-Indians who do business on the

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[4] Two judges dissented. Both argued that tribal sovereignty does not encompass the power to tax non-Indian lessees, 617 F. 2d, at 551–556 (Seth, C. J., dissenting); *id.*, at 556–565 (Barrett, J., dissenting) (also arguing the tax violates the Commerce Clause).

reservation stems exclusively from its power to exclude such persons from tribal lands. Because the Tribe did not initially condition the leases upon the payment of a severance tax, petitioners assert that the Tribe is without authority to impose such a tax at a later time. We disagree with the premise that the power to tax derives only from the power to exclude. Even if that premise is accepted, however, we disagree with the conclusion that the Tribe lacks the power to impose the severance tax.

A

In *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980) (*Colville*), we addressed the Indian tribes' authority to impose taxes on non-Indians doing business on the reservation. We held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.*, at 152. The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See, *e. g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1, 199 (1824).

The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 437 (1980); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940). They benefit from the provision of police protection and other governmental services, as well as from "'the ad-

vantages of a civilized society'" that are assured by the existence of tribal government. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 228 (1980) (quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.[5] Cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 624–629 (1981); *id.*, at 647 (BLACKMUN, J., dissenting); *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 426–437.

As we observed in *Colville*, *supra*, the tribe's interest in levying taxes on nonmembers to raise "revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 447 U. S., at 156–157. This surely is the case here. The mere fact that the government imposing the tax also enjoys rents and royalties as the lessor of the mineral lands does not undermine the government's authority to impose the tax. See *infra*, at 145–148. The royalty payments from the mineral leases are paid to the Tribe in its role as partner in petitioners' commercial venture. The severance tax, in contrast, is petitioners' contribution "to the general cost of providing governmental services." *Commonwealth Edison Co.* v. *Montana*, *supra*, at 623. State governments commonly receive both royalty payments and severance taxes from lessees of mineral lands within their borders.

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[5] Through various Acts governing Indian tribes, Congress has expressed the purpose of "fostering tribal self-government." *Colville*, 447 U. S., at 155. We agree with Judge McKay's observation that "[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal

Viewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government. Cf. *Colville, supra*, at 153. In *Colville*, the Court relied in part on a 1934 opinion of the Solicitor for the Department of the Interior. In this opinion, the Solicitor recognized that, in the absence of congressional action to the contrary, the tribes' sovereign power to tax "'may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.'" 447 U. S., at 153 (quoting *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934)). *Colville* further noted that official executive pronouncements have repeatedly recognized that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest . . . ,'including jurisdiction to tax." 447 U. S., at 152–153 (citing 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855)).[6]

Similarly, Congress has acknowledged that the tribal power to tax is one of the tools necessary to self-government and territorial control. As early as 1879, the Senate Judi-

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taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes." 617 F. 2d, at 550 (McKay, J., concurring).

[6] Moreover, in its revision of the classic treatise on Indian Law, the Department of the Interior advances the view that the Indian tribes' power to tax is not limited by the power to exclude. See U. S. Solicitor for Dept. of Interior, Federal Indian Law 438 (1958) ("The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction") (footnote omitted). See also F. Cohen, Handbook of Federal Indian Law 142 (1942) ("One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed") (footnote omitted).

ciary Committee acknowledged the validity of a tax imposed by the Chickasaw Nation on non-Indians legitimately within its territory:

> "We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; and *they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects*—a right not in any sense derived from the Government of the United States." S. Rep. No. 698, 45th Cong., 3d Sess., 1–2 (1879) (emphasis added).

Thus, the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits no other conclusion. As we observed in *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975), "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" They "are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Ibid.* See, *e. g.*, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89, 92, 99 (CA8 1956); *Crabtree* v. *Madden*, 54 F. 426, 428–429 (CA8 1893); Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States,' in The Legal Conscience 230, 234 (L. Cohen ed.

1960). Adhering to this understanding, we conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management.

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

We are not persuaded by the dissent's attempt to limit an Indian tribe's authority to tax non-Indians by asserting that its only source is the tribe's power to exclude such persons from tribal lands. Limiting the tribes' authority to tax in this manner contradicts the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that the sovereign taxing power is a tool for raising revenue necessary to cover the costs of government.

Nor are we persuaded by the dissent that three early decisions upholding tribal power to tax nonmembers support this limitation. *Post*, at 175–183, discussing *Morris* v. *Hitchcock*, 194 U. S. 384 (1904); *Buster* v. *Wright*, 135 F. 947 (CA8 1905), appeal dism'd, 203 U. S. 599 (1906); *Maxey* v. *Wright*, 3 Ind. T. 243, 247–250, 54 S. W. 807, 809 (Ct. App. Ind. T.), aff'd, 105 F. 1003 (CA8 1900). In discussing these cases, the dissent correctly notes that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax. None of these cases, however, establishes that the authority to tax derives *solely* from the power to exclude. Instead, these cases demonstrate that a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the

privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Morris v. *Hitchcock*, for example, suggests that the taxing power is a legitimate instrument for raising revenue, and that a tribe may exercise this power over non-Indians who receive privileges from the tribe, such as the right to trade on Indian land. In *Morris*, the Court approved a tax on cattle grazing and relied in part on a Report to the Senate by the Committee on the Judiciary, which found no legal defect in previous tribal tax legislation having "a twofold object—to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and *to raise revenue*." 194 U. S., at 389 (emphasis added). In *Maxey* v. *Wright*, the question of Indian sovereignty was not even raised: the decision turned on the construction of a treaty denying the Tribe any governing or jurisdictional authority over nonmembers. 3 Ind. T., at 247–248, 54 S. W., at 809.[7]

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[7] The governing treaty in *Maxey* v. *Wright* restricted the tribal right of self-government and jurisdiction to members of the Creek or Seminole Tribes. The court relied, at least in part, on opinions of the Attorney General interpreting this treaty. For example, one such opinion stated that, whatever the meaning of the clause limiting to tribal members the Tribes' unrestricted rights of self-government and jurisdiction, it did

"'not limit the right of these tribes to pass upon the question, who . . . shall

Finally, the decision in *Buster* v. *Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster* v. *Wright*. In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorporated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners*." 135 F., at 952 (empha-

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share their occupancy, and upon what terms. That is a question which all private persons are allowed to decide for themselves; and even wild animals, not men, have a certain respect paid to the instinct which in this respect they share with man. The serious words "jurisdiction" and "self-government" are scarcely appropriate to the right of a hotel keeper to prescribe rules and charges for persons who become his fellow occupants.'" 3 Ind. T., at 250, 54 S. W., at 809 (quoting 18 Op. Atty. Gen. 4, 36, 37 (1884)).

The court, as well as the opinion of the Attorney General, found that the Tribes' "natural instinct" to set terms on occupancy was unaltered by the treaty. Neither the court nor the Attorney General adressed the scope of Indian sovereignty when unlimited by treaty; instead, they identified a tribe's right, as a social group, to exclude intruders and place conditions on their occupancy. The court's dependence on this reasoning hardly bears on the more general question posed here: what is the source of the Indian tribes' sovereign power to tax absent a restriction by treaty or other federal law?

sis added).[8] This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

We choose not to embrace a new restriction on the extent of the tribal authority to tax, which is based on a questionable interpretation of three early cases. Instead, based on the views of each of the federal branches, general principles of taxation, and the conception of Indian tribes as domestic, dependent nations, we conclude that the Tribe has the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and to pay for the costs of self-government.

B

Alternatively, if we accept the argument, advanced by petitioners and the dissent, that the Tribe's authority to tax derives solely from its power to exclude non-Indians from the reservation, we conclude that the Tribe has the authority to impose the severance tax challenged here. Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to

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[8] Both the classic treatise on Indian law and its subsequent revision by the Department of the Interior, see n. 6, *supra*, agree with this reading of *Buster* v. *Wright*. Federal Indian Law, *supra* n. 6, at 438; Cohen, *supra* n. 6, at 142 (both citing *Buster* v. *Wright*, *supra*, for the proposition that the power to tax is an inherent sovereign power not dependent on the power to exclude).

place other conditions on the non-Indian's conduct or continued presence on the reservation.[9] A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.[10]

Petitioners argue that their leaseholds entitle them to enter the reservation and exempt them from further exercises of the Tribe's sovereign authority. Similarly, the dissent asserts that the Tribe has lost the power to tax petitioners' mining activities because it has leased to them the use of the mineral lands and such rights of access to the reservation as might be necessary to enjoy the leases. *Post*, at 186–190.[11] However, this conclusion is not compelled by linking the taxing power to the power to exclude. Instead, it is based on additional assumptions and confusions about the consequences of the commercial arrangement between petitioners and the Tribe.

Most important, petitioners and the dissent confuse the Tribe's role as commercial partner with its role as sover-

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[9] See also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (CA8 1958) (lessees of tribal lands subject to Indian tax on use of land).

[10] Here, the leases extend for as long as minerals are produced in paying quantities, in other words, until the resources are depleted. Thus, under the dissent's approach, the Tribe would never have the power to tax petitioners regardless of the financial burden to the Tribe of providing and maintaining governmental services for the benefit of the petitioners.

[11] But see *Buster* v. *Wright*, 135 F., at 958:

"The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns . . . ."

eign.[12] This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements. It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.

Confusing these two results denigrates Indian sovereignty. Indeed, the dissent apparently views the tribal power to exclude, as well as the derivative authority to tax, as merely the power possessed by any individual landowner or any social group to attach conditions, including a "tax" or fee, to the entry by a stranger onto private land or into the social group, and not as a sovereign power. The dissent does pay lipservice to the established views that Indian tribes retain those fundamental attributes of sovereignty, including the power to tax transactions that occur on tribal lands, which have not been divested by Congress or by necessary implication of the tribe's dependent status, see *Colville*, 447 U. S., at 152, and that tribes "are a good deal more than 'private, voluntary organizations.'" *United States* v. *Mazurie*, 419 U. S., at 557. However, in arguing that the Tribe somehow "lost" its power to tax petitioners by not in-

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[12] In contrast, the 1958 treatise on Indian law written by the United States Solicitor for the Department of the Interior recognized and distinguished the scope of these two roles when it embraced as the "present state of the law" the following summary:

"'Over tribal lands, *the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.* But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.'" Federal Indian Law, *supra* n. 6, at 439 (quoting Solicitor's Opinion of Oct. 25, 1934) (emphasis added).

See Cohen, *supra* n. 6, at 143.

cluding a taxing provision in the original leases or otherwise notifying petitioners that the Tribe retained and might later exercise its sovereign right to tax them, the dissent attaches little significance to the sovereign nature of the tribal authority to tax, and it obviously views tribal authority as little more than a landowner's contractual right. This overly restrictive view of tribal sovereignty is further reflected in the dissent's refusal to apply established principles for determining whether other governmental bodies have waived a sovereign power through contract. See *post*, at 189, n. 50. See also *infra*, at 148.

Moreover, the dissent implies that the power to tax depends on the consent of the taxed as well as on the Tribe's power to exclude non-Indians. Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority. Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority. *E. g., United States* v. *Wheeler*, 435 U. S. 313, 322 (1978).[13] Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.

Viewed in this light, the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax. Contractual arrangements remain subject to subsequent legislation by the presiding sovereign. See, *e. g., Veix* v. *Sixth Ward Building & Loan Assn. of*

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[13] See also P. Maxfield, M. Dieterich, & F. Trelease, Natural Resources Law on American Indian Lands 4–6 (1977). Federal limitations on tribal sovereignty can also occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests. See *Colville*, 447 U. S., at 153. This concern is not presented here. See *ibid.*

Newark, 310 U. S. 32 (1940); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934). Even where the contract at issue requires payment of a royalty for a license or franchise issued by the governmental entity, the government's power to tax remains unless it "has been specifically surrendered in terms which admit of no other reasonable interpretation." *St. Louis* v. *United R. Co.*, 210 U. S. 266, 280 (1908).

To state that Indian sovereignty is different than that of Federal, State or local Governments, see *post*, at 189, n. 50, does not justify ignoring the principles announced by this Court for determining whether a sovereign has waived its taxing authority in cases involving city, state, and federal taxes imposed under similar circumstances. Each of these governments has different attributes of sovereignty, which also may derive from different sources. These differences, however, do not alter the principles for determining whether any of these governments has waived a sovereign power through contract, and we perceive no principled reason for holding that the different attributes of Indian sovereignty require different treatment in this regard. Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.

No claim is asserted in this litigation, nor could one be, that petitioners' leases contain the clear and unmistakable surrender of taxing power required for its extinction. We could find a waiver of the Tribe's taxing power only if we inferred it from silence in the leases. To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head, and we do not adopt this analysis.[14]

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[14] Petitioners and the dissent also argue that we should infer a waiver of the taxing power from silence in the Tribe's original Constitution. Although it is true that the Constitution in force when petitioners signed

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The Tribe has the inherent power to impose the severance tax on petitioners, whether this power derives from the Tribe's power of self-government or from its power to exclude. Because Congress may limit tribal sovereignty, we now review petitioners' argument that Congress, when it enacted two federal Acts governing Indians and various pieces of federal energy legislation, deprived the Tribe of its authority to impose the severance tax.

In *Colville*, we concluded that the "widely held understanding within the Federal Government has always been that *federal law to date has not worked a divestiture of Indian taxing power*." 447 U. S., at 152 (emphasis added). Moreover, we noted that "[n]o federal statute cited to us shows any congressional departure from this view." *Id.*, at 153. Likewise, petitioners can cite to no statute that specifically divests the Tribe of its power to impose the severance tax on their mining activities. Instead, petitioners argue that Congress *implicitly* took away this power when it enacted the Acts and various pieces of legislation on which petitioners rely. Before reviewing this argument, we reiterate here our admonition in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 60 (1978): "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

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their leases did not include a provision specifically authorizing a severance tax, neither the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes. *E. g., Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89, 94 (CA8 1956); *Buster* v. *Wright*, 135 F., at 950. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence on this point is that the sovereign power to tax remains intact. The Tribe's Constitution was amended to authorize the tax before the tax was imposed, and this is the critical event necessary to *effectuate* the tax. See *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d, at 554, 556; *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, *supra*, at 99.

Petitioners argue that Congress pre-empted the Tribe's power to impose a severance tax when it enacted the 1938 Act, 25 U. S. C. §§ 396a–396g. In essence, petitioners argue that the tax constitutes an additional burden on lessees that is inconsistent with the Act's regulatory scheme for leasing and developing oil and gas reserves on Indian land. This Act, and the regulations promulgated by the Department of the Interior for its enforcement, establish the procedures to be followed for leasing oil and gas interests on tribal lands. However, the proviso to 25 U. S. C. § 396b states that "the foregoing provisions *shall in no manner restrict the right of tribes* . . . to lease lands for mining purposes . . . *in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, [464–475, 476–478], and 479 of this title*" (emphasis added).[15] Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary.[16]

Petitioners also assert that the 1927 Act, 25 U. S. C. §§ 398a–398e, divested the Tribe's taxing power. We disagree. The 1927 Act permits state taxation of mineral les-

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[15] The Secretary has implemented the substance of this proviso by the following regulation:

"The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. 461–479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior." 25 CFR § 171.29 (1980).

[16] In arguing that the 1938 Act was intended to pre-empt the severance tax, petitioners attach great significance to the Secretary's approval of the leases. Curiously, they attach virtually no significance to the fact that the Secretary also approved the tax ordinance that they challenge here.

sees on Executive Order reservations, but it indicates no change in the taxing power of the affected tribes. See 25 U. S. C. § 398c. Without mentioning the tribal authority to tax, the Act authorizes state taxation of royalties from mineral production on all Indian lands. Petitioners argue that the Act transferred the Indian power to tax mineral production to the States in exchange for the royalties assured the tribes. This claim not only lacks any supporting evidence in the legislative history, it also deviates from settled principles of taxation: different sovereigns can enjoy powers to tax the same transactions. Thus, the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax. *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F. 2d 1253 (CA9 1976), cert. denied, 430 U. S. 983 (1977). Cf. *Colville*, 447 U. S., at 158 ("There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other").[17]

Finally, petitioners contend that tribal taxation of oil and gas conflicts with national energy policies, and therefore the tribal tax is pre-empted by federal law. Again, petitioners cite no specific federal statute restricting Indian sovereignty. Nor do they explain why state taxation of the same type of activity escapes the asserted conflict with federal policy. Cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981). Indeed, rather than forbidding tribal severance taxes, Congress has included taxes imposed by an Indian

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[17] The Tribe argues that the 1927 Act granting the States the power to tax mineral production on Indian land is inapplicable because the leases at issue here were signed pursuant to the 1938 Act. The 1938 Act, which makes uniform the laws applicable to leasing mineral rights on tribal lands, does not contain a grant of power to the States comparable to that found in the 1927 Act. As a result, the Tribe asserts that the State of New Mexico has no power to tax the production under petitioners' leases with the Tribe. Because the State of New Mexico is not a party to this suit, the Court of Appeals did not reach this issue. See 617 F. 2d, at 547–548, n. 5. For this reason, and because we conclude that the 1927 Act did not affect the Tribe's authority to tax, we likewise do not reach this issue.

tribe in its definition of costs that may be recovered under federal energy pricing regulations. Natural Gas Policy Act of 1978, Pub. L. 95–621, §§ 110(a), (c) (1), 92 Stat. 3368, 15 U. S. C. §§ 3320(a), (c) (1) (1976 ed., Supp. IV). Although this inclusion may not reflect Congress' view with respect to the source of a tribe's power to impose a severance tax,[18] it surely indicates that imposing such a tax would not contravene federal energy policy and that the tribal authority to do so is not implicitly divested by that Act.

We find no "clear indications" that Congress has implicitly deprived the Tribe of its power to impose the severance tax. In any event, if there were ambiguity on this point, the doubt would benefit the Tribe, for "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143–144 (1980). Accordingly, we find that the Federal Government has not divested the Tribe of its inherent authority to tax mining activities on its land, whether this authority derives from the Tribe's power of self-government or from its power to exclude.

III

Finding no defect in the Tribe's exercise of its taxing power, we now address petitioners' contention that the severance tax violates the "negative implications" of the Commerce Clause because it taxes an activity that is an integral

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[18] The statute provides that Indian severance taxes may be recovered through federal energy pricing. However, the legislative history indicates that Congress took no position on the source of the Indian tribes' power to impose the tax in the first place:

"While severance taxes which may be imposed by an Indian tribe are to be treated in the same manner as State imposed severance taxes, the conferees do not intend to prejudge the outcome of the cases on appeal before the Tenth Circuit Court of Appeals respecting the right of Indian tribes to

part of the flow of commerce, discriminates against interstate commerce, and imposes a multiple burden on interstate commerce. At the outset, we note that reviewing tribal action under the Interstate Commerce Clause is not without conceptual difficulties. *E. g.*, nn. 21 and 24, *infra*. Apparently recognizing these difficulties, the Solicitor General, on behalf of the Secretary, argues that the language,[19] the structure, and the purposes of the Commerce Clause support the conclusion that the Commerce Clause does not, of its own force, limit Indian tribes in their dealings with non-Indians. Brief for Secretary of Interior 35–40. The Solicitor General reasons that the Framers did not intend "the courts, through the Commerce Clause, to impose their own views of the proper relationship between Indians and non-Indians and to strike down measures adopted by a tribe with which the political departments of government had not seen fit to disagree." *Id.*, at 39. Instead, where tribal legislation is inimical to the national welfare, the Solicitor asserts that the Framers contemplated that the remedies would be the negotiation or renegotiation of treaties, the enactment of legislation governing trade and other relations, or the exertion of superior force by the United States Government. *Id.*, at 38–39. Using similar reasoning, the Solicitor suggests that if the Commerce Clause does impose restrictions on tribal activity, those restrictions must arise from the Indian Commerce Clause, and not its interstate counterpart. *Id.*, at 40–43.

To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state

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impose taxes on persons or organizations other than Indians who are engaged in business activities on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes." S. Conf. Rep. No. 95–1126, p. 91 (1978); H. R. Conf. Rep. No. 95–1752, p. 91 (1978).

[19] The Commerce Clause empowers Congress "[t]o regulate Commerce *with* foreign Nations, and *among* the several States, and *with* the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3 (emphasis added).

and local interference, and has not relied on the Clause to authorize tribal regulation of commerce without any constitutional restraints. We see no need to break new ground in this area today: even if we assume that tribal action is subject to the limitations of the Interstate Commerce Clause, this tax does not violate the "negative implications" of that Clause.

A

A state tax may violate the "negative implications" of the Interstate Commerce Clause by unduly burdening or discriminating against interstate commerce. See, *e. g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). Judicial review of state taxes under the Interstate Commerce Clause is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States.

However, we only engage in this review when Congress has not acted or purported to act. See, *e. g.*, *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 421–427 (1946). Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action. See *Prudential Insurance Co.* v. *Benjamin*, *supra*, at 431.[20] Courts are

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[20] In *Prudential Insurance Co.* v. *Benjamin*, this Court refused to invalidate a South Carolina tax on out-of-state insurance companies despite appellant's contention that the tax impermissibly burdened interstate commerce. The Court refused to entertain appellant's argument because Congress, in passing the McCarran-Ferguson Act, had provided that "si-

final arbiters under the Commerce Clause only when Congress has not acted. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S., at 454.

Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect.[21] Under the Indian Reorganization Act, 25 U. S. C. §§476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary. See Revised Constitution of the Jicarilla Tribe, Art. XI, §§1(e), 2. Cf. 25 U. S. C. §§476, 477; 25 CFR §171.29 (1980) (implementing the proviso to 25 U. S. C. §396b, quoted in n. 15, *supra*).

As we noted earlier, the severance tax challenged by petitioners was enacted in accordance with this congressional scheme. Both the Tribe's Revised Constitution and the challenged tax ordinance received the requisite approval from the Secretary. This course of events fulfilled the administrative process established by Congress to monitor such exercises of tribal authority. As a result, this tribal tax comes to us in a

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lence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States." 59 Stat. 33, 15 U. S. C. §1011.

[21] Although Congress has not expressly announced that Indian taxes do not threaten its latent power to regulate interstate commerce, it is unclear how Congress could articulate that intention any more convincingly than it has done here. In contrast to when Congress acts with respect to the States, when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes, not pursuant to its authority under the Interstate Commerce Clause. This is but one of the difficulties inherent in reviewing under the Interstate Commerce Clause both tribal action and congressional action regulating the tribes. Therefore, in determining whether Congress has "acted" to preclude judicial review, we do not find it significant that the congressional action here was not taken pursuant to the Interstate Commerce Clause.

posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

Finally, Congress is well aware that Indian tribes impose mineral severance taxes such as the one challenged by petitioners. See Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3320(a), (c)(1) (1976 ed., Supp. IV). Congress, of course, retains plenary power to limit tribal taxing authority or to alter the current scheme under which the tribes may impose taxes. However, it is not our function nor our prerogative to strike down a tax that has traveled through the precise channels established by Congress, and has obtained the specific approval of the Secretary.

B

The tax challenged here would survive judicial scrutiny under the Interstate Commerce Clause, even if such scrutiny were necessary. In *Complete Auto Transit, Inc.* v. *Brady*, *supra*, at 279, we held that a state tax on activities connected to interstate commerce is sustainable if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Petitioners do not question that the tax on the severance of minerals from the mines[22] meets the first and the

[22] Petitioners initially contend that the ordinance taxes the transportation of the minerals from the reservation, not their severance from the mines. As a result, they argue that the ordinance impermissibly burdens interstate commerce by taxing the movement in commerce itself, which is not a local event. The tax, by its terms, applies to resources that are "produced on the Jicarilla Apache Tribe Reservation and sold or transported off the Reservation." App. 39. The Tribe explains that this language was used

second tests: the mining activities taxed pursuant to the ordinance occur entirely on reservation land. Furthermore, petitioners do not challenge the tax on the ground that the amount of the tax is not fairly related to the services provided by the Tribe. See Supplemental Brief for Petitioners in No. 80-15, pp. 11, 17-20.[23]

Instead, petitioners focus their attack on the third factor, and argue that the tax discriminates against interstate commerce. In essence, petitioners argue that the language "sold or transported off the reservation" exempts from taxation minerals sold on the reservation, kept on the reservation for use by individual members of the Tribe, and minerals taken by the Tribe on the reservation as in-kind royalty. Although petitioners admit that no sales have occurred on the reservation to date, they argue that the Tribe might induce private industry to locate on the reservation to take advantage of this allegedly discriminatory taxing policy. We do not accept petitioners' arguments; instead, we agree with the Tribe, the Solicitor General, and the Court of Appeals that the tax is imposed on minerals sold on the reservation or transported off the reservation before sale. See 617 F. 2d, at 546. Cf. n. 22, *supra*.[24] Under this interpretation, the tax does not

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because no sale occurs prior to the transportation off the reservation. The Tribe's tax is due at the time of severance. *Id.*, at 38. Therefore, we agree with the Court of Appeals that the taxable event defined by the ordinance is the removal of minerals from the soil, not their transportation from the reservation. See 617 F. 2d, at 546.

[23] The Court of Appeals noted that, because the lessees chose not to build a factual foundation to challenge the tax on this ground, there was no basis on which to find that the tax was not fairly related to the services provided by the Tribe. See *id.*, at 545, n. 4. Indeed, when the Tribe attempted to introduce at trial evidence of the services it had provided to establish this relationship, the District Court rejected this evidence upon petitioners' objection that such evidence was irrelevant to their challenge. Brief for Respondent Jicarilla Apache Tribe 7-8; 6 Record 278-290, 294, 300-308.

[24] The ordinance does not distinguish between minerals remaining within New Mexico and those transported beyond the state boundary. As a result, petitioners' argument that the tax discriminates against interstate

treat minerals transported away from the reservation differently than it treats minerals that might be sold on the reservation. Nor does the Tribe's tax ordinance exempt minerals ultimately received by individual members of the Tribe. The ordinance does exempt minerals received by the Tribe as in-kind payments on the leases and used for tribal purposes,[25] but this exemption merely avoids the administrative makework that would ensue if the Tribe, as local government, taxed the amount of minerals that the Tribe, as commercial partner, received in royalty payments. Therefore, this exemption cannot be deemed a discriminatory preference for local commerce.[26]

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commerce by favoring local sales focuses on the boundary between the reservation and the State of New Mexico and not on any interstate boundaries. We will assume for purposes of this argument only that this alleged reservation-state discrimination could give rise to a Commerce Clause violation.

[25] Paragraph 4 of the ordinance specifies that "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation." App. 39.

[26] Petitioners contend that because New Mexico may tax the same mining activity at full value, the Indian tax imposes a multiple tax burden on interstate commerce in violation of the Commerce Clause. The multiple taxation issue arises where two or more taxing jurisdictions point to some contact with an enterprise to support a tax on the entire value of its multistate activities, which is more than the contact would justify. *E. g.*, *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 384–385 (1952). This Court has required an apportionment of the tax based on the portion of the activity properly viewed as occurring within each relevant State. See, *e. g.*, *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 219 (1980); *Washington Revenue Dept.* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734, 746, and n. 16 (1978).

This rule has no bearing here, however, for there can be no claim that the Tribe seeks to tax any more of petitioners' mining activity than the portion occurring within tribal jurisdiction. Indeed, petitioners do not even argue that the Tribe is seeking to seize more tax revenues than would be fairly related to the services provided by the Tribe. See *supra*, at 157, and n. 23. In the absence of such an assertion, and when the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activ-

IV

In *Worcester* v. *Georgia*, 6 Pet., at 559, Chief Justice Marshall observed that Indian tribes had "always been considered as distinct, independent political communities, retaining their original natural rights." Although the tribes are subject to the authority of the Federal Government, the "weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection." *Id.*, at 561. Adhering to this understanding, we conclude that the Tribe did not surrender its authority to tax the mining activities of petitioners, whether this authority is deemed to arise from the Tribe's inherent power of self-government or from its inherent power to exclude nonmembers. Therefore, the Tribe may enforce its severance tax unless and until Congress divests this power, an action that Congress has not taken to date. Finally, the severance tax imposed by the Tribe cannot be invalidated on the ground that it violates the "negative implications" of the Commerce Clause.

Affirmed.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Indian tribes that occupied North America before Europeans settled the continent were unquestionably sovereigns. They ruled themselves and they exercised dominion over the lands that nourished them. Many of those tribes, and some attributes of their sovereignty, survive today. This Court, since its earliest days, has had the task of identi-

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ity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause. These cases, of course, do not involve a challenge to state taxation, and we intimate no opinion on the possibility of such a challenge.

fying those inherent sovereign powers that survived the creation of a new Nation and the introduction of an entirely new system of laws applicable to both Indians and non-Indians.

In performing that task, this Court has guarded carefully the unique status of Indian tribes within this Nation. Over its own members, an Indian tribe's sovereign powers are virtually unlimited; the incorporation of the tribe into the United States has done little to change internal tribal relations. In becoming part of the United States, however, the tribes yielded their status as independent nations; Indians and non-Indians alike answered to the authority of a new Nation, organized under a new Constitution based on democratic principles of representative government. In that new system of government, Indian tribes were afforded no general powers over citizens of the United States. Many tribes, however, were granted a power unknown to any other sovereignty in this Nation: a power to exclude nonmembers entirely from territory reserved for the tribe. Incident to this basic power to exclude, the tribes exercise limited powers of governance over nonmembers, though those nonmembers have no voice in tribal government. Since a tribe may exclude nonmembers entirely from tribal territory, the tribe necessarily may impose conditions on a right of entry granted to a nonmember to do business on the reservation.

The question presented in these cases is whether, after a tribe has granted nonmembers access to its reservation on specified terms and conditions to engage in an economic venture of mutual benefit, the tribe may impose a tax on the nonmembers' share of benefits derived from the venture. The Court today holds that it may do so. In my opinion this holding distorts the very concept of tribal sovereignty. Because I am convinced that the Court's treatment of these important cases gives inadequate attention to the critical difference between a tribe's powers over its own members and its powers over nonmembers, I set forth my views at greater length than is normally appropriate in a dissenting opinion.

I

The 2,100 members of the Jicarilla Apache Tribe live on a reservation in northern New Mexico.[1] The area encompassed by the reservation became a part of the United States in 1848 when the Mexican War ended in the Treaty of Guadalupe Hidalgo. See 9 Stat. 922. Between 1848 and 1871, the United States did not enter into any treaty with the Jicarillas or enact any special legislation relating to them; in 1871 Congress outlawed any future treaties with Indian tribes.[2] In 1887, President Cleveland issued an Executive Order setting aside a tract of public lands in the Territory of New Mexico "as a reservation for the use and occupation of the Jicarilla Apache Indians." Except for a provision protecting bona fide settlers from deprivation of previously acquired rights, the Executive Order contained no special rules applicable to the reservation.[3] The mineral leases at issue in this case

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[1] See Plaintiff's Exhibit E, p. 4.

[2] "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." 16 Stat. 566, current version at 25 U. S. C. § 71.

[3] The entire Executive Order reads as follows:

"EXECUTIVE MANSION, FEBRUARY 11, 1887.

"It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz:

"27, 28, 29, and 30 north, ranges 1 east, and 1, 2, and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided*, That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain.

"Grover Cleveland."

1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904).

were granted by the Jicarilla Apache Tribe on these reservation lands.

The record does not indicate whether any leasing activity occurred on the Jicarilla Reservation between 1887 and 1953. During that period, however, the authority of Indian tribes to enter into mineral leases was clarified. In 1891 Congress passed a statute permitting the mineral leasing of Indian lands. Act of Feb. 28, 1891, § 3, 26 Stat. 795, 25 U. S. C. § 397. Because the statute applied only to lands "occupied by Indians who have bought and paid for the same," the statute was interpreted to be inapplicable to reservations created by Executive Order. See *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159, 161–162, 164. In 1922, the Secretary of the Interior took the position that Indian reservations created by Executive Order were public lands and that Indians residing on those reservations had no right to share in royalties derived from oil and gas leases. 49 I. D. 139.[4]

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[4] The Secretary contended that the land on Executive Order reservations was subject to leasing, as "lands of the United States," under the Mineral Lands Leasing Act of February 25, 1920, 41 Stat. 437, 30 U. S. C. § 181 *et seq.* In 1924, Attorney General Stone rendered an opinion stating that the Mineral Lands Leasing Act did not apply to Executive Order reservations. 34 Op. Atty. Gen. 181. In 1925, Stone instituted litigation in the District Court of Utah to cancel certain leases that had been authorized by the Secretary of the Interior pursuant to the Mineral Lands Leasing Act. See H. R. Rep. No. 1791, 69th Cong., 2d Sess., 5 (1927). The case was dismissed by stipulation after the enactment of the 1927 Act noted in the text. See *United States* v. *McMahon*, 273 U. S. 782.

A later decision by this Court suggests that the Secretary's position was correct. In *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, the Court held that an Indian tribe was not entitled to compensation from the United States when an Executive Order reservation was abolished. The Court said:

"Perhaps the most striking proof of the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an executive order reservation is the very absence of compensatory payments in such situations. It was a common practice, during the

In 1927, Congress enacted a statute expressly providing that unallotted lands on any Indian reservation created by Executive Order could be leased for oil and gas mining purposes with the approval of the Secretary of the Interior.[5] The statute directed that all rentals, royalties, or bonuses for such leases should be paid to the Treasurer of the United States for the benefit of the tribe for which the reservation was created.[6] The statute further provided that state taxes

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period in which reservations were created by executive order, for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it. That is to say, the procedure followed in the case before us was typical. No compensation was made, and neither the Government nor the Indians suggested that it was due.

. . . . .

"We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of 1875 and 1876, and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding. The orders were effective to withdraw from sale the lands affected and to grant the use of the lands to the petitioner. But the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States. The executive orders of 1879 and 1884 were simply an exercise of this power of termination, and the payment of compensation was not required." *Id.*, at 330–331.

See also *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 279–282.

[5] Act of Mar. 3, 1927, 44 Stat. (part 2) 1347, current version at 25 U. S. C. § 398a. Section 1 of the Act provided:

"[U]nallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 [25 U. S. C. § 398]."

See also 25 U. S. C. § 398. Unallotted land is land that had not been allotted in severalty to individual Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388.

[6] Section 2 of the Act provided:

"[T]he proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the

could be levied upon the output of such oil and gas leases,[7] but made no mention of the possibility that the Indian tribes, in addition to receiving royalties, could impose taxes on the output.[8]

In 1934, Congress enacted the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, which authorized any Indian tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior. The Act provided that, "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law," the constitution should vest certain specific powers, such as the power to employ legal counsel, in the tribe.[9] The Act

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tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress." 44 Stat. (part 2) 1347, current version at 25 U. S. C. § 398b.

[7] Section 3 of the Act provided:

"[T]axes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians." 44 Stat. (part 2) 1347, current version at 25 U. S. C. § 398c.

[8] In 1938, Congress passed the Act of May 11, 1938, 52 Stat. 347, 25 U. S. C. §§ 396a–396g, which was designed in part to achieve uniformity for all mineral leases of Indian lands. Like the 1927 Act, the statute provided that the tribes were entitled to the royalties from such leases. The statute made no mention of taxes. See n. 45, *infra*.

[9] The statute provided, in part:

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate

also authorized the Secretary of the Interior to issue a charter of incorporation to an Indian tribe, and provided that the charter could convey to the tribe the power to purchase, manage, and dispose of its property.[10] The 1934 Act was silent concerning the right of an Indian tribe to levy taxes.[11] The first Jicarilla Apache Constitution was approved by the Secretary of the Interior in 1937.[12]

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constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. . . .

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments." 25 U. S. C. § 476.

[10] The statute provided:

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress." 25 U. S. C. § 477.

[11] See F. Cohen, Handbook of Federal Indian Law 267 (1942) (hereinafter Cohen).

[12] The 1937 Constitution made no reference to any power to assess taxes against nonmembers. See 1937 Constitution and By-Laws of the Jicarilla Apache Tribe, Defendants' Exhibit G.

In 1953, the Tribe executed an oil and gas lease with the Phillips Petroleum Co. App. 22–30. The lease, prepared on a form provided by the Bureau of Indian Affairs of the Department of the Interior, presumably is typical of later leases executed between other companies and the Tribe.[13] The lease provides that in return for certain rents, royalties, and a cash bonus of $71,345.99, all to be paid to the treasurer of the Tribe, the Tribe as lessor granted to the lessee "the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under" the described tracts of land, together with the right to construct and maintain buildings, plants, tanks, and other necessary structures on the surface. *Id.*, at 22–23. The lease is for a term of 10 years following approval by the Secretary of the Interior "and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." *Ibid.* The lessee is obligated to use reasonable diligence in the development of the property, and to pay an annual rental of $1.25 per acre and a royalty of 12½% "of the value or amount" of all oil and gas "produced and saved" from the leased land. *Id.*, at 24, 26. Oil and gas used by the lessee for development and operation of the lease is royalty-free. *Id.*, at 24. The Tribe reserved the rights to use free of charge sufficient gas for any school or other building owned by the Tribe on the leased premises, and to take its royalty in kind. *Id.*, at 27–28.

The lease contains no reference to the payment of taxes. The lessee does, however, agree to comply with all regulations of the Secretary of the Interior

> "now or hereafter in force relative to such leases: *Provided*, That no regulation hereafter approved shall effect

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[13] This lease is attached to petitioners' complaint in No. 80–11. The lease attached to the complaint in No. 80–15 was also executed in 1953. See App. 62. The record does not disclose the date on which most of the leases with petitioners were executed, but the record does indicate that leases were executed as late as 1967. See Plaintiffs' Exhibit 1. Leases of Jicarilla tribal property cover in the aggregate over 500,000 acres of

a change in rate or royalty or annual rental herein specified without the written consent of the parties to this lease." *Id.*, at 27.

The lease was approved by the Commissioner of Indian Affairs on behalf of the Secretary of the Interior. *Id.*, at 32. Both of the 1953 leases described in the record are still producing.

In 1968, the Tribe adopted a Revised Constitution giving its Tribal Council authority, subject to approval by the Secretary of the Interior, "to impose taxes and fees on non-members of the tribe doing business on the reservation."[14] Eight years later, the Tribal Council enacted an Oil and Gas Severance Tax Ordinance, which was approved by the Secretary of the Interior. The Tribal Ordinance provides that a severance tax "is imposed on any oil and natural gas severed, saved and removed from Tribal lands . . . ." *Id.*, at 38. The rate of the tax is $.05 per million BTU of gas produced on the reservation and sold or transported off the reservation and $0.29 per barrel of crude or condensate produced on the reservation and sold or transported off the reservation. *Id.*, at 39. Royalty gas or oil taken by the Tribe, as well as gas or oil used by the Tribe, is exempt from the tax. *Ibid.* Thus the entire burden of the tax apparently will fall on nonmembers of the Tribe. The tax, if sustained, will produce over $2 million in revenues annually.[15]

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land, comprising almost 69% of the acreage within the Jicarilla Reservation. Brief for Respondent Jicarilla Apache Tribe 2.

[14] App. to Brief for Petitioners in No. 80-15, pp. 12a-13a. An earlier Constitution adopted in 1960 contained a similar provision permitting "taxes and fees on persons doing business on the reservation." See 1960 Constitution of the Jicarilla Apache Tribe, Art. VI, § 5, Defendant's Exhibit A.

[15] See District Court's Findings of Fact and Conclusions of Law, Finding No. 32, App. 130. The Tribe's answers to interrogatories indicate that in 1976 the royalties on the leases received by the Tribe amounted to $3,995,469.69. See Plaintiff's Exhibit E, p. 7; Tr. 269.

II

The powers possessed by Indian tribes stem from three sources: federal statutes, treaties, and the tribe's inherent sovereignty. Neither the Tribe nor the Federal Government seeks to justify the Jicarilla Tribe's severance tax on the basis of any federal statute,[16] and the Jicarilla Apaches, who reside on an Executive Order reservation, executed no treaty with the United States from which they derive sovereign powers. Therefore, if the severance tax is valid, it must be as an exercise of the Tribe's inherent sovereignty.

Tribal sovereignty is neither derived from nor protected by the Constitution.[17] Indian tribes have, however, retained many of the powers of self-government that they possessed at the time of their incorporation into the United States. As stated by Justice M'Lean in *Worcester* v. *Georgia*, 6 Pet. 515, 580 (concurring opinion):

> "At no time has the sovereignty of the country been recognised as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognised as vested in them."

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[16] Congress may delegate "sovereign" powers to the tribes. See *United States* v. *Mazurie*, 419 U. S. 544. As indicated, however, neither the 1927 statute permitting Indians to receive royalties from the lease of tribal lands nor the Indian Reorganization Act of 1934 conveys authority to the Indian tribes to tax. See *supra*, at 163–165.

[17] The only reference to Indian tribes in the Constitution is in Art. I, § 8, cl. 3, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." More significant than this reference to Indian tribes is the absence of any mention of the tribes in the Tenth Amendment, which provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Similarly, the Court in *United States* v. *Kagama*, 118 U. S. 375, 381–382, stated:

> "[The Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

Two distinct principles emerge from these early statements of tribal sovereignty: that Indian tribes possess broad powers of self-governance over tribal members, but that tribes do not possess the same attributes of sovereignty that the Federal Government and the several States enjoy.[18] In determining the extent of the sovereign powers that the tribes retained in submitting to the authority of the United States,

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[18] The Indian tribes often have been described as "domestic dependent nations." The term was first used in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, where Chief Justice Marshall, writing for the Court, explained:

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet, it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.*, at 17.

The United States retains plenary authority to divest the tribes of any attributes of sovereignty. See *United States* v. *Wheeler*, 435 U. S. 313, 319; *Winton* v. *Amos*, 255 U. S. 373, 391–392; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; 1 American Indian Policy Review Commission, Final Report 106–107 (1977) (hereinafter AIPRC Final Report). Thus, for example, Congress can waive the tribes' sovereign immunity. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512.

this Court has recognized a fundamental distinction between the right of the tribes to govern their own internal affairs and the right to exercise powers affecting nonmembers of the tribe.

The Court has been careful to protect the tribes from interference with tribal control over their own members. The Court has recognized that tribes have the power to prosecute members for violations of tribal criminal law, and that this power is an inherent attribute of tribal sovereignty. *United States* v. *Wheeler*, 435 U. S. 313. The tribes also retain the power to create substantive law governing internal tribal affairs. Tribes may define rules of membership, and thus determine who is entitled to the benefits of tribal citizenship, *Roff* v. *Burney*, 168 U. S. 218; establish rules of inheritance, which supersede applicable state law, *Jones* v. *Meehan*, 175 U. S. 1, 29; and determine rights to custody of a child of divorced parents of the tribe, and thus pre-empt adoption proceedings brought in state court. *Fisher* v. *District Court*, 424 U. S. 382. This substantive tribal law may be enforced in tribal courts. *Williams* v. *Lee*, 358 U. S. 217; *Fisher* v. *District Court*, *supra*.

In many respects, the Indian tribes' sovereignty over their own members is significantly greater than the States' powers over their own citizens. Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community. The equal protection components of the Fifth and Fourteenth Amendments, which limit federal or state authority, do not similarly limit tribal power. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56, and n. 7.[19] The criminal jurisdiction of the tribes over their own members is similarly uncon-

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[19] The Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U. S. C. §§ 1301–1303, prohibits Indian tribes from denying "to any person within its jurisdiction the equal protection of its laws." § 1302(8). In *Santa Clara Pueblo*, however, the Court held that sovereign immunity protected a tribe from suit under the Act, that the Act did not create a pri-

strained by constitutional limitations applicable to the States and the Federal Government.[20] Thus the use of the word "sovereign" to characterize tribal powers of self-government is surely appropriate.

In sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined.[21] The Court has emphasized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana* v. *United States*, 450 U. S. 544, 564. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, the Court held that tribes have no criminal jurisdiction over crimes committed by nonmembers within the reservations.[22] In *Montana* v. *United States*, *supra*, the Court held that the Crow Tribe could not prohibit hunting and fishing by nonmembers on res-

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vate cause of action cognizable in federal court, and that a tribal court was the appropriate forum for vindication of rights created by the Act.

[20] In *Talton* v. *Mayes*, 163 U. S. 376, the Court held that the Fifth Amendment right to indictment by grand jury does not apply to prosecutions in tribal courts. See also *United States* v. *Wheeler*, *supra*, at 328–329.

[21] Certain treaties that specifically granted the right of self-government to the tribes also specifically excluded jurisdiction over nonmembers. See, *e. g.*, Treaty with the Cherokees, Art. 5, 7 Stat. 481 (1835); Treaty with the Choctaws and Chickasaws, Art. 7, 11 Stat. 612 (1855); Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 703 (1856).

[22] In support of that holding, the Court stated:

"Upon incorportion into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574 (1823)." 435 U. S., at 209.

See also *New York ex rel. Ray* v. *Martin*, 326 U. S. 496, 499 (state court has jurisdiction to try a non-Indian for a crime committed against a non-Indian on a reservation).

ervation land no longer owned by the Tribe, and indicated that the principle underlying *Oliphant*—that tribes possess limited power over nonmembers—was applicable in a civil as well as a criminal context. As stated by the Court, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana* v. *United States*, *supra*, at 565 (footnote omitted).[23]

The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is

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[23] Preceding this statement the Court noted that "the Court [in *Oliphant*] quoted Justice Johnson's words in his concurrence in *Fletcher* v. *Peck*, 6 Cranch 87, 147—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.' 435 U. S., at 209." *Montana* v. *United States*, 450 U. S., at 565. See also *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661 (tribes cannot freely alienate to non-Indians the land they occupy); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17–18 (tribes cannot enter into direct commercial or foreign relations with other nations).

In *United States* v. *Wheeler*, *supra*, the Court held that the tribes' power to prosecute its members for tribal offenses was not "implicitly lost by virtue of their dependent status," but stated:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . .

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection.' *Worcester* v. *Georgia* [6 Pet.], at 560–561." 435 U. S., at 326.

consistent with the fundamental principle that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall*, 440 U. S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited. Certainly, tribal authority over nonmembers—including the power to tax—is not unprecedented. An examination of cases that have upheld this power, however, demonstrates that the power to impose such a tax derives solely from the tribes' power to exclude nonmembers entirely from territory that has been reserved for the tribe. This "power to exclude" logically has been held to include the lesser power to attach conditions on a right of entry granted by the tribe to a nonmember to engage in particular activities within the reservation.

III

A study of the source of the tribes' power to tax nonmembers must focus on the extent of the tribal power to tax that existed in 1934, when the Indian Reorganization Act was enacted to prevent further erosion of Indian sovereign powers.[24]

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[24] The Indian Reorganization Act of 1934 confirmed but did not enlarge the inherent sovereign powers of the Indian tribes. Congress intended the Act to "stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority. . . ." S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934). As one commentator interpreted § 16 of the Act:

"[I]t would appear that powers originally held by tribes that were recognized and allowed to be retained by treaties or prior statutes, as well as any additional powers conferred in the same manner, would be retained by tribes that accepted the terms of the 1934 Act. . . . The provision is consistent with the act's purpose of enhancing tribal government in that it recognized and reconfirmed those powers a tribe may already have had as a government." Mettler, A Unified Theory of Indian Tribal Sovereignty, 30 Hastings L. Rev. 89, 97 (1978).

Moreover, although the power given by the Reorganization Act to the Secretary of the Interior to approve or disapprove of the exercise of tribal

Shortly after the Act was passed, the Solicitor of the Department of the Interior issued a formal opinion setting forth his understanding of the powers that might be secured by an Indian tribe and incorporated in its constitution by virtue of the reference in the Reorganization Act to powers vested in an Indian tribe "by existing law."[25] Solicitor Margold con-

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powers places a limit on tribal sovereignty, that power does not enable the Secretary to add to the inherent powers that a tribe possessed before the Act was passed.

On the other hand, the fact that an Indian tribe may never have had the occasion to exercise a particular power over nonmembers in its early history is not a sufficient reason to deny the existence of that power. Accordingly, the fact that there is no evidence that the Jicarilla Apache Tribe ever imposed a tax of any kind on a nonmember does not require the conclusion that it has no such taxing power. To the extent that the power to tax was an attribute of sovereignty possessed by Indian tribes when the Reorganization Act was passed, Congress intended the statute to preserve those powers for all Indian tribes that adopted a formal organization under the Act.

[25] 55 I. D. 14 (1934). Solicitor Margold described the scope of this opinion as follows:

"My opinion has been requested on the question of what powers may be secured to an Indian tribe and incorporated in its constitution and by-laws by virtue of the following phrase, contained in section 16 of the Wheeler-Howard Act (48 Stat. 984, 987) [the Reorganization Act of 1934]:

'In addition to *all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest . . . . [Italics added.]'

"The question of what powers are vested in an Indian tribe or tribal council by existing law cannot be answered in detail for each Indian tribe without reference to hundreds of special treaties and special acts of Congress. It is possible, however, on the basis of the reported cases, the written opinions of the various executive departments, and those statutes of Congress which are of general import, to define the powers which have heretofore been recognized as lawfully within the jurisdiction of an Indian tribe. My answer to the propounded question, then, will be general, and subject to correction for particular tribes in the light of the treaties and statutes affecting such tribe wherever such treaties or statutes contain peculiar provisions restricting or enlarging the general authority of an Indian tribe." *Id.*, at 17–18.

cluded that among those powers was a power of taxation; his opinion described the permissible exercise of that power:

> "Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I. D. 14, 46 (1934).

Solicitor Margold cited three decisions in support of this opinion. These three cases, *Buster* v. *Wright*, 135 F. 947 (CA8 1905), appeal dism'd, 203 U. S. 599; *Morris* v *Hitchcock*, 194 U. S. 384; and *Maxey* v. *Wright*, 3 Ind. T. 243, 54 S. W. 807 (Ct. App. Ind. T.), aff'd, 105 F. 1003 (CA8 1900), were decided shortly after the turn of the century and are the three leading cases considering the power of an Indian tribe to assess taxes against nonmembers.[26] The three cases are similar in result and in their reasoning. In each the court upheld the tax; in each the court relied on the Tribe's power to exclude non-Indians from its reservation and concluded that the Tribe could condition entry or continued presence within the reservation on the payment of a license fee or tax; and in each the court assumed that the ultimate remedy for nonpayment of the tax would be exclusion from the reservation.

In the first of these cases, *Maxey* v. *Wright*, the Court of Appeals of Indian Territory affirmed an order by a federal territorial court dismissing a complaint filed by non-Indian lawyers practicing in the Creek Nation. The complaint sought to enjoin the Indian agent for the Five Civilized Tribes from collecting an annual occupation tax of $25 assessed on each non-Indian lawyer residing and practicing

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[26] Felix Cohen, in his Handbook on Federal Indian Law published in 1942, also relies on these cases in his discussion of tribal taxation of nonmembers. Cohen 266–267. The Court in *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, cited both *Buster* v. *Wright* and *Morris* v. *Hitchcock* in upholding an exercise of the tribal power to tax. 447 U. S., at 153. See *infra*, at 185.

his profession on the reservation. In rejecting the attorneys' claim, the Court of Appeals first analyzed the relevant treaties between the United States and the Creeks and noted that the Indians had "carefully guarded their sovereignty, and their right to admit, and consequently to exclude, all white persons, except such as are named in the treaty." 3 Ind. T., at 247, 54 S. W., at 809. The court noted that the United States had agreed that all persons who were not expressly excepted and were present in the Creek Nation "without the consent of that Nation [were] deemed to be intruders," and that the Government had "pledge[d] itself to remove them." *Id.*, at 248, 54 S. W., at 809. Because attorneys were not within any excepted class,[27] the court concluded that the Tribe had the authority to require them either to pay the license fee or to be removed as "intruders."[28] The court held:

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[27] "Attorneys practicing in the United States courts are not persons who come within the exceptions, for they are not 'in the employment of the government of the United States,' or 'persons peaceably traveling or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States.' " 3 Ind. T., at 248–249, 54 S. W., at 809.

[28] In reaching this conclusion the court relied heavily on two opinions of the Attorney General of the United States. In the first opinion, issued in 1881, Attorney General MacVeagh supported the validity of Indian permit laws that determined which persons would be permitted to reside on the Choctaw and Chickasaw Reservations. 17 Op. Atty. Gen. 134. In his discussion of the right of non-Indians to enter and remain on tribal lands, MacVeagh stated:

"Replying to your fourth question: it seems from what has been already said that, besides those persons or classes mentioned by you, only those who have been permitted by the Choctaws or Chickasaws to reside within their limits, or to be employed by their citizens as teachers, mechanics, or skilled agriculturists, have a right to enter and remain on the lands of these tribes; *and the right to remain is gone when the permit has expired.*" *Id.*, at 136 (emphasis added).

In a second opinion on the same subject, Attorney General Phillips stated in 1884 that, in the absence of a treaty or statute, the power of an Indian tribe "to regulate its own rights of *occupancy*, and to say who shall participate therein and upon what conditions, can not be doubted." 18 Op.

"[T]he Creek nation had the power to impose this condition or occupation tax, if it may be so called, upon attorneys at law (white men) residing and practicing their profession in the Indian Territory. And inasmuch as the government of the United States, in the treaty, had declared that all persons not authorized by its terms to reside in the Creek Nation should be deemed to be intruders, and had obligated itself to remove all such persons from the Creek Nation, the remedy to enforce this provision of the treaty was a removal by the United States from the Creek Nation of the delinquent as an intruder." *Id.*, at 250, 54 S. W., at 809–810.[29]

Atty. Gen. 34, 36. Although the treaties applicable to the Choctaw and Chickasaw Tribes specifically excepted from the grant of self-government the power over nonmembers, the Attorney General did not construe this provision to limit the Tribes' power to exclude:

"I submit that whatever this may mean it does not limit the right of these *tribes* to pass upon the question, who (of persons *indifferent to the United States*, *i. e.*, neither employés, nor objectionable) shall share their *occupancy* and upon what terms. That is a question which all private persons are allowed to decide for themselves . . . ." *Id.*, at 37.

[29] In other parts of its opinion, the court restated the propositions that the Tribe was "clothed with the power to admit white men, or not, at its option, which, as we hold, gave it the right to impose conditions," 3 Ind. T., at 253, 54 S.W., at 811, and that a lawyer who refused to pay for the privilege of remaining would become an "intruder":

"On the whole case we therefore hold that a lawyer who is a white man, and not a citizen of the Creek Nation, is, pursuant to their statute, required to pay for the privilege of remaining and practicing his profession in that nation the sum of $25; that, if he refuse the payment thereof, he becomes, by virtue of the treaty, an intruder, and that in such a case the government of the United States may remove him from the nation; and that this duty devolves upon the interior department. Whether the interior department or its Indian agents can be controlled by the courts by the writs of mandamus and injunction is not material in this case, because, as we hold, an attorney who refuses to pay the amount required by the statute by its very terms becomes an intruder, whom the United States promises by the terms of the treaty to remove, and therefore in such cases the officers and agents of the interior department would be acting clearly and properly within the scope of their powers." *Id.*, at 256–257, 54 S. W., at 812.

Morris v. *Hitchcock*, 194 U. S. 384, decided by this Court in 1904, also arose from a challenge to an enactment of one of the Five Civilized Tribes that required non-Indians to pay annual permit fees. The complainants owned cattle and horses that were grazing on land in the Chickasaw Nation pursuant to contracts with individual members of the Tribe. Complainants filed suit in the District of Columbia seeking an injunction preventing federal officials from removing their cattle and horses from the Indian Territory for failure to pay the permit fees assessed by the Tribe. An order dismissing the complaint was affirmed by the Court of Appeals for the District of Columbia and by this Court.

This Court's opinion first noted that treaties between the United States and the Chickasaw Nation had granted the Tribe the right "to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders,"[30] and that the United States had assumed the obligation of protecting the Indians from aggression by persons not subject to their jurisdiction. *Id.*, at 389. The Court then reviewed similar legislation that had been adopted by the Chickasaw Nation in 1876,[31] and noted that in 1879 the Senate Committee on the Judiciary had specifically referred to the 1876 legislation and expressed an opinion that it was valid. *Id.*, at 389–390.

The Court also reviewed two opinions of the Attorney General that had concluded that the power of the Chickasaw to impose permit fees had not been withdrawn by Congress.[32]

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[30] The Court stated:

"And it is not disputed that under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." 194 U. S., at 389.

[31] The 1876 legislation required licensed merchants and traders to obtain a permit and pay a fee of $25.

[32] The Court relied on 23 Op. Atty. Gen. 214 (1900) and 23 Op. Atty. Gen. 528 (1901). In the first opinion, Attorney General John W. Griggs stated:

"The treaties and laws of the United States make all persons, with a

Although Congress subsequently had created an express exception in favor of owners of town lots and thus protected them from eviction as intruders, the Court noted that no comparable protection had been given to owners of cattle and horses. *Id.*, at 392–393. On the basis of these authorities, the Court concluded that the Chickasaw legislation imposing grazing fees was valid.

In the third case, *Buster* v. *Wright*, 135 F. 947 (CA8 1905), nonmembers of the Creek Nation brought suit against federal inspectors to enjoin them from stopping the plaintiffs from doing business within the reservation; the nonmembers feared such action because they had refused to pay a permit tax assessed on traders by the Tribe. The Court of Appeals relied on *Morris* v. *Hitchcock* and *Maxey* v. *Wright* in upholding the tax. The opinion for the court by Judge Walter H. Sanborn emphasized that the tax was in the nature of a condition precedent to transacting business within the reservation and that the plaintiffs had ample notice of the tax:

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few specified exceptions, who are not citizens of an Indian nation or members of an Indian tribe, and are found within an Indian nation without permission, intruders there, and require their removal by the United States. This closes the whole matter, absolutely excludes all but the excepted classes, and fully authorizes these nations to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose, and it must be borne in mind that citizens of the United States, have, as such, no more right or business to be there than they have in any foreign nation, and can lawfully be there at all only by Indian permission; and that their right to be or remain or carry on business there depends solely upon whether they have such permission.

"As to the power or duty of your Department in the premises there can hardly be a doubt. Under the treaties of the United States with these Indian nations this Government is under the most solemn obligation, and for which it has received ample consideration, to remove and keep removed from the territory of these tribes, all this class of intruders who are there without Indian permission. The performance of this obligation, as in other matters concerning the Indians and their affairs, has long been devolved upon the Department of the Interior." 23 Op. Atty. Gen., at 218.

"The permit tax of the Creek Nation, which is the subject of this controversy, is the annual price fixed by the act of its national council, which was approved by the President of the United States in the year 1900, for the privilege which it offers to those who are not citizens of its nation of trading within its borders. The payment of this tax is a mere condition of the exercise of this privilege. No noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. Thus, without entering upon an extended discussion or consideration of the question whether this charge is technically a license or a tax, the fact appears that it partakes far more of the nature of a license than of an ordinary tax, because it has the optional feature of the former and lacks the compulsory attribute of the latter.

"Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate the propositions that prior to March 1, 1901, the Creek Nation had lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders, and that the executive department of the government of the United States had plenary power to enforce its payment through the Secretary of the Interior and his subordinates, the Indian inspector, Indian agent, and Indian police." 135 F., at 949–950.

The court noted that the traders, who had purchased town lots of the Creek Nation pursuant to a 1901 agreement between the Creeks and the United States, could not rely on that agreement as an implied divestiture of a pre-existing power to tax.[33] The court held that even though noncitizens

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[33] After citing the opinion of Attorney General Griggs quoted at length in *Morris* v. *Hitchcock*, Judge Sanborn wrote:

"Pursuant to this decision the civilized tribes were charging, and the Indian agent was collecting, taxes from noncitizens engaged in business in

of the Tribe had acquired lawful ownership of lots pursuant to the 1901 agreement and could not be evicted from those lots, they had no right to conduct business within the reservation without paying the permit taxes.[34]

Prior to the enactment of the Indian Reorganization Act in 1934, these three cases were the only judicial decisions considering the power of an Indian tribe to impose a tax on nonmembers.[35] These cases demonstrate that the power of an

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these nations. It was under this state of facts that the United States and the Creek Nation made the agreement of 1901. Did they intend by that agreement that the Creek Nation should thereby renounce its conceded power to exact these permit taxes? Both parties knew that this power existed, and the United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise. The subject of these taxes was presented to the minds of the contracting parties and was considered during the negotiation of the agreement, for that contract contains express stipulations that cattle grazed on rented allotments shall not be liable to any tribal tax (chapter 676, 31 Stat. 871, § 37), and that 'no noncitizen renting lands from a citizen for agricultural purposes as provided by law, whether such lands have been selected as an allotment or not, shall be required to pay any permit tax' (chapter 676, 31 Stat. 871, § 39). But they made no provision that noncitizens who engaged in the mercantile business in the Creek Nation should be exempt from these taxes. As the law then in force required such noncitizens to pay such taxes, as both parties were then aware of that fact and considered the question, and as they made no stipulation to abolish these taxes, the conclusive presumption is that they intended to make no such contract, and that the power of the Creek Nation to exact these taxes, and the authority of the Secretary of the Interior and of his subordinates to collect them, were neither renounced, revoked, nor restricted, but that they remained in full force and effect after as before the agreement of 1901." 135 F., at 954.

[34] *Ibid.* The court stated:

"The legal effect . . . of the law prescribing the permit taxes is to prohibit noncitizens from conducting business within the Creek Nation without the payment of these taxes." *Id.*, at 955.

[35] Two decades after the Reorganization Act was passed the problem was revisited by the Eighth Circuit. In *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89 (1956), the court held that the Tribe had the power to assess a tax on a nonmember lessee of land within the reservation for the privilege of grazing stock on reservation land. And

Indian tribe to impose a tax solely on nonmembers doing business on the reservation derives from the tribe's power to exclude those persons entirely from tribal lands or, in the alternative, to impose lesser restrictions and conditions on a right of entry granted to conduct business on the reservation.[36] This interpretation is supported by the fact that the

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in *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (1958), the court held that the United States could bring an action on behalf of the Tribe to collect a license tax of 3 cents per acre per annum for grazing land and 15 cents per acre per annum for farm land levied on nonmember lessees. The court in *Barta* held that the tax did not violate the constitutional rights of the nonmember lessees, stating in part:

"The tribe by provisions of its treaty with the United States has power to provide for the admission of nonmembers of the tribe onto the reservation. Having such power, it has the authority to impose restrictions on the presence of nonmembers within the reservation." *Id.*, at 556.

Language in both *Iron Crow* and *Barta* suggests that the Court of Appeals, unlike the earlier courts, may not have rested the taxing power solely on the power to exclude. The Court of Appeals of course did not have the benefit of our decisions in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, *Wheeler*, and *Montana* v. *United States*.

[36] In the chapter of his treatise entitled "Taxation," Felix Cohen states:

"Though the scope of the power [to tax] as applied to nonmembers is not clear, it extends at least to property of nonmembers used in connection with Indian property as well as to privileges enjoyed by nonmembers in trading with the Indians. The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate within the tribal domain." Cohen 266–267 (footnotes omitted).

In another chapter, entitled "The Scope of Tribal Self-Government," cited by the Secretary of the Interior and the Tribe here, Cohen describes the power of taxation as "an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress . . . ." *Id.*, at 142. After discussing *Buster* v. *Wright*, Cohen cites that case for the proposition that "[t]he power to tax does not depend upon the power to remove and has been upheld where there was no power in the

remedy for the nonpayment of the tax in all three cases was exclusion from the reservation.[37]

As I have noted, a limitation on the power of Indian tribes to tax nonmembers is not simply an archaic concept derived from three old cases that has no basis in logic or equity. Tribal powers over nonmembers are appropriately limited because nonmembers are foreclosed from participation in tribal government. If the power to tax is limited to situations in which the tribe has the power to exclude, then the nonmember is subjected to the tribe's jurisdiction only if he accepts the conditions of entry imposed by the tribe.[38] The limited source of the power to tax nonmembers—the power to exclude intruders—is thus consistent with this Court's rec-

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tribe to remove the taxpayer from the tribal jurisdiction." Cohen 143. As demonstrated above, however, the license tax in *Buster* was predicated on the tribe's right to attach conditions on the right of nonmembers to conduct business on the reservation; the tribe could prevent such nonmembers from doing business regardless of whether it could physically remove them from the reservation. Moreover, in that same chapter on tribal self-government, Cohen recognizes that tribal taxes have been upheld on the basis of the tribe's power to remove nonmembers from the reservation, and that "[i]t is therefore pertinent, in analyzing the scope of tribal taxing powers, to inquire how far an Indian tribe is empowered to remove nonmembers from its reservation." Cohen 143.

The American Indian Policy Review Commission recognized that the court decisions upholding the tribes' taxing powers "rely largely upon the power of tribes to remove persons from the reservation, and consequently, to prescribe the conditions upon which they shall enter," but argued for a broader source of the right to tax. AIPRC Final Report 178–179.

[37] In *Buster* v. *Wright*, the penalty for nonpayment of the tax was the closing of the nonmember's business, enforced by the Secretary of the Interior. 135 F., at 954. In *Morris* v. *Hitchcock*, the remedy was the removal of the nonmember's cattle from the reservation, again enforced by the United States. 194 U. S., at 392. In *Maxey* v. *Wright*, an attorney refusing to pay the license fee to the Interior Department was subject to removal from the reservation. 3 Ind. T., at 250, 54 S. W., at 810.

[38] "No noncitizen is required to exercise a privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other." *Buster* v. *Wright*, 135 F., at 949.

ognition of the limited character of the power of Indian tribes over nonmembers in general.[39] The proper source of the taxing authority asserted by the Jicarilla Apache Tribe in these cases, therefore, is not the Tribe's inherent power of self-government, but rather its power over the territory that has been set apart for its use and occupation.[40]

This conclusion is consistent with our recent decision in *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134. In that case we held that a tribal tax on cigarettes sold on the reservations of the Colville, Makah, and Lummi Tribes to nonmembers of the Tribes was a permis-

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[39] See *supra*, at 171–172. As I have indicated, see n. 21, *supra*, treaties recognizing the inherent power of tribal self-government have also deprived the tribes of jurisdiction over nonmembers. Nevertheless, those same treaties often specifically recognized the right of the tribe to exclude nonmembers from the reservation or to attach conditions on their entry. See *e. g.*, Treaty with the Choctaw and Chickasaw, Art. 7, 11 Stat. 612 (1855); Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 699 (1856). See 2 C. Kappler, Indian Affairs, Laws and Treaties 7, 9, 12, 15, 17, 20, 21, 27, 30, 42, 75, 418, 682, 699, 703, 719, 761, 774, 779, 790, 794, 800, 866, 886, 888, 929, 985, 990, 998, 1008, 1016, 1021 (1904).

[40] The various tribes may have taken a similar view of their power to tax at the time of the Indian Reorganization Act. Cohen's treatise notes:

"The power of an Indian tribe to levy taxes upon its own members and upon nonmembers doing business within the reservations has been affirmed in many tribal constitutions approved under the Wheeler-Howard Act [Indian Reorganization Act], as has the power to remove nonmembers from land over which the tribe exercises jurisdiction." Cohen 143.

The following clause from the 1935 Constitution of the Rosebud Sioux Tribe, which Cohen cites as a "typical" statement of such "tribal powers," indicates that the Tribe perceived the scope of its taxation powers over nonmembers to be narrower than the scope of that power over members. The Constitution conveys tribal power—

"(h) To levy taxes upon members of the tribe and to require the performance of reservation labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon nonmembers doing business within the reservation.

"(i) To exclude from the restricted lands on the reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior." *Ibid.*

sible exercise of the Tribes' retained sovereign power to tax.[41] We recognized that the power to tax non-Indians entering the reservation had not been divested by virtue of the Tribes' dependent status and that no overriding federal interest would be frustrated by the tribal taxation. The Court quoted with approval, as an indication of the Executive Branch's understanding of the taxing power, Solicitor Margold's 1934 opinion. The Court noted further that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" and cited *Buster* v. *Wright* and *Morris* v. *Hitchcock*. 447 U. S., at 153.[42] The tax in *Colville*, which was applied to nonmembers who entered the reservation and sought to purchase cigarettes, is clearly valid under the rationale that the tribes' power to tax derives from the right to exclude nonmembers from the reservation and the lesser right to attach conditions on the entry of such nonmembers seeking to do business there.[43] *Colville* is consistent with the principles set forth above. The power of Indian tribes to tax nonmembers stems from the tribes' power to exclude those nonmembers; any exercise of this power must be consistent with its source.[44]

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[41] The Court stated:

"The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 447 U. S., at 152.

[42] The Court also cited, without discussion, the Eighth Circuit's decision in *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (1956). See n. 35, *supra*.

[43] A nonmember can avoid the tax by declining to do business on the reservation; the "sanction" imposed for refusal to pay the tax is denial of permission to buy cigarettes.

[44] In some respects the tribal power to tax nonmembers may be greater than the taxing power of other sovereigns. States do not have any power to exclude nonresidents from their borders. Moreover, their taxing statutes, like their other laws, must comply with the Equal Protection Clause of the Fourteenth Amendment. They may not, therefore, impose discriminatory taxes as a condition attached to entry into the jurisdiction in

IV

The power to exclude petitioners would have supported the imposition of a discriminatory tribal tax on petitioners when they sought to enter the Jicarilla Apache Reservation to explore for minerals. Moreover, even if no tax had been imposed at the time of initial entry, a discriminatory severance tax could have been imposed as a condition attached to the grant of the privilege of extracting minerals from the earth.[45] But the Tribe did not impose any tax prior to petitioners' entry or as a condition attached to the privileges granted by the leases in 1953. As a result, the tax imposed in 1976 is not valid unless the Tribe retained its power either to exclude petitioners from the reservation or to prohibit them from continuing to extract oil and gas from reservation lands.

The leases executed by the Tribe and petitioners are clearly valid and binding on both parties. The Tribe does not contend that the leases were not the product of arm's-length bargaining. Moreover, the leases were executed on a form prepared by the Department of the Interior, the Department gave specific approval to the terms of the leases, and they were executed pursuant to explicit congressional authority.[46] Under the leases petitioners clearly have the

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order to engage in economic activity. But since an Indian tribe has exclusive control over the "use and occupancy" of land within its reservation, it arguably could attach special discriminatory conditions to any license to a nonmember to use or occupy a portion of that land. As stated earlier, at a minimum the equal protection components of the Fifth and Fourteenth Amendments, which limit the sovereign powers of the Federal and State Governments, do not similarly restrict the sovereign powers of an Indian tribe. See *supra*, at 170.

[45] "[A]s the payment of a tax or license fee may be made a condition of entry upon tribal land, it may also be made a condition to the grant of other privileges, such as the acquisition of a tribal lease." Cohen 143.

[46] Congress intended the Act of March 3, 1927, to make applicable to Executive Order reservations the leasing provisions already applicable to treaty reservations pursuant to the Act of May 29, 1924, ch. 210, 43 Stat. 244. S. Rep. No. 1240, 69th Cong., 2d Sess., 3 (1927). The 1927 Act thus permitted the leasing of unallotted Indian land for terms not to exceed 10

right to remain on the reservation to do business for the duration of the contracts.[47]

There is no basis for a claim that exercise of the mining rights granted by the leases was subject to an additional, unstated condition concerning the payment of severance taxes.[48]

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years and as much longer as oil and gas in paying quantities were found on the land. 44 Stat. (part 2) 1347. Among the purposes of the 1927 statute were to "[p]ermit the exploration for oil and gas on Executive-order Indian Reservations," to "[g]ive the Indian tribes all the oil and gas royalties," and to "[p]lace with Congress the future determination of any changes of boundaries of Executive-order reservations or withdrawals." S. Rep. No. 1240, *supra*, at 3. In light of these purposes, it is clear that Congress intended leases executed pursuant to the 1927 Act to be binding.

The Tribe contends that the leases in these cases were executed pursuant to the Act of May 11, 1938, 52 Stat. 347, and not the 1927 Act. The Tribe notes that the lease in No. 80–15 states that it was executed pursuant to the 1938 Act. See App. 64. In response, petitioners note that, although the Tribe argues that the 1938 Act—unlike the 1927 Act—does not require that royalties be paid to the Secretary of the Interior for the benefit of the Tribe, petitioners make their royalty payments to the United States Geological Survey for the benefit of the Jicarilla Apache. See Tr. 79–80. There is no need to resolve this question, because for our purposes the provisions of the 1938 Act do not vary significantly from the provisions of the 1927 Act. The 1938 Act, like the 1927 Act, permits the leasing of Indian lands for a period "not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. § 396a. One of the purposes of the 1938 Act was to establish uniformity in the leasing of tribal lands by applying the law governing oil and gas leasing to all other mineral leasing as well. S. Rep. No. 985, 75th Cong., 1st Sess., 1–2 (1937). Other purposes were to "bring all mineral leasing matters in harmony with the Indian Reorganization Act," *id.*, at 3, and to enact changes designed "to give the Indians the greatest return from their property." *Id.*, at 2. There is no indication in the legislative history that the purposes of the 1938 Act are in any way inconsistent with the purposes of the 1927 Act and prior legislation. Presumably the purposes of the earlier legislation were incorporated into the uniform scheme intended by the 1938 Act.

[47] As Attorney General MacVeagh stated in 1881, only those permitted by the tribe to remain on the reservation may do so, "and the right to remain is gone when the permit has expired." 17 Op. Atty. Gen., at 136.

[48] In *Colville*, the nonmember desiring to purchase cigarettes on the reservation knew that his right to do so was conditioned on his consent to pay the tax. Attorney General Griggs, in his 1900 opinion on "Trespassers on

At the time the leases contained in the record were executed, the Jicarilla Apache Constitution contained no taxing authorization whatever; the severance tax ordinance was not enacted until many years after all lessees had been granted an unlimited right to extract oil and gas from the reservation. In addition, the written leases unambiguously stated:

> "[N]o regulation hereafter approved shall effect a change in rate or royalty or annual rental herein specified without the written consent of the parties to this lease." App. 27.

Nor can it be said that notice of an inherent right to tax could have been gleaned from relevant statutory enactments. When Congress enacted legislation in 1927 granting the Indians the royalty income from oil and gas leases on reservations created by Executive Order, it neither authorized nor prohibited the imposition of any taxes by the tribes. Although the absence of such reference does not indicate that Congress pre-empted the right of the tribes to impose such a tax,[9] the lack of any mention of tribal severance taxes defeats the ar-

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Indian Lands," discussed in similar terms the effect on tribal laws of a federal statute providing for the sale of reservation lots to non-Indians:

"[T]he legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation, nor does it authorize him to do any act in violation of the treaties with such nation. These laws requiring a permit to reside or carry on business in the Indian country existed long before and at the time this act was passed. And if any outsider saw proper to purchase a town lot under this act of Congress, he did so with full knowledge that he could occupy it for residence or business only by permission from the Indians." 23 Op. Atty. Gen., at 217.

In 1977, the American Indian Policy Review Commission noted that Indian tribes "do not both tax and receive royalties. Usually, they just receive royalties." AIPRC Final Report 344.

[9] The statute did authorize the collection of severance taxes by the States. Petitioners have argued that this authorization pre-empted any tribal power to impose a comparable tax. As recognized by the Court of Appeals, however, the legislative history indicates that Congress simply did not consider the question of tribal taxes on mineral output from reservation lands. 617 F. 2d 537, 547 (CA10 1980).

gument that all parties were aware as a matter of law that a severance tax could be imposed at any time as a condition to the continued performance of a mineral lease.

Thus, nothing in the leases themselves or in any Act of Congress conveyed an indication that petitioners could accept the rights conferred by the leases only by accepting a condition that they pay any subsequently enacted severance tax. Nor could such a condition be presumed from prior taxing activity of the Tribe. In my opinion it is clear that the parties negotiated the leases in question with absolutely no expectation that a severance tax could later be imposed; in the contemplation of the parties, the conditions governing petitioners' right to extract oil and gas were not subject to change during the terms of the agreements. There simply is no support for the proposition that the Tribe retained the power in the leases to impose an additional condition on petitioners' right to enter the reservation and extract oil and gas from reservation lands. Since that authority was not retained, the Tribe does not now have the power to alter unilaterally the terms of the agreement and impose an additional burden on petitioners' right to do business on the reservation.[50]

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[50] The Secretary of the Interior argues that a license or franchise issued by a governmental body does not prevent the later imposition of a tax unless the right to tax "'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" Brief for Secretary of Interior 13, n. 7 (quoting *St. Louis* v. *United R. Co.*, 210 U. S. 266, 280). See also *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192, 195; *New York Transit Corp.* v. *City of New York*, 303 U. S. 573, 590–593. The principal issue in these cases cited by the Secretary was whether the retroactive imposition of a franchise tax violated the Contract Clause of the Constitution or was so fundamentally unfair as to constitute a denial of due process in violation of the Fourteenth Amendment. Although this argument was by no means frivolous, cf. *Puerto Rico* v. *Russell & Co.*, 315 U. S. 610, no such issue is raised here. These cases are distinguishable from the instant cases because Indian tribes do not have the same attributes of sovereignty as do States and their subdivisions. See *supra*, at 168–173.

In these cases, the Tribe seeks to impose a tax on the very activity that the leases granted petitioners the right to undertake. As Solicitor Margold wrote long ago:

> "Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But on all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and *does not infringe any vested rights of persons now occupying reservation land under lawful authority.*" 55 I. D., at 50 (emphasis added).

Petitioners were granted authority by the Tribe to extract oil and gas from reservation lands. The Tribe now seeks to change retroactively the conditions of that authority. These petitioners happen to be prosperous oil companies. Moreover, it may be sound policy to find additional sources of revenue to better the economic conditions of many Indian tribes. If this retroactive imposition of a tax on oil companies is permissible, however, an Indian tribe may with equal legitimacy contract with outsiders for the construction of a school or a hospital, or for the rendition of medical or technical services, and then—after the contract is partially performed—change the terms of the bargain by imposing a gross receipts tax on the outsider. If the Court is willing to ignore the risk of such unfair treatment of a local contractor or a local doctor because the Secretary of the Interior has the power to veto a tribal tax, it must equate the unbridled discretion of a political appointee with the protection afforded by rules of law. That equation is unacceptable to me. Neither wealth, political opportunity, nor past transgressions can justify denying any person the protection of the law.

IN RE R. M. J.

APPEAL FROM THE SUPREME COURT OF MISSOURI

No 80-1431. Argued November 9, 1981—Decided January 25, 1982

Rule 4 of the Missouri Supreme Court, regulating advertising by lawyers, states that a lawyer may include 10 categories of information in a published advertisement: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain "routine" legal services. Although the Rule does not state explicitly that these 10 categories of information are the only information that will be permitted, that is the interpretation given the Rule by the State Supreme Court and appellee Advisory Committee, which is charged with its enforcement. An addendum to the Rule specifies two ways in which areas of practice may be listed in an advertisement, under one of which the lawyer may use one or more of a list of 23 areas of practice but may not deviate from the precise wording stated in the Rule to describe these areas. In addition, the Rule permits a lawyer to send professional announcement cards announcing a change of address or firm name, or similar matters, but only to "lawyers, clients, former clients, personal friends, and relatives." An information was filed in the Missouri Supreme Court by appellee Advisory Committee, charging appellant, a practicing lawyer in St. Louis, Mo., with violations of Rule 4. The information charged that appellant published advertisements which listed areas of practice in language other than that specified in the Rule and which listed the courts in which appellant was admitted to practice although this information was not included among the 10 categories of information authorized by the Rule. In addition, the information charged that appellant had mailed announcement cards to persons other than those permitted by the Rule. Appellant claimed that each of the restrictions upon advertising was unconstitutional under the First and Fourteenth Amendments, but the Missouri Supreme Court upheld the constitutionality of Rule 4 and issued a private reprimand.

Held: None of the restrictions in question upon appellant's First Amendment rights can be sustained in the circumstances of this case. Pp. 199–207.

(a) Although the States retain the ability to regulate commercial speech, such as lawyer advertising, that is inherently misleading or that has proved to be misleading in practice, the First and Fourteenth

Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. Pp. 199–204.

(b) Because the listing published by appellant—*e. g.*, "real estate" instead of "property law" as specified by Rule 4, and "contracts" and "securities," which were not included in the Rule's listing—has not been shown to be misleading, and appellee suggests no substantial interest promoted by the restriction, the portion of Rule 4 specifying the areas of practice that may be listed is an invalid restriction upon speech as applied to appellant's advertisements. P. 205.

(c) Nor has appellee identified any substantial interest in prohibiting a lawyer from identifying the jurisdictions in which he is licensed to practice. Such information is not misleading on its face. That appellant was licensed to practice in both Illinois and Missouri is factual and highly relevant information, particularly in light of the geography of the region in which he practices. While listing the relatively uninformative fact that he is a member of the United States Supreme Court Bar could be misleading, there was no finding to this effect by the Missouri Supreme Court, there is nothing in the record to indicate it was misleading, and the Rule does not specifically identify it as potentially misleading. Pp. 205–206.

(d) With respect to the restriction on announcement cards, while mailings may be more difficult to supervise, there is no indication in the record that an inability to supervise is the reason the State restricts the potential audience of the cards. Nor is it clear that an absolute prohibition is the only solution, and there is no indication of a failed effort to proceed along a less restrictive path. P. 206.

609 S. W. 2d 411, reversed.

POWELL, J., delivered the opinion for a unanimous Court.

Charles B. Blackmar argued the cause for appellant. With him on the briefs were *Charles A. Blackmar*, *Bruce J. Ennis*, and *Charles S. Sims*.

John W. Inglish argued the cause and filed a brief for appellee.*

**Thomas Lumbard* and *Harry M. Philo* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging reversal.

Jerry L. Zunker filed a brief for the State Bar of Texas as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

The Court's decision in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), required a re-examination of long-held perceptions as to "advertising" by lawyers. This appeal presents the question whether certain aspects of the revised ethical rules of the Supreme Court of Missouri regulating lawyer advertising conform to the requirements of *Bates*.

I

As with many of the States, until the decision in *Bates*, Missouri placed an absolute prohibition on advertising by lawyers.[1] After the Court's invalidation of just such a prohibition in *Bates*, the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri revised that court's Rule 4 regulating lawyer advertising. The Committee sought to "strike a midpoint between prohibition and unlimited advertising,"[2] and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represents a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain specified language.

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[1] Prior to the 1977 revision, Rule 4 provided in pertinent part:

"(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, 'public communication' includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

"(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf . . . ." Mo. Sup. Ct. Rules Ann., Rule 4, DR 2-101, p. 63 (Vernon 1981) (historical note).

[2] Report of Committee to Chief Justice of Supreme Court of Missouri (Sept. 9, 1977), reprinted in App. A-30.

Thus, part B of DR 2–101 of the Rule states that a lawyer may "publish . . . in newspapers, periodicals and the yellow pages of telephone directories" 10 categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified "routine" legal services.[3] Although the Rule does not state explicitly that these 10 categories of information or the 3 indicated forms of printed advertisement are the only information and the only means of advertising that will be permitted,[4] that is the interpretation given the Rule by the State Supreme Court and the Advisory Committee[5] charged with its enforcement.

In addition to these guidelines, and under authority of the Rule, the Advisory Committee has issued an addendum to the Rule providing that if the lawyer chooses to list areas of

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[3] The 10 listed "routine" services are: an uncontested dissolution of marriage; an uncontested adoption; an uncontested personal bankruptcy; an uncomplicated change of name; a simple warranty or quitclaim deed; a simple deed of trust; a simple promissory note; an individual Missouri or federal income tax return; a simple power of attorney; and a simple will. Mo. Rev. Stat., Sup. Ct. Rule 4, DR 2–101(B) (1978) (Index Vol.). The Rule authorizes the Advisory Committee to approve additions to this list of routine services. *Ibid.*

[4] Indeed, on its face, the Rule would appear to suggest that its specific provisions are intended only to provide a safe harbor, and not to prohibit all other forms of advertising or categories of information. This impression is conveyed by the Rule's inclusion of a general prohibition on misleading advertising in DR 2–101(A):

"A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Rule 4, DR 2–101(A).

[5] The Advisory Committee is a standing committee of the Supreme Court of Missouri and is responsible for prosecuting disciplinary proceedings and for giving formal and informal opinions on the Canons of Professional Responsibility. See Rule 5.

practice in his advertisement, he must do so in one of two prescribed ways. He may list one of three general descriptive terms specified in the Rule—"General Civil Practice," "General Criminal Practice," or "General Civil and Criminal Practice." Alternatively, he may use one or more of a list of 23 areas of practice, including, for example, "Tort Law," "Family Law," and "Probate and Trust Law." He may not list both a general term and specific subheadings, nor may he deviate from the precise wording stated in the Rule. He may not indicate that his practice is "limited" to the listed areas and he must include a particular disclaimer of certification of expertise following any listing of specific areas of practice.[6]

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[6] The addendum to the rule promulgated by the Advisory Committee provided in relevant part as follows:

"[T]he following areas for fields of law may be advertised by use of the specific language hereinafter set out:

1. 'General Civil Practice'
2. 'General Criminal Practice'
3. 'General Civil and Criminal Practice.'

"If a lawyer or law firm uses one of the above, no other area can be used . . . . If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:

1. 'Administrative Law'
2. 'Anti-Trust Law'
3. 'Appellate Practice'
4. 'Bankruptcy'
5. 'Commercial Law'
6. 'Corporation Law and Business Organizations'
7. 'Criminal Law'
8. 'Eminent Domain Law'
9. 'Environmental Law'
10. 'Family Law'
11. 'Financial Institution Law'
12. 'Insurance Law'
13. 'International Law'
14. 'Labor Law'
15. 'Local Government Law'

[*Footnote 6 is continued on p. 196*]

Finally, one further aspect of the Rule is relevant in this case. DR 2–102 of Rule 4 regulates the use of professional announcement cards. It permits a lawyer or firm to mail a dignified "brief professional announcement card stating new or changed associates or addresses, change of firm name, or similar matters." The Rule, however, does not permit a general mailing; the announcement cards may be sent only to "lawyers, clients, former clients, personal friends, and relatives."[7] Mo. Rev. Stat., Sup. Ct. Rule 4, DR 2–102(A)(2) (1978) (Index Vol.).

II

Appellant graduated from law school in 1973 and was admitted to the Missouri and Illinois Bars in the same year. After a short stint with the Securities and Exchange Commission in Washington, D. C., appellant moved to St. Louis, Mo., in April 1977, and began practice as a sole practitioner. As a means of announcing the opening of his office, he mailed professional announcement cards to a selected list of addressees. In order to reach a wider audience, he placed several advertisements in local newspapers and in the yellow pages of the local telephone directory.

The advertisements at issue in this litigation appeared in January, February, and August 1978, and included informa-

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16. 'Military Law'
17. 'Probate and Trust Law'
18. 'Property Law'
19. 'Public Utility Law'
20. 'Taxation Law'
21. 'Tort Law'
22. 'Trial Practice'
23. 'Workers Compensation Law.'

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

"If one or more of these specific areas of practice are used in any advertisement, the following statement must be included . . . :

'Listing of the above areas of practice does not indicate any certification of expertise therein.'" Rule 4, Addendum III (Adv. Comm. Nov. 13, 1977).

[7] This provision of Rule 4 was not altered by the 1977 amendments.

tion that was not expressly permitted by Rule 4. They included the information that appellant was licensed in Missouri and Illinois. They contained, in large capital letters, a statement that appellant was "Admitted to Practice Before THE UNITED STATES SUPREME COURT." And they included a listing of areas of practice that deviated from the language prescribed by the Advisory Committee—*e. g.*, "personal injury" and "real estate" instead of "tort law" and "property law"—and that included several areas of law without analogue in the list of areas prepared by the Advisory Committee—*e. g.*, "contract," "zoning & land use," "communication," "pension & profit sharing plans."[8] See n. 6, *supra*. In addition, and with the exception of the advertisement appearing in August 1978, appellant failed to include the required disclaimer of certification of expertise after the listing of areas of practice.

On November 19, 1979, the Advisory Committee filed an information in the Supreme Court of Missouri charging appel-

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[8] In an advertisement published in the August 1978 yellow pages for St. Louis, and typical of appellant's other advertisements, appellant included a listing of 23 areas of practice. Four of the areas conformed to the language prescribed in the Rule—"bankruptcy," "anti-trust," "labor," and "criminal." Eleven of the areas deviated from the precise language of the Rule—"tax," "corporate," "partnership," "real estate," "probate," "wills, estate planning," "personal injury," "trials & appeals," "workmen's compensation," "divorce-separation," and "custody-adoption," instead of, respectively, and as required by the Rule, "taxation law," "corporation law and business organizations," "property law," "probate & trust law," "tort law," "trial practice," "appellate practice," "workers compensation law," and "family law." Eight other areas listed in the advertisement are not listed in any manner by the Advisory Committee's addendum: "contract," "aviation," "securities-bonds," "pension & profit sharing plans," "zoning & land use," "entertainment/sports," "food, drug & cosmetic," and "communication."

A photograph of the advertisements as they appeared in the St. Louis, Suburban West, Telephone Directory for February 1978, and in the January/February 1978 issue of the West End Word is reproduced as an Appendix to this opinion. In all of appellant's advertisements the statement as to his membership in the Bar of the United States Supreme Court was printed conspicuously in large capital letters.

lant with unprofessional conduct. The information charged appellant with publishing three advertisements that listed areas of law not approved by the Advisory Committee, that listed the courts in which appellant was admitted to practice, and, in the case of two of the advertisements, that failed to include the required disclaimer of certification. The information also charged appellant with sending announcement cards to "persons other than lawyers, clients, former clients, personal friends, and relatives" in violation of DR 2–102(A)(2). In response, appellant argued that, with the exception of the disclaimer requirement, each of these restrictions upon advertising was unconstitutional under the First and Fourteenth Amendments.

In a disbarment proceeding, the Supreme Court of Missouri upheld the constitutionality of DR 2–101 of Rule 4 and issued a private reprimand. 609 S. W. 2d 411 (1981). But the court did not explain the reasons for its decision, nor did it state whether it found appellant to have violated each of the charges lodged against him or only some of them. Indeed, the court only purported to uphold the constitutionality of DR 2–101; it did not mention the propriety of DR 2–102, which governs the use of announcement cards.

Writing in separate dissenting opinions, Chief Justice Bardgett and Judge Seiler argued that the information should be dismissed. The dissenters suggested that the State did not have a significant interest either in requiring the use of certain, specified words to describe areas of practice or in prohibiting a lawyer from informing the public as to the States and courts in which he was licensed to practice. Nor would the dissenters have found the mailing of this sort of information to be unethical.[9]

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[9] The dissenting Judges differed in several respects. Chief Justice Bardgett considered that appellant's listing of the fact that he was admitted to practice before the United States Supreme Court was not improper; Judge Seiler argued that this information was more misleading than helpful. Moreover, Judge Seiler argued that appellant should not be penalized

III

In *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), the Court considered whether the extension of First Amendment protection to commercial speech announced in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), applied to the regulation of advertising by lawyers.[10] The *Bates* Court held that indeed lawyer advertising was a form of commercial speech, protected by the First Amendment, and that "advertising by attorneys may not be subjected to blanket suppression." 433 U. S., at 383.

More specifically, the *Bates* Court held that lawyers must be permitted to advertise the fees they charge for certain "routine" legal services. The Court concluded that this sort of price advertising was not "inherently" misleading, and therefore could not be prohibited on that basis. The Court also rejected a number of other justifications for broad restrictions upon advertising including the potential adverse effect of advertising on professionalism, on the administration

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for having omitted a disclaimer of certification when the addendum requiring the disclaimer was not available until after appellant had placed the advertisements and after it was too late to add the disclaimer. Chief Justice Bardgett's dissent omits any mention of appellant's failure to include a disclaimer. See n. 18, *infra*. Finally, Chief Justice Bardgett expressed his belief that our decision in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557 (1980), concerning the regulation of commercial speech, does not apply in its entirety to the regulation of lawyer advertising. Judge Seiler appeared to take the opposite position. Both of the dissenting opinions reflect a thoughtful examination of the charges made against appellant.

[10] The Court in *Virginia Pharmacy*, expressly reserved this question:

"We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." 425 U. S., at 773, n. 25.

of justice, and on the cost and quality of legal services, as well as the difficulties of enforcing standards short of an outright prohibition. None of these interests was found to be sufficiently strong or sufficiently affected by lawyer advertising to justify a prohibition.

But the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated.[11] False, deceptive, or misleading advertising remains subject to restraint,[12] and the Court recognized that advertising by the professions poses special risks of deception—"[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.*, at 383 (footnote

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[11] Even as to price advertising, the Court suggested that some regulation would be permissible. For example, the bar may "define the services that must be included in an advertised package . . . ." 433 U. S., at 373, n. 28, and the bar could require disclaimers or explanations to avoid false hopes, *id.*, at 384 ("[S]ome limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled").

Presumably, too, the bar may designate the services that may be considered "routine." Moreover, the Court might reach a different decision as to price advertising on a different record. If experience with particular price advertising indicates that the public is in fact misled or that disclaimers are insufficient to prevent deception, then the matter would come to the Court in an entirely different posture. The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be "inherently" misleading, the Court must take such experience into account. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S., at 372 ("We are not persuaded that restrained professional advertising . . . will be misleading").

[12] See *Friedman* v. *Rogers*, 440 U. S. 1, 11, n. 9 (1979) ("When dealing with restrictions on commercial speech we frame our decisions narrowly, 'allowing modes of regulation [of commercial speech] that might be impermissible in the realm of noncommercial expression'" (quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978)); *Virginia Pharmacy*

omitted). The Court suggested that claims as to quality or in-person solicitation might be so likely to mislead as to warrant restriction. And the Court noted that a warning or disclaimer might be appropriately required, even in the context of advertising as to price, in order to dissipate the possibility of consumer confusion or deception.[13] "[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less." *Id.*, at 375.[14]

Board v. *Virginia Citizens Consumer Council*, 425 U. S., at 771–772, and n. 24 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely") (citations and footnote omitted).

[13] In addition, the *Bates* Court noted that reasonable restrictions on the time, place, and manner of advertising would still be permissible, while "the special problems of advertising on the electronic broadcast media will warrant special consideration." 433 U. S., at 384.

[14] The Model Rules of Professional Conduct proposed by the American Bar Association Commission on Evaluation of Professional Standards provide that "a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact." Rule 7.2(a). Rule 7.1 prohibits misleading advertising in the following terms:

"A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

"(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

"(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

"(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."

[*Footnote 14 is continued on p. 202*]

In short, although the Court in *Bates* was not persuaded that price advertising for "routine" services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the "product" renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.

Thus, the Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. In *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462 (1978), the Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation, that such solicitation could be prohibited. And in *Friedman* v. *Rogers*, 440 U. S. 1 (1979), we held that Texas could prohibit the use of trade names by optometrists particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names.

Commentary following the Rule suggests that the Rule would prohibit "advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."

It is understood that the format of the proposed new Rules will be considered by the House of Delegates of the American Bar Association at its 1982 midyear meeting and that the substance of the Rules will be considered at the 1982 annual meeting. We, of course, imply no view as to these proposals.

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e. g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U. S., at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 563–564 (1980).[15] Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest. Thus, in *Bates*, the Court found that the potentially adverse

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[15] See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S., at 566:

"In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both

effect of advertising on professionalism and the quality of legal services was not sufficiently related to a substantial state interest to justify so great an interference with speech.[16] 433 U. S., at 368–372, 375–377.

IV

We now turn to apply these generalizations to the circumstances of this case.[17]

The information lodged against appellant charged him with four separate kinds of violation of Rule 4: listing the areas of his practice in language or in terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and States in which he had been admitted to practice, and mailing announcement cards to persons other than "lawyers, clients, former clients, personal friends, and relatives." Appellant makes no challenge to the constitutionality of the disclaimer requirement,[18] and we pass on to the remaining three infractions.

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inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

As the discussion in the text above indicates, the *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public. See n. 10, *supra*.

[16] We recognize, of course, that the generalizations summarized above do not afford precise guidance to the Bar and the courts. They do represent the general principles that may be distilled from our decisions in this developing area of the law. As they are applied on a case-by-case basis—as in Part IV of this opinion—more specific guidance will be available.

[17] We note that the restrictions placed upon appellant's speech by Rule 4 imposed a restriction only upon commercial speech—"expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, *supra*, at 561. By describing his services and qualifications, appellant's sole purpose was to encourage members of the public to engage him for personal profit.

[18] At oral argument counsel for appellant stated that the constitutionality of the disclaimer requirement was not before the Court, and that "[t]he dis-

Appellant was reprimanded for deviating from the precise listing of areas of practice included in the Advisory Committee addendum to Rule 4. The Advisory Committee does not argue that appellant's listing was misleading. The use of the words "real estate" instead of "property" could scarcely mislead the public. Similarly, the listing of areas such as "contracts" or "securities," that are not found on the Advisory Committee's list in any form, presents no apparent danger of deception. Indeed, as Chief Justice Bardgett explained in dissent, in certain respects appellant's listing is more informative than that provided in the addendum. Because the listing published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of Rule 4 is an invalid restriction upon speech as applied to appellant's advertisements.

Nor has the Advisory Committee identified any substantial interest in a rule that prohibits a lawyer from identifying the jurisdictions in which he is licensed to practice. Such information is not misleading on its face. Appellant was licensed to practice in both Illinois and Missouri. This is factual and highly relevant information particularly in light of the geography of the region in which appellant practiced.

Somewhat more troubling is appellant's listing, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States. See Appendix to this opinion. The emphasis of this relatively uninformative fact is at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court. Yet there is no finding to this effect by the Missouri Supreme Court. There

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ciplinary action was not based on a failure to include the disclaimer." Tr. of Oral Arg. 16.

Although, the Supreme Court of Missouri did not explicitly indicate whether appellant was in violation of each and every one of the charges made against him, that is the implication of the opinion particularly when read in light of the more detailed dissenting opinions.

is nothing in the record to indicate that the inclusion of this information was misleading. Nor does the Rule specifically identify this information as potentially misleading or, for example, place a limitation on type size or require a statement explaining the nature of the Supreme Court Bar.

Finally, appellant was charged with mailing cards announcing the opening of his office to persons other than "lawyers, clients, former clients, personal friends and relatives." Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings.[19] There is no indication in the record of a failed effort to proceed along such a less restrictive path.[20] See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S., at 566 ("we must determine whether the regulation . . . is not more extensive than is necessary to serve" the governmental interest asserted).

In sum, none of the three restrictions in the Rule upon appellant's First Amendment rights can be sustained in the circumstances of this case. There is no finding that appellant's speech was misleading. Nor can we say that it was inher-

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[19] Rule 7.2(b) of the proposed Model Rules of Professional Conduct of the American Bar Association requires that "[a] copy or recording of an advertisement or written communication shall be kept for one year after its dissemination."

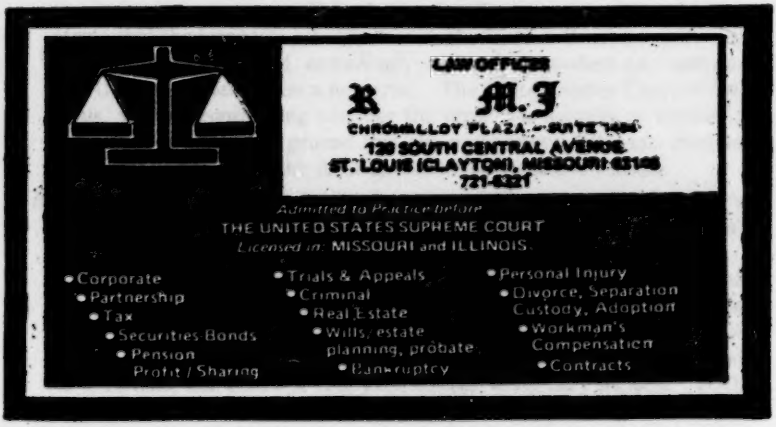
[20] The Advisory Committee argues that a general mailing from a lawyer would be "frightening" to the public unaccustomed to receiving letters from law offices. If indeed this is likely, the lawyer could be required to stamp "This is an Advertisement" on the envelope. See *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 541–542 (1980) (billing insert is not a significant intrusion upon privacy, and privacy interest can be protected through means other than a general prohibition).

ently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.

Accordingly, the judgment of the Supreme Court of Missouri is

Reversed.

APPENDIX TO OPINION OF THE COURT



The advertisement above appeared in the January/February 1978 issue of the West End Word and was the basis for Count I of the Information.

J , R M

- Corporate
- Partnership
- Real Estate
- Tax
- Bankruptcy
- Probate
- Contracts
- Anti-Trust
- Labor
- Criminal
- Personal Injury
- Trials & Appeals
- Securities-Bonds
- Wills, Estate-Planning
- Pension-Profit-Sharing
- Workman's Compensation
- Divorce, Separation
- Custody, Adoption

Admitted To Practice Before
THE UNITED STATES
SUPREME COURT
Licensed In: MISSOURI & ILLINOIS

120 S Central——721-5321

The advertisement above appeared in the yellow pages of the Southwestern Bell Telephone Co. telephone directory for St. Louis Suburban West issued in February 1978, and was the basis for Count II of the Information.

SMITH, CORRECTIONAL SUPERINTENDENT v. PHILLIPS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1082. Argued November 9, 1981—Decided January 25, 1982

After being convicted of murder at a jury trial in a New York court, respondent moved to vacate his conviction on the ground that a juror in his case submitted during the trial an application for employment as an investigator in the District Attorney's Office, and that the prosecuting attorneys, upon being informed of the juror's application, withheld the information from the trial court and respondent's defense counsel until after the trial. At a hearing on the motion before the same judge who had presided at the trial, the motion was denied, the judge finding "beyond a reasonable doubt" that the events giving rise to the motion did not influence the verdict. The Appellate Division of the New York Supreme Court affirmed the conviction, and the New York Court of Appeals denied leave to appeal. Subsequently, respondent sought habeas corpus relief in Federal District Court, alleging that he had been denied due process of law under the Fourteenth Amendment by the conduct of the juror in question. While finding insufficient evidence to demonstrate that the juror was actually biased, the District Court nevertheless imputed bias to him and, accordingly, ordered respondent released unless the State granted him a new trial. The United States Court of Appeals, without considering whether the juror was actually or impliedly biased, affirmed on the ground that the prosecutors' failure to disclose their knowledge about the juror denied respondent due process.

Held: Respondent was not denied due process of law either by the juror's conduct or by the prosecutors' failure to disclose the juror's job application. Pp. 215–221.

(a) Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that held in this case. *Remmer* v. *United States*, 347 U. S. 227. Moreover, this being a federal habeas action, the state trial judge's findings are presumptively correct under 28 U. S. C. § 2254(d). Federal courts in such proceedings must not disturb the state courts' findings unless the federal habeas

court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence. Here, neither the District Court nor the Court of Appeals took issue with the state trial judge's findings. Pp. 215–218.

(b) The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Here, the prosecutors' failure to disclose the juror's job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. Pp. 218–221.

(c) Absent a violation of some right guaranteed respondent by the Fourteenth Amendment, it was error for the lower courts to order a new trial. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. P. 221.

632 F. 2d 1019, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 221. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 224.

Robert M. Pitler argued the cause for petitioner. With him on the briefs were *Mark Dwyer* and *Vivian Berger*.

William M. Kunstler argued the cause for respondent. With him on the briefs was *C. Vernon Mason*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was convicted in November 1974 by a New York state-court jury on two counts of murder and one count of attempted murder. After trial, respondent moved to vacate his conviction pursuant to § 330.30 of the N.Y. Crim. Proc. Law (McKinney 1971) (CPL),[1] and a hearing on his mo-

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**Charles S. Sims, Bruce J. Ennis, Jr.*, and *Richard M. Zuckerman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] Section 330.30 provides in pertinent part:

"At any time after rendition of a verdict of guilty and before sentence,

tion was held pursuant to N. Y. CPL § 330.40.[2] The hearing was held before the justice who presided at respondent's trial, and the motion to vacate was denied by him in an opinion concluding "beyond a reasonable doubt" that the events giving rise to the motion did not influence the verdict. *People* v. *Phillips*, 87 Misc. 2d 613, 614, 630, 384 N. Y. S. 2d 906, 907–908, 918 (1975). The Appellate Division of the Supreme Court, First Division, affirmed the conviction without opinion. 52 App. Div. 2d 758, 384 N. Y. S. 2d 715 (1976). The New York Court of Appeals denied leave to appeal. 39 N. Y. 2d 949, 352 N. E. 2d 894 (1976).

Some four years after the denial of leave to appeal by the Court of Appeals, respondent sought federal habeas relief in the United States District Court for the Southern District of New York on the same ground which had been asserted in the state post-trial hearing. The District Court granted the writ, 485 F. Supp. 1365 (1980), and the United States Court of Appeals for the Second Circuit affirmed on a somewhat different ground. 632 F. 2d 1019 (1980). We granted certiorari to consider the important questions of federal constitutional law in relation to federal habeas proceedings raised by these decisions. 450 U. S. 909 (1981). We now reverse.

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the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

. . . . .

"2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict . . . ."

[2] CPL § 330.40 provides that motions to set aside the verdict under CPL § 330.30 must be decided by hearing if they allege disputed facts sufficient to grant the motion. At the hearing, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion." CPL § 330.40(g).

I

A

Respondent's original motion to vacate his conviction was based on the fact that a juror in respondent's case, one John Dana Smith, submitted during the trial an application for employment as a major felony investigator in the District Attorney's Office.[3] Smith had learned of the position from a friend who had contacts within the office and who had inquired on Smith's behalf without mentioning Smith's name or the fact that he was a juror in respondent's trial. When Smith's application was received by the office, his name was placed on a list of applicants but he was not then contacted and was not known by the office to be a juror in respondent's trial.

During later inquiry about the status of Smith's application, the friend mentioned that Smith was a juror in respondent's case. The attorney to whom the friend disclosed this fact promptly informed his superior, and his superior in turn informed the Assistant District Attorney in charge of hiring investigators. The following day, more than one week before the end of respondent's trial, the assistant informed the two attorneys actually prosecuting respondent that one of the jurors had applied to the office for employment as an investigator.

The two prosecuting attorneys conferred about the application but concluded that, in view of Smith's statements during *voir dire*,[4] there was no need to inform the trial court or de-

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[3] Smith's letter of application was addressed to the District Attorney and stated:

"I understand that a federally funded investigative unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator."

The letter did not mention that Smith was a juror in respondent's trial. Appended to the letter was a resumé containing biographical information about Smith. *People* v. *Phillips*, 87 Misc. 2d 613, 616, 384 N. Y. S. 2d 906, 909 (1975).

[4] The trial judge described the *voir dire* in respondent's case as "ten days of meticulous examination." *Id.*, at 614, 384 N. Y. S. 2d, at 907. During

fense counsel of the application. They did instruct attorneys in the office not to contact Smith until after the trial had ended, and took steps to insure that they would learn no information about Smith that had not been revealed during *voir dire*. When the jury retired to deliberate on November 20th, three alternate jurors were available to substitute for Smith, and neither the trial court nor the defense counsel knew of his application. The jury returned its verdict on November 21st.

The District Attorney first learned of Smith's application on December 4th. Five days later, after an investigation to verify the information, he informed the trial court and defense counsel of the application and the fact that its existence was known to attorneys in his office at some time before the conclusion of the trial. Respondent's attorney then moved to set aside the verdict.

At the hearing before the trial judge, Justice Harold Birns, the prosecuting attorneys explained their decision not to disclose the application and Smith explained that he had seen nothing improper in submitting the application during the trial. Justice Birns, "[f]rom all the evidence adduced" at the hearing, 87 Misc. 2d, at 621, 384 N. Y. S. 2d, at 912, found that "Smith's letter was indeed an indiscretion" but that it "in no way reflected a premature conclusion as to the [respondent's] guilt, or prejudice against the [respondent], or an inability to consider the guilt or innocence of the [respondent]

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his *voir dire*, Smith stated that he intended to pursue a career in law enforcement and that he had applied for employment with a federal drug enforcement agency. He also disclosed that his wife was interested in law enforcement, an interest which arose out of an incident in which she was assaulted and seriously injured. Smith stated that he had previously worked as a store detective for Bloomingdale's Department Store, and, in that capacity, had made several arrests which led to contact with the District Attorney's Office. In response to close inquiry by defense counsel, Smith declared his belief that he could be a fair and impartial juror in the case. This assurance apparently satisfied defense counsel, for Smith was permitted to take his seat among the jurors even though the defense had several unused peremptory challenges.

solely on the evidence." *Id.*, at 627, 384 N. Y. S. 2d, at 915. With respect to the conduct of the prosecuting attorneys, Justice Birns found "no evidence" suggesting "a sinister or dishonest motive with respect to Mr. Smith's letter of application." *Id.*, at 618–619, 384 N. Y. S. 2d, at 910.

B

In his application for federal habeas relief, respondent contended that he had been denied due process of law under the Fourteenth Amendment to the United States Constitution by Smith's conduct. The District Court found insufficient evidence to demonstrate that Smith was actually biased. 485 F. Supp., at 1371. Nonetheless, the court imputed bias to Smith because "the average man in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application." *Id.*, at 1371–1372. Accordingly, the court ordered respondent released unless the State granted him a new trial within 90 days.

The United States Court of Appeals for the Second Circuit affirmed by a divided vote. The court noted that "it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial,'" but the court did not consider whether Smith was actually or impliedly biased. 632 F. 2d, at 1022. Rather, the Court of Appeals affirmed respondent's release simply because "the failure of the prosecutors to disclose their knowledge denied [respondent] due process." *Ibid.* The court explained: "To condone the withholding by the prosecutor of information casting substantial doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the judicial process." *Id.*, at 1023.[5]

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[5] This conclusion was based upon the majority's reading of our decision in *United States* v. *Agurs*, 427 U. S. 97 (1976), a reading by which it concluded that due process is violated when the prosecutor's actions treat a

II

In argument before this Court, respondent has relied primarily on reasoning adopted by the District Court.[6] He contends that a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question. Given the human propensity for self-justification, respondent argues, the law must impute bias to jurors in Smith's position. We disagree.

This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. For example, in *Remmer* v. *United States*, 347 U. S. 227 (1954), a juror in a federal criminal trial was approached by someone offering money in exchange for a favorable verdict. An FBI agent was assigned to investigate the attempted bribe, and the agent's report was reviewed by the trial judge and the prosecutor without disclosure to defense counsel. When they learned of the incident after trial, the defense attorneys moved that the verdict be vacated, alleging that "they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror" had the incident been disclosed to them during trial. *Id.*, at 229.

This Court recognized the seriousness not only of the attempted bribe, which it characterized as "presumptively prejudicial," but also of the undisclosed investigation, which was "bound to impress the juror and [was] very apt to do so

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defendant unfairly or impugn the integrity of the judicial process, even if the defendant is not thereby prejudiced. 632 F. 2d 1019, 1023 (1980). As will be seen in Part III of this opinion, the Court of Appeals misread *Agurs*.

[6] Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977); *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970); *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941).

unduly." *Ibid.* Despite this recognition, and a conviction that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions," *ibid.*, the Court did not require a new trial like that ordered in this case. Rather, the Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to participate." *Id.*, at 230 (emphasis added). In other words, the Court ordered precisely the remedy which was accorded by Justice Birns in this case.

Even before the decision in *Remmer*, this Court confronted allegations of implied juror bias in *Dennis* v. *United States*, 339 U. S. 162 (1950). Dennis was convicted of criminal contempt for failure to appear before the Committee on Un-American Activities of the House of Representatives. He argued that the jury which convicted him, composed primarily of employees of the United States Government, was inherently biased because such employees were subject to Executive Order No. 9835, 3 CFR 627 (1943–1948 Comp.), which provided for their discharge upon reasonable grounds for belief that they were disloyal to the Government. Dennis contended that such employees would not risk the charge of disloyalty or the termination of their employment which might result from a vote for acquittal. The Court rejected this claim of implied bias, noting that Dennis was "free to show the existence of actual bias" but had failed to do so. 339 U. S., at 167. The Court thus concluded: "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.*, at 171–172. See also *Frazier* v. *United States*, 335 U. S. 497 (1948); *United States* v. *Wood*, 299 U. S. 123 (1936).

Our decision last Term in *Chandler* v. *Florida*, 449 U. S. 560 (1981), also treated a claim of implied juror bias. Appellants in *Chandler* were convicted of various theft crimes at a

jury trial which was partially televised under a new Canon of Judicial Ethics promulgated by the Florida Supreme Court. They claimed that the unusual publicity and sensational courtroom atmosphere created by televising the proceedings would influence the jurors and preclude a fair trial. Consistent with our previous decisions, we held that "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly." *Id.*, at 575. Because the appellants did "not [attempt] to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them," we refused to set aside their conviction. *Id.*, at 581.

These cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.[7]

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[7] Respondent correctly notes that determinations made in *Remmer*-type hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. As we said in *Dennis* v. *United States*, 339 U. S. 162 (1950), "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Id.*, at 171. See also *United States* v. *Reid*, 12 How. 361, 366 (1852).

The District Court and the Court of Appeals disregarded this doctrine: they held that a post-trial hearing comporting with our decisions in *Remmer* and other cases prosecuted in the *federal* courts was constitutionally insufficient in a state court under the Due Process Clause of the Fourteenth Amendment. It seems to us to follow "as the night the day" that if in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system.[8]

Of equal importance, this case is a federal habeas action in which Justice Birns' findings are presumptively correct under 28 U. S. C. § 2254 (d). We held last Term that federal courts in such proceedings must not disturb the findings of state courts unless the federal habeas court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence. *Sumner* v. *Mata*, 449 U. S. 539, 551 (1981). Here neither the District Court nor the Court of Appeals took issue with the findings of Justice Birns.

III

As already noted, the Court of Appeals did not rely upon the District Court's imputation of bias. Indeed, it did not even reach the question of juror bias, holding instead that the prosecutors' failure to disclose Smith's application, without more, violated respondent's right to due process of law. Respondent contends that the Court of Appeals thereby cor-

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[8] In connection with his argument that due process was denied by the prosecutors' withholding of Smith's application, respondent notes that had the prosecutors disclosed the application, the trial court could have replaced Smith with an alternate juror. Thus, respondent argues, not only was the prosecutors' action itself a denial of due process, but it also prevented respondent from availing himself of the process available under New York law for correcting juror bias. See N. Y. CPL § 270.35 (McKinney 1971). This argument proves too much. If the hearing and deter-

rectly preserved "the appearance of justice." Brief for Respondent 7. This contention, too, runs contrary to our decided cases.

Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. In *Brady* v. *Maryland*, 373 U. S. 83 (1963), for example, the prosecutor failed to disclose an admission by a participant in the murder which corroborated the defendant's version of the crime. The Court held that a prosecutor's suppression of requested evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. Applying this standard, the Court found the undisclosed admission to be relevant to punishment and thus ordered that the defendant be resentenced. Since the admission was not material to guilt, however, the Court concluded that the trial itself complied with the requirements of due process despite the prosecutor's wrongful suppression.[9] The Court thus recognized that the aim of due process "is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." *Ibid.*

This principle was reaffirmed in *United States* v. *Agurs*, 427 U. S. 97 (1976). There, we held that a prosecutor must disclose unrequested evidence which would create a reasonable doubt of guilt that did not otherwise exist. Consistent

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mination to replace a juror during trial would have adequately protected respondent's right to due process of law, and would not have been rendered impossible by necessary reliance on the juror's own testimony, we see no reason why a post-trial hearing and determination would be any less protective or possible.

[9] As we said of *Brady* in *United States* v. *Agurs*, 427 U. S., at 106: "[T]he confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not on the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process."

with *Brady*, we focused not upon the prosecutor's failure to disclose, but upon the effect of nondisclosure on the trial:

> "Nor do we believe the constitutional obligation [to disclose unrequested information] is measured by the moral culpability, or willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of the evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U. S., at 110 (footnote and citation omitted).[10]

In light of this principle, it is evident that the Court of Appeals erred when it concluded that prosecutorial misconduct alone requires a new trial. We do not condone the conduct of the prosecutors in this case. Nonetheless, as demonstrated in Part II of this opinion, Smith's conduct did not impair his ability to render an impartial verdict. The trial judge expressly so found. 87 Misc. 2d, at 627, 384 N. Y. S. 2d, at 915.

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[10] Even in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, we have required a new trial only when the tainted evidence was material to the case. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972); *Napue* v. *Illinois*, 360 U. S. 264, 272 (1959). This materiality requirement implicitly recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes.

We note, of course, that nothing in this case suggests that the prosecutors' conduct was undertaken in bad faith. As the trial court found, "there is no evidence which to any degree points to a conclusion that any member of the District Attorney's staff, . . . or any court officer, had a sinister or dishonest motive with respect to Mr. Smith's letter of application, or sought to gain thereby an unfair advantage over the defendant." 87 Misc. 2d, at 618–619, 384 N. Y. S. 2d, at 910.

Therefore, the prosecutors' failure to disclose Smith's job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause.

IV

A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution. As we said in *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973):

> "Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial. Even if the Court of Appeals believed, as the respondent contends, that prosecutorial misbehavior would "reign unchecked" unless a new trial was ordered, it had no authority to act as it did. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. *Chandler* v. *Florida*, 449 U. S., at 570, 582–583; *Cupp* v. *Naughten*, *supra*, at 146. No such wrongs occurred here. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion, but write separately to express my view that the opinion does not foreclose the use of "implied bias" in appropriate circumstances.

I

Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an inter-

est in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

Nevertheless, I believe that in most instances a postconviction hearing will be adequate to determine whether a juror is biased. A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.

I am concerned, however, that in certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice. While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.*

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*In the exceptional situations that may require application of an "implied bias" doctrine, the lower federal courts need not be deterred by 28 U. S. C. § 2254(d), which provides that in a federal habeas proceeding

"a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .

. . . . .

II

None of our previous cases preclude the use of the conclusive presumption of implied bias in appropriate circumstances. *Remmer* v. *United States*, 347 U. S. 227 (1954), on which the Court heavily relies, involved not juror misconduct, but the misconduct of a third party who attempted to bribe a juror. Under those circumstances, where the juror has not been accused of misconduct or has no actual stake in the outcome of the trial, and thus has no significant incentive to shield his biases, a postconviction hearing could adequately determine whether or not the juror was biased. In *Dennis* v. *United States*, 339 U. S. 162 (1950), the Court rejected a claim that a juror's employment with the Federal Government was a ground to find implied bias, but did not foreclose a finding of implied bias in more serious situations. Justice Reed, who concurred in the Court's opinion, wrote that he read "the Court's decision to mean that Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case." *Id.*, at 172–173.

Moreover, this Court has used implied bias to reverse a conviction. In *Leonard* v. *United States*, 378 U. S. 544 (1964) (*per curiam*), the Court held that prospective jurors who had heard the trial court announce the defendant's guilty

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"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

. . . . .

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding. . . ."

In those extraordinary situations involving implied bias, state-court proceedings resulting in a finding of "no bias" are by definition inadequate to uncover the bias that the law conclusively presumes.

verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.

III

Because there may be circumstances in which a postconviction hearing will not be adequate to remedy a charge of juror bias, it is important for the Court to retain the doctrine of implied bias to preserve Sixth Amendment rights. I read the Court's opinion as not foreclosing the use of implied bias in appropriate situations, and, therefore, I concur.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Juror John Smith vigorously pursued employment with the office of the prosecutor throughout the course of his jury service in respondent's state criminal trial. The prosecutors learned of Smith's efforts during the trial, but improperly failed to disclose this information until after the jury had returned a verdict of guilty against respondent. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. Thus, it ruled that respondent was not prejudiced, and refused to set aside the conviction. Respondent subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that he was denied his constitutional right to an impartial jury. The District Court ruled that the conviction should be set aside, and the United States Court of Appeals for the Second Circuit affirmed. A majority of this Court now reverses, holding that the post-trial evidentiary hearing provided sufficient protection to respondent's right to an impartial jury. Because I find the majority's analysis completely unpersuasive, I dissent.

I

The right to a trial by an impartial jury lies at the very heart of due process. *Irvin* v. *Dowd*, 366 U. S. 717, 721–722

(1961).[1] "[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt." *Estes* v. *Texas*, 381 U. S. 532, 565 (1965) (Warren, C. J., with whom Douglas and Goldberg, JJ., joined, concurring). That purpose simply cannot be achieved if the jury's deliberations are tainted by bias or prejudice. Fairness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial. Thus, time and time again, in a broad variety of contexts, the Court has adopted strong measures to protect the right to trial by an impartial jury.

The Court has insisted that defendants be given a fair and meaningful opportunity during *voir dire* to determine whether prospective jurors are biased—even if they have no specific prior knowledge of bias. In *Ham* v. *South Carolina*, 409 U. S. 524 (1973), the Court held that a trial court may not deny a Negro defendant the opportunity to question prospective jurors on the subject of racial prejudice when the circumstances suggest the need for such questioning. Even when questions about racial prejudice are not required, a generalized and thorough inquiry into prejudice is necessary. *Ristaino* v. *Ross*, 424 U. S. 589 (1976).

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[1] In *Irvin* v. *Dowd*, the Court stated:

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257; *Tumey* v. *Ohio*, 273 U. S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." 366 U. S., at 722.

The Court has also insisted that the jury be selected from a representative cross-section of the community. Selection procedures that exclude significant portions of the population, and thus increase the risk of bias, are invalid. For example, in *Peters* v. *Kiff*, 407 U. S. 493 (1972), the Court invalidated a selection procedure that resulted in the systematic exclusion of Negroes.[2] Similarly, in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), the Court struck down a state rule excluding women from compulsory jury service.[3] And in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the Court ruled that a defendant in a capital case was denied his right to an impartial jury on the issue of sentence when the trial judge automatically excluded jurors who had scruples against capital punishment.

The right to a jury drawn from a fair cross-section of the community extends even to defendants who are not members of the excluded class. In *Peters* v. *Kiff*, *supra*, the defendant challenging the exclusion of blacks was white; in *Taylor* v. *Louisiana*, *supra*, the defendant challenging the exclusion of women was male. Exclusion is impermissible, not simply because jurors who are not members of the defendant's class may be prejudiced against the defendant, but also because the jury would be deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff*, *supra*, at 503–504 (opinion announcing judgment). See also *Taylor* v. *Louisiana*, *supra*, at 531.[4]

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[2] In *Peters* v. *Kiff*, the opinion announcing the judgment of the Court stated that such procedures were unacceptable even when there is no proof of actual bias. 407 U. S., at 504 (MARSHALL, J., joined by Douglas and Stewart, JJ.). The opinion explained that actual bias is virtually impossible to prove. *Ibid.* Thus, it is necessary to "decide on principle which side shall suffer the consequences of unavoidable uncertainty." *Ibid.* Given the great potential for harm, and the importance of the right to an impartial jury, doubts should be resolved in favor of the defendant. *Ibid.*

[3] See also *Ballard* v. *United States*, 329 U. S. 187 (1946).

[4] In *Taylor* v. *Lousiana*, the Court stated that "'a flavor, a distinct quality is lost if either sex is excluded,'" and that "'exclusion of one may indeed

The Court has also acted to protect defendants from the possibility that jurors might be prejudiced by extensive pretrial publicity. In *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), it ruled that the trial court should have granted a request for a change in venue, when the entire community had seen the defendant confess to the crime in a police interrogation broadcast on television. The Court did not require a particularized showing that the confession actually prejudiced the jurors against the defendant. Later, in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), the Court reversed a conviction where widespread and inflammatory publicity had preceded the trial, even though each of the jurors had insisted that he would remain impartial.

Similarly, the Court has stated that defendants must be protected from the impact on jurors of publicity during trial. Although an absolute constitutional ban on news coverage of trials by the print or broadcast media cannot be justified, the defendant must be given an opportunity to demonstrate that the media's coverage of his case compromised the ability of the particular jury that heard the case to weigh the evidence fairly. *Chandler* v. *Florida*, 449 U. S. 560, 575 (1981); see also *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 563–565 (1976); *Estes* v. *Texas*, *supra*.

The Court has guarded against other conduct by third parties that might affect the jury's impartiality. In *Remmer* v. *United States*, 347 U. S. 227 (1954), it ruled that any communication with a juror during a trial about the matter pending before the jury "is, for obvious reasons, deemed presumptively prejudicial." *Id.*, at 229. Although this presumption is not conclusive, "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Ibid.* See also *Turner* v. *Louisiana*, 379 U. S. 466 (1965) (jury could not try a case after it had been placed

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make the jury less representative of the community than would be true if an economic or racial group were excluded.'" 419 U. S., at 532 (quoting *Ballard* v. *United States*, *supra*, at 194).

in protective custody of deputy sheriffs who had been the principal prosecution witnesses, even though jurors might not have been influenced by the association).

To summarize, the Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial. In this case, where there was evidence that juror Smith had a serious conflict of interest, and where that conflict would inevitably distort his perspective on the case, the majority nevertheless holds that the juror's simple assertion, after the verdict, that he was not biased sufficiently protects respondent's right to trial by an impartial jury. This holding is utterly inconsistent with the Court's historical recognition of this "most priceless" right. *Irvin, supra*, at 721.

II

A

The majority concedes the importance of the right to a trial by an impartial jury. It claims, however, that respondent's right was adequately protected here, because the state trial judge conducted a postverdict evidentiary hearing and concluded that Smith was not actually biased. According to the majority, the Constitution requires only that the defendant be given an opportunity to prove actual bias. Indeed, it would apparently insist on proof of actual bias, not only when a juror had applied for employment with the prosecutor's office, but also when the juror was already employed in the prosecutor's office, or when he served as a prosecuting attorney. The majority relies on the premise that an evidentiary hearing provides adequate assurance that prejudice does not exist. This premise, however, ignores basic human psychology. In cases like this one, an evidentiary hearing can never adequately protect the right to an impartial jury.

Despite the majority's suggestions to the contrary, juror Smith was not a passive, indifferent job applicant.[5] He began pursuing employment as an investigator in the Office of the District Attorney on September 23, 1974, the same day he was sworn in. He asked a friend, Criminal Court Officer Rudolph Fontaine, to determine the proper method of applying for employment. Once he had completed his application, he gave it to Fontaine for hand delivery to the District Attorney's Office, apparently because he assumed that the court officer had a personal contact in the office. In addition, after the application had been filed, he met regularly with Fontaine and Jury Warden Mario Piazza in order to determine the progress of his application. On November 21, 1974, the jury returned a verdict of guilt and the trial ended. The very next day, Smith phoned the District Attorney's Office to check on the status of his application. When he was unable to get in touch with anyone who knew about his application, he asked his former supervisor to make inquiries in his behalf.

When a juror vigorously and actively pursues employment in the prosecutor's office throughout the course of a trial, the probability of bias is substantial. This bias may be conscious, part of a calculated effort to obtain a job. The juror may believe that his application will be viewed favorably if the defendant is found guilty. Thus, he may decide to vote for a verdict of guilty regardless of the evidence, and he may attempt to persuade the other jurors that acquittal is not justified. There is also a very serious danger of unconscious bias. Only individuals of extraordinary character would not be affected in some way by their interest in future employ-

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[5] The majority notes that during *voir dire*, the defense chose not to challenge Smith, even though he had stated that he had a strong interest in a law enforcement career. *Ante*, at 212–213, n. 4. However, since the defendant was himself a law enforcement officer, such an interest would not necessarily have been unfavorable to the defense. I think it clear that a general career interest in law enforcement is very different from an application for a job with the prosecutor in a particular case.

ment. Subconsciously, the juror may tend to favor the prosecutor simply because he feels some affinity with his potential employer. Indeed, the juror may make a sincere effort to remain impartial, and yet be unable to do so.

Not only is the probability of bias high, it is also unlikely that a post-trial evidentiary hearing would reveal this bias. As the Court of Appeals stated, given the human propensity for self-justification, it is very difficult "to learn from a juror's own testimony after the verdict whether he was in fact 'impartial.'" 632 F. 2d 1019, 1022 (CA2 1980). Certainly, a juror is unlikely to admit that he had consciously plotted against the defendant during the course of the trial. Such an admission would have subjected juror Smith to criminal sanctions.[6] It would also have damaged his prospects for a career in law enforcement. A law enforcement agency is unlikely to hire an investigator whose credibility could always be impeached by an admission that he had disregarded his juror's oath in a criminal trial.

Even when the bias was not part of an affirmative course of misconduct, however, but was unconscious, a juror is unlikely to admit that he had been unable to weigh the evidence fairly. If he honestly believes that he remained impartial throughout the trial, no amount of questioning will lead to an admission. Rather, the juror will vehemently deny any accusations of bias.[7]

In the past, the Court has recognized that the question whether a juror is prejudiced poses substantial problems of proof.

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[6] If Smith were found to have engaged in a course of conscious misconduct, he might have been prosecuted under N. Y. Penal Law § 195.05 (obstructing governmental administration); § 215.20 (bribe receiving by a juror); or § 215.20 (misconduct by a juror) (McKinney 1975). He might also have been found guilty of criminal contempt. See § 215.20.

[7] The petitioner emphasizes that during the evidentiary hearing, the trial judge had an opportunity to observe the juror's demeanor. Thus, argues the petitioner, even where the juror denies that he was biased, the trial judge will be able to measure the juror's integrity, and decide whether

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence." *Crawford* v. *United States*, 212 U. S. 183, 196 (1909).

Similarly, in *Irvin* v. *Dowd*, 366 U. S., at 728, the Court stated that although a juror may be sincere when he says that he was fair and impartial to the defendant, the "psychological impact requiring such a declaration before one's fellows is often its father." And in *Peters* v. *Kiff*, the opinion announcing the judgment stated: "It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce." 407 U. S., at 504 (MARSHALL, J., joined by Douglas and Stewart, JJ.).

I believe that in cases like this one, where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed biased as a matter of law. Specifically, where a juror pursues employment with the office of the prosecutor, under circumstances highly suggestive of misconduct or conflict of interest, bias should be "implied," and he should be automatically disqualified, despite the absence of proof of actual bias. If the juror's efforts to secure employment are not revealed until after the trial, the conviction must be set aside.[8] The right to a trial by an impartial

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to credit his claim that he fairly weighed the evidence. It may be true that the opportunity to observe the juror will be of assistance in some cases. However, it will be of little value where the juror honestly but falsely believes that he was impartial.

[8] Although the concurring opinion would not use an implied-bias rule in this case, it agrees that in some circumstances, such a rule is appropriate. It suggests, for example, that a finding of implied bias might be justified where "the juror is an actual employee of the prosecuting agency." *Ante*,

jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality.

B

Adoption of a conclusive presumption of bias in these limited circumstances would not be without precedent; such presumptions of juror bias have ancient historical roots. At English common law, prospective jurors could be challenged not only when the defendant could prove actual bias, but also when the circumstances were such that bias could be implied.[9] Blackstone states that exclusion of a prospective juror for implied bias is appropriate when it is shown:

> "that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him." 3 W. Blackstone, Commentaries 480–481 (W. Hammond ed. 1890).

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at 222. In my view, it is impossible to draw meaningful distinction between a juror who is an actual employee of the prosecuting agency, and a juror who has applied for employment with that agency. Indeed, there may be a greater danger of bias where the juror is pursuing a job. An individual who has not yet obtained employment and who believes that his job prospects are at stake may be very anxious to please.

[9] In *United States* v. *Wood*, 299 U. S. 123 (1936), the Court described the common law regarding challenges to prospective jurors as follows:

"Challenges at common law were to the array, that is, with respect to the constitution of the panel, or to the polls, for disqualification of a juror. Challenges to the polls were either 'principal' or 'to the favor,' the former being upon grounds of absolute disqualification, the latter for actual bias." *Id.*, at 134–135.

See also 3 W. Blackstone, Commentaries 480–481 (W. Hammond ed. 1890).

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land . . . ; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 S. Thorne, Bracton on the Laws and Customs of England 405 (1968).

The States also employ rules of implied bias. Most jurisdictions have statutes that set forth conduct or status that will automatically disqualify prospective jurors, without regard to whether that person is actually biased. These statutes frequently exclude persons related to the prosecution, defense counsel, a witness, or the defendant.[10] The New York statute, which would have been applied here if juror Smith's intention to apply for a job had come to light during *voir dire*, is especially broad; it disqualifies any person who has a relationship to a party or witness to the action which is likely to preclude that person from rendering an impartial verdict. N. Y. Crim. Proc. Law § 270.20(1)(c) (McKinney 1971). This provision, added to the statute in 1971, calls for the application of an "average person" standard and does not require proof that the particular potential juror would be biased. See, *e. g.*, *People* v. *Provenzano*, 50 N. Y. 2d 420, 424, 407 N. E. 2d 408, 410 (1980).[11]

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[10] See, *e. g.*, Cal. Penal Code Ann. § 1074 (West Supp. 1981); Idaho Code § 19-2020 (1979); Minn. Stat. Rule Crim. Proc. 26.02(5) (1980); N. Y. Crim. Proc. Law § 270.20(1) (McKinney 1971); N. D. Cent. Code § 29-17-36 (Supp. 1981); Okla. Stat., Tit. 22, § 660 (1971); Ore. Rev. Stat. § 136.220 (1979); S. D. Comp. Laws Ann. § 23A-20-13 (1979); Utah Code Ann. § 77-35-18(e) (1980).

[11] At the time of *voir dire*, Smith had not yet applied for a job with the office of the District Attorney. It seems likely, however, that if he had filed an application at this point, and this fact came to light during *voir dire*, he would have been automatically disqualified pursuant to N. Y. Crim. Proc. Law § 270.20(1)(c) (McKinney 1971).

Some state courts have also permitted challenges for implied bias on a case-by-case basis.[12] In fact, at least one court has presumed bias in circumstances very similar to those presented here. In *Haak* v. *State*, —— Ind. ——, 417 N. E. 2d 321 (1981), the Indiana Supreme Court held that a woman whose husband was offered a position on the prosecutor's staff on the day that she was selected as a juror in a rape case was impliedly biased. The court stated that the juror's bias could not be "avoided or dissolved by admonitions from the court or by the juror's assertion that she believed she could judge the case impartially." *Id.*, at ——, 417 N. E. 2d, at 326. It was unrealistic to "expect a juror in this situation to act with an even hand toward both parties." *Ibid.* Thus, the trial judge erred in refusing to grant defendant's motion for a mistrial.[13] See also *Tableporter* v. *Urist*, 157 Misc. 347, 283 N. Y. S. 350 (Mun. Ct. 1935) (conviction set aside where juror's son applied to defendant for a job).

Of course, the fact that many States employ rules of implied bias in situations similar to those presented here does not necessarily imply that such rules are constitutionally mandated.[14] The widespread state practice does, however,

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[12] See, *e. g.*, *State* v. *West*, 157 W. Va. 209, 210, 200 S. E. 2d 859, 861 (1973) (reversible error where trial court denies challenge for cause to juror who is employee of prosecutorial agency); *State* v. *Kokoszka*, 123 Conn. 161, 163, 193 A. 210, 211 (1937); *State* v. *Howard*, 17 N. H. 171 (1845), overruled on other grounds, *Shulinsky* v. *Boston & M. R. Co.*, 83 N. H. 86, 89, 139 A. 189, 191 (1927).

[13] Cf. *Block* v. *State*, 100 Ind. 357 (1885) (juror who is deputy prosecutor should be disqualified); *Barnes* v. *State*, 263 Ind. 320, 330 N. E. 2d 743 (1975) (juror whose relative is a member of the prosecutor's staff should be disqualified).

[14] A decision to endorse rules of implied bias would not lead to the constitutionalization of a wide variety of state disqualification rules. As I stated above, I believe that an implied-bias rule is constitutionally mandated only when the probability of bias is particularly great, and when an evidentiary hearing is particularly unlikely to reveal that bias. Measured against this standard, many state rules would not be constitutionally required.

support that conclusion. The States would not adopt such rules at the expense of their strong interest in efficiently procuring convictions if they were not committed to safeguarding the right to trial by an impartial jury, and if they did not believe that this right was seriously threatened.

C

In concluding that an implied-bias rule is not appropriate, and that a post-trial evidentiary hearing is an adequate remedy, the majority relies heavily on this Court's decision in *Remmer* v. *United States*, 347 U. S. 227 (1954). The defendant in that case was being tried for income tax evasion. During the course of the trial, an unnamed person attempted to bribe a juror. The juror reported this incident to the trial judge, who asked the Federal Bureau of Investigation (FBI) to conduct an investigation. After interviewing the juror, the FBI concluded that the bribery attempt had been made "in jest," *id.*, at 228, and had not had a prejudicial impact. The trial judge decided not to take any action. The defense learned of the incident after the jury returned a verdict of guilty. It moved for a new trial, complaining that the bribery attempt and the FBI investigation were likely to have influenced the jury's deliberations. The Court held that any private communication with a juror during trial about the matter pending before the jury is presumptively prejudicial. It stated, however, that this presumption is not conclusive, and that the Government should be given an opportunity to show that the contact was harmless. The Court then remanded the case to the District Court with directions to hold a hearing to determine whether the incident was harmful, and if so, to grant a new trial.

According to the majority, *Remmer* establishes that a postverdict inquiry will always be the appropriate remedy where claims of jury prejudice are raised after the conclusion of the trial. The holding of *Remmer* is not nearly so broad, however. The Court did not purport to address instances of

serious juror misconduct in which bias could be implied. An examination of the facts of that case reveals that the danger of bias was much less substantial in that case than in this one. The defendant claimed only that the jury might have been influenced by the unsuccessful bribery attempt and the FBI investigation. There were no allegations that the jurors themselves were guilty of misconduct. Moreover, even if the jurors were influenced by the bribery attempt made "in jest" or the contact with the FBI, an evidentiary hearing was more likely to reveal that impact. A juror will be less reluctant to admit that he was disturbed or upset by the misconduct of a third party, than to admit that he himself acted improperly.

The majority also relies upon this Court's decisions in *Dennis* v. *United States*, 339 U. S. 162 (1950); *Frazier* v. *United States*, 335 U. S. 497 (1948); and *United States* v. *Wood*, 299 U. S. 123 (1936).[15] In these cases, the Court indicated that the fact that a juror was employed by the Federal Government did not by itself require a finding of implied bias in cases in which the Government was a party.[16] The Court was not persuaded by "vague conjectures" that Government employees are "peculiarly vulnerable" to a "miasma of fear," or are "so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors." *Dennis*, *supra*, at 172. However,

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[15] It further relies on this Court's decision in *Chandler* v. *Florida*, 449 U. S. 560 (1981), which held that the appropriate safeguard against the possiblity that news coverage of a defendant's trial influenced the jurors is the defendant's opportunity to show that the coverage compromised the ability of the jury to adjudicate fairly. However, that case certainly does not hold that automatic disqualification rules would never be appropriate.

[16] *United States* v. *Wood*, upheld the constitutionality of a District of Columbia statute that permitted Federal Government employees to serve on juries in which the United States was a party. *Dennis* v. *United States*, ruled that Government employees need not be excused from serving as jurors in the prosecution of the General Secretary of the Communist Party, U. S. A. *Frazier* v. *United States*, refused to uphold a challenge to a jury that consisted entirely of Government employees.

these cases do not hold that an implied-bias rule would never be appropriate. In all three decisions the Court stressed that trial judges would retain power to safeguard the interests of the defendant where circumstances suggest a real danger of bias. This power surely includes the application of a *per se* rule where necessary. *Dennis, supra,* at 168; *Frazier, supra,* at 511; *Wood, supra,* at 150.[17]

Indeed, in *Leonard* v. *United States,* 378 U. S. 544 (1964) (*per curiam*), this Court explicitly endorsed the application of an implied-bias rule.[18] The petitioner in that case was con-

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[17] There is language in each of the three opinions that might be interpreted to suggest that a hearing to determine actual bias will always be a sufficient remedy. See, *e. g., Dennis* v. *United States,* 339 U. S., at 171–172 ("[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury"); *Frazier* v. *United States,* 335 U. S., at 510 (in ordinary circumstances jurors are subject to challenge only for "actual bias"); *United States* v. *Wood,* 299 U. S., at 150 (courts should conduct full inquiry into "actual bias" where circumstances suggest such inquiry is appropriate). In these cases, however, the Court regarded "actual bias" as including "not only prejudice in the subjective sense but also such as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise.' " *Frazier* v. *United States, supra,* at 510–511, n. 19 (quoting *United States* v. *Wood, supra,* at 133–134).

[18] Cf. *Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927) (judge with financial interest in outcome is disqualified from hearing case, even though he might not actually have been affected by financial interest, because average man in that position would be subject to "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused"); *In re Murchison,* 349 U. S. 133 (1955) (judge may not conduct grand jury inquiry and then adjudicate charges against defendant because his impartiality might reasonably be questioned); *Peters* v. *Kiff,* 407 U. S. 493 (1972) (opinion of MARSHALL, J., joined by Douglas and Stewart, JJ.) (possibility that jury selection procedures that exclude Negroes might result in bias against defendant is sufficient to justify invalidation of those procedures); see also n. 2, *supra.*

It is relevant to note that if a judge had an application pending with a litigant while he was trying a case, he would be presumed biased, no matter how vigorously he protested that he was actually impartial. See *Tumey, supra; Murchison, supra.*

victed in separate trials of forging Government checks and of transporting forged instruments in interstate commerce. The two cases were tried in succession. The jury in the first case announced its guilty verdict in open court in the presence of the jury panel from which the jurors who were to try the second case were selected. Petitioner objected, but the objection was overruled. This Court reversed, holding that prospective jurors who have sat in the courtroom and heard a verdict returned against an individual immediately prior to that individual's trial on a similar charge should be automatically disqualified.[19]

In short, this Court's cases do not establish that an automatic disqualification rule is never appropriate. To the contrary, *Leonard* reveals that the Court has employed such a rule in those limited circumstances presenting an unusually high probability that a juror is biased and a similarly high probability that a hearing will not reveal that bias.

D

The majority also emphasizes that federal courts exercising habeas corpus jurisdiction must ordinarily defer to state-court findings of fact. It points to 28 U. S. C. § 2254(d),

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[19] A number of lower federal courts have also suggested that implied-bias rules may be appropriate in some circumstances. See, *e. g.*, *McCoy* v. *Goldston*, 652 F. 2d 654 (CA6 1981) (bias should be implied and new trial granted where juror conceals information that would have resulted in disqualification for cause); *United States* v. *Allsup*, 566 F. 2d 68, 71–72 (CA9 1977) (new trial should be granted in robbery trial where two of jurors worked for bank that had been robbed); *Deschenes* v. *United States*, 224 F. 2d 688 (CA10 1955) (dictum) (in some circumstances prejudice must be presumed and court, as matter of law, must grant a new trial); *Cavness* v. *United States*, 187 F. 2d 719 (CA5 1951) (dictum) (same). See also *United States* v. *Kyle*, 152 U. S. App. D. C. 141, 145, 469 F. 2d 547, 551 (1972) (Bazelon, J., dissenting) (defendant claims that juror who had been castigated by judge when serving as a juror in another trial would be prejudiced against him; "[a] Procrustean demand for a showing of prejudice is ill-suited to a case where the very integrity of the judicial process is at stake and where the inability to demonstrate prejudice offers little assur-

which provides that state-court factfinding should be presumed correct. Of course, federal courts have limited power of review in habeas corpus proceedings. I think it clear, however, that deference is not appropriate under the circumstances of this case.

As I have already explained, I do not believe that it was possible for the state court to determine, on the basis of an evidentiary hearing, whether Smith was biased. The state factfinding was inherently unreliable. Section 2254(d) recognizes that deference is not appropriate in such cases. It provides that the presumption in favor of state factfinding may be overcome when "the applicant did not receive a full, fair, and adequate hearing in the state court proceeding," or when "he was otherwise denied due process of law." §§ 2254(d)(6), (7). The evidentiary hearing conducted here was not fair and adequate. Furthermore, because the hearing could not protect sufficiently the right to an impartial jury, respondent was denied due process. Under the circumstances, § 2254(d) does not bar review of the state-court decision.

III

I would also affirm the decision of the Court of Appeals on an alternative ground. Respondent was prejudiced by the

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ance that prejudice did not exist"), cert. denied, 409 U. S. 1117 (1973). But see *United States* v. *Brown*, 644 F. 2d 101, 104–105 (CA2 1981) (court refuses to "'create a set of unreasonably constricting presumptions that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where . . . there is no showing of actual bias or prejudice'") (quoting *Mikus* v. *United States*, 433 F. 2d 719, 724 (CA2 1970)).

Almost 200 years ago, in *United States* v. *Burr*, 25 Fed. Cas. 49, 50 (No. 14,692g) (CC Va. 1807), Chief Justice Marshall indicated that he believed implied-bias rules were appropriate in some circumstances. A person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice, because in general persons in a similar situation would feel prejudice." *Ibid.*

prosecutors' failure to disclose during the trial their knowledge that juror Smith had applied for a job with the Office of the District Attorney. If the prosecutors had informed the court in a timely fashion, an alternate juror would almost certainly have been selected, thus ending any danger of bias.

The prosecutors' conduct in withholding the information was clearly improper. At the evidentiary hearing, they claimed that they failed to disclose the fact that Smith had applied for a job with their office in part because they were caught up in preparations for the final stages of trial. This explanation is not convincing. At the close of the evidence, the prosecutors revealed that another juror, Bethel, had been arrested on a narcotics charge prior to trial and had agreed to cooperate with the District Attorney's Office in exchange for dismissal of the charges. After this disclosure, and an *in camera* hearing, the parties consented to the discharge of this juror, and his replacement by one of four alternates. The fact that the prosecutors were willing to disclose information concerning Bethel suggests that they failed to reveal Smith's conduct, not because of time pressures, but because they believed that Smith's presence on the jury would be valuable.[20] Even the petitioner now concedes that the prosecutors should have informed the trial judge and the defense as soon as they learned of Smith's application, and that their failure to do so was inexcusable.

The majority argues that prosecutorial misconduct, by itself, is not sufficient to justify reversal of a conviction in ha-

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[20] The state trial judge, the District Court, and the Court of Appeals all condemned the prosecuting attorneys' conduct. The trial judge stated that the failure to inform the court and defense counsel of Smith's application was "a serious error in judgment," *People* v. *Phillips*, 87 Misc. 2d 613, 628, 384 N. Y. S. 2d 906, 916 (1975), and "unique misjudgment," *id.*, at 631, 384 N. Y. S. 2d, at 918. See also 485 F. Supp. 1365, 1369–1370 (SDNY 1980); 632 F. 2d 1019, 1023 (CA2 1980).

beas corpus proceedings.[21] It relies primarily on this Court's decisions in *United States* v. *Agurs*, 427 U. S. 97, 110, 112 (1976), and *Brady* v. *Maryland*, 373 U. S. 83, 87, 92 (1963), which suggest that the constitutional obligation to disclose material evidence is not measured simply by the moral culpability of the prosecutor, and that relief is ordinarily appropriate only when the defendant was prejudiced by the prosecutor's actions.[22] Even if the majority is correct in holding that prejudice is also required where the prosecutor fails to disclose information suggesting that a juror might be biased, I think it clear that respondent was prejudiced here. If the fact that Smith had applied for a job had been promptly disclosed, respondent's jury trial right could have been protected.

If disclosure had been made during trial, the parties might simply have agreed that Smith should be replaced with one of

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[21] The majority also points out that federal courts do not have supervisory power over state courts, and that as a result, habeas corpus review of a state-court conviction based on prosecutorial misconduct must focus on possible due process violations. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974).

[22] Depending on the nature of the prosecutor's misconduct, the prejudice requirement may be easily satisfied. If the prosecutor knowingly presents perjured testimony, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States* v. *Agurs*, 427 U. S., at 103–104. After all, presentation of perjured testimony is "a corruption of the truth-seeking function of the trial process." *Id.*, at 104. Where the prosecutor fails to comply with a request for specific evidence, and if there is a substantial basis for claiming that the evidence was material, the failure to disclose is rarely excused. *Brady* v. *Maryland*, 373 U. S., at 87. The defendant faces a substantial burden only if the prosecutor fails to disclose material evidence, when no specific request for the evidence was ever made. In this circumstance, the verdict may be set aside if the evidence creates a reasonable doubt that did not otherwise exist. *United States* v. *Agurs*, *supra*, at 112.

the alternates. Such an agreement was reached with respect to juror Bethel. The trial judge might also have exercised his power under N. Y. Crim. Proc. Law § 270.35 (McKinney 1971), which provides that "[i]f at any time after the trial jury has been sworn and before its rendition of a verdict the court is satisfied, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve . . . , or that a juror has engaged in misconduct of a substantial nature . . . , the court may, if an alternative juror . . . is available for service, discharge such trial juror and order that he be replaced."[23] Both of these simple remedies would have eliminated the possibility of juror bias.

At the very least, as the trial judge himself stated, if disclosure had been made during trial he would have conducted a hearing to determine whether Smith had engaged in misconduct or whether he was actually biased. As I have already suggested, I have serious doubts whether an evidentiary hearing of this nature could ever be reliable. However, a hearing during trial is far more likely to reveal evidence of bias than a post-trial hearing. The pressures on a juror in Smith's position would be much less substantial. After trial, he would have to admit that he had been unable to obey his oath as a juror, and that he had been unfair in evaluating the evidence. During trial, on the other hand, he would only have to state that his pending application for a job with the prosecutor's office might affect his ability to weigh the evidence fairly.

Just as important, the pressures on the judge are much less substantial where the hearing is held during the course of a trial. During trial, if the judge finds that a juror is biased, he can simply replace the juror with an alternate.

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[23] The failure to disclose possible juror bias can be analogized to a prosecutor's knowing use of perjured testimony. Both forms of prosecutorial misconduct result in corruption of the truth-seeking function of the trial process. See *United States* v. *Agurs*, *supra*, at 105; see also n. 20, *supra*. Thus, in this context also, the conviction should be set aside if there is any

After trial, if actual bias is found, the only remedy is to set aside the conviction and begin a new trial. Any judge would hesitate before taking such action. The pressures must have been particularly great in this case. Respondent was first tried in 1972. When the jury was unable to reach a verdict, a mistrial was declared. Respondent's second trial did not begin until two years later. The second trial lasted nine weeks, and 44 witnesses were called to testify. Under these circumstances, where a third trial would have led to even more expense and delay, a judge would be reluctant to set aside the conviction.

In short, if the prosecutors had not withheld the information about Smith's job application, it is quite likely that Smith would have been excused and replaced with an alternate. If a replacement had been made, the substantial danger of juror bias would have been eliminated. Thus, under the circumstances, respondent was prejudiced by the prosecutors' misconduct. Given the existence of this prejudice, and the fundamental importance of the right to an impartial jury, I would set aside the conviction.

The limited power of federal courts in habeas corpus proceedings poses no obstacle to this conclusion. Although the trial judge found during a post-trial hearing that Smith was not actually biased, deference to state-court factfinding is not required where the evidentiary hearing on which the factfinding is based is inherently unreliable. See *supra*, at 238–239. The prosecutors' misconduct in this case deprived respondent of a hearing during trial, and of the opportunity to substitute an alternate juror. Where the prosecutors' conduct acted to deprive respondent of this alternative, the State cannot, consistent with due process, relegate respondent's right to an impartial jury to a belated, inadequate post-trial hearing.

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reasonable likelihood that the material omission could have affected the judgment of the jury. See 427 U. S., at 103–104; n. 20, *supra*. Here, clearly, such a reasonable likelihood does exist.

IV

The majority adopts a completely unrealistic view of the efficacy of a post-trial hearing, and thus fails to accord any meaningful protection to the right to an impartial jury, one of the most valuable rights possessed by criminal defendants. I would affirm the judgment of the Court of Appeals on the ground that a juror who applies for employment with the office of the prosecutor and vigorously pursues that employment throughout the course of the trial is impliedly biased. I would also affirm on the alternative ground that the prosecutors improperly failed to disclose during trial that the juror applied for a job, thereby prejudicing respondent by depriving him of the opportunity to substitute an unbiased alternate juror.

The majority concedes that due process means an unbiased jury, "capable and willing to decide the case solely on the evidence." *Ante*, at 217. All respondent has asked for is the opportunity to be tried by such a jury. If the prosecutors had taken the simple step of informing the trial judge that Smith had applied for employment with their office, Smith could have been replaced, and respondent would have received an opportunity to be tried by an impartial jury. Because the prosecutors intentionally failed to do so, however, a juror who was almost certainly prejudiced against respondent participated in the deliberations. If due process really does mean a full and fair opportunity to be tried by an unbiased jury, "capable and willing to decide the case solely on the evidence"—then in this case, due process has been denied.

Reporter's Note

The next page is purposely numbered 901. The numbers between 244 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JANUARY 15 THROUGH FEBRUARY 19, 1982

JANUARY 15, 1982

Miscellaneous Order

No. 81-1282. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL. D. C. Idaho; and

No. 81-1283. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL. C. A. 9th Cir. The parties are invited to file on or before Wednesday, January 20, 1982, responses to the suggestion of the Solicitor General that the Court vacate the judgment of the United States District Court for the District of Idaho on grounds of lack of ripeness, without further briefing or oral argument.

JANUARY 18, 1982

Appeals Dismissed

No. 80-1575. CRAIG ET AL. *v.* BICKEL ET AL.; and

No. 80-1624. LARSEN ET AL. *v.* VAN SLOOTEN. Appeals from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 410 Mich. 21, 299 N. W. 2d 704.

No. 81-600. HERNANDEZ *v.* CITY OF LAFAYETTE, LOUISIANA, ET AL. Appeal from Ct. App. La., 3d Cir., dismissed for want of substantial federal question. Reported below: 399 So. 2d 1179.

No. 81-961. VIGILANT INSURANCE CO. *v.* PITONIAK. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 104 Mich. App. 718, 305 N. W. 2d 305.

No. 81-1078. GELLER *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 663 F. 2d 1067.

Certiorari Granted—Vacated and Remanded

No. 80-1498. NATIONAL LABOR RELATIONS BOARD *v.* H & D, INC. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U. S. 404 (1982). Reported below: 665 F. 2d 257.

Miscellaneous Orders

No. A-570. WASHBURN *v.* WASHBURN. Super. Ct. D. C. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A-583. MELIA *v.* UNITED STATES ET AL. C. A. 2d Cir. Application for recall and stay of mandate, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-617. UNITED STATES *v.* UNDETERMINED QUANTITIES OF ARTICLES OF DRUGS. Application for stay of the orders of the United States District Court for the Southern District of Florida, Case Nos. 80-6400-Civ-JLK and 80-6407-Civ-JLK, entered November 13, 1981, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending final disposition of the appeal to the United States Court of Appeals for the Eleventh Circuit.

No. D-255. IN RE DISBARMENT OF HOLMAN. It is ordered that James R. Holman, of Tempe, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-256. IN RE DISBARMENT OF DEFRANCIS. It is ordered that Frank D. DeFrancis, of Dayton, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80-1190. PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.; and

No. 80-1193. UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL. *v.* SWINT ET AL. C. A. 5th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Pullman-Standard to reconsider order denying motion for divided argument denied.

No. 80-1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 454 U. S. 812];

No. 80-2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812]; and

No. 80-2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812.] Motions of Council on Administrative Law of the Federal Bar Association, American Bar Association, and Philip Burton et al. for leave to file briefs as *amici curiae* granted.

No. 80-2043. BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, ET AL. *v.* PICO, BY HIS NEXT FRIEND, PICO, ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 891.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 80-2147. CONNECTICUT ET AL. *v.* TEAL ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 813.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80-2150. FINNEGAN ET AL. *v.* LEU ET AL. C. A. 6th Cir. [Certiorari granted, 454 U. S. 813.] Motions of American Federation of Labor and Congress of Industrial Organizations and National Labor Law Center of the National Lawyers Guild for leave to file briefs as *amici curiae* granted.

No. 81-31. CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.;

No. 81-228. UNITED STATES ET AL. *v.* GRACE BRETHREN CHURCH ET AL.; and

No. 81-455. GRACE BRETHREN CHURCH ET AL. *v.* UNITED STATES ET AL. D. C. C. D. Cal. [Probable jurisdiction postponed, 454 U. S. 961.] Motion of the Solicitor General for divided argument granted.

No. 81-38. CRAWFORD ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 454 U. S. 892.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and additional time for oral argument is granted to be allotted as follows: Counsel for respondent, 20 minutes; and the Solicitor General, 15 minutes. Petitioners also allotted an additional five minutes for oral argument. Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81-55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 81-202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1030.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. Motion of petitioners for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 81-244. LORETTO *v.* TELEPROMPTER MANHATTAN CATV CORP. ET AL. Ct. App. N. Y. [Probable jurisdiction noted, 454 U. S. 938.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81-280. GENERAL BUILDING CONTRACTORS ASSN., INC. *v.* PENNSYLVANIA ET AL.;

No. 81-330. UNITED ENGINEERS & CONSTRUCTORS, INC. *v.* PENNSYLVANIA ET AL.;

No. 81-331. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* PENNSYLVANIA ET AL.;

No. 81-332. GLASGOW, INC. *v.* PENNSYLVANIA ET AL.; and

No. 81-333. BECHTEL POWER CORP. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 454 U. S. 939.] Motion of petitioner in No. 81-280 for divided argument and for additional time for oral argument granted, and an additional 15 minutes allotted for oral argument to be divided as follows: Counsel for petitioners in Nos. 81-280 and 81-331, 20 minutes; and counsel for petitioners in Nos. 81-330, 81-332, and 81-333, 25 minutes. Respondents also allotted an additional 15 minutes for oral argument. Motion of petitioners in Nos. 81-330, 81-331, 81-332, and 81-333 for divided argument and for additional time for oral argument denied.

No. 81-349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied. Motion of Multistate Tax Commission for leave to participate in oral argument as *amicus curiae* denied. Motion of appellees to reconsider order denying motion for additional time for oral argument denied. JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 81-447. CITY OF WICHITA FALLS, TEXAS, ET AL. *v.* STONE, 454 U. S. 1082. Motion of respondent for award of costs, damages, and related expenses denied.

No. 81-5761. IN RE WIDEMON. Petition for writ of mandamus denied.

No. 81-1098 (A-330). CENTRAL INTELLIGENCE AGENCY ET AL. *v.* HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY. C. A. D. C. Cir. Motion of respondent to modify the order entered by THE CHIEF JUSTICE on November 17, 1981, is granted, and the order is vacated insofar as it relates to the "35 congressionally generated documents." In all other respects, the order of THE CHIEF JUSTICE entered November 17, 1981, is continued pending this Court's final disposition of the petition for writ of certiorari.

No. 81-5612. IN RE BEACH;
No. 81-5859. IN RE KING; and
No. 81-5869. IN RE CLAYBORNE. Petitions for writs of habeas corpus denied.

No. 81-5880. IN RE PAUL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 81-485. HILLSBORO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir.; and
No. 81-930. UNITED STATES *v.* BLISS DAIRY, INC. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 81-485, 641 F. 2d 529; No. 81-930, 645 F. 2d 19.

Certiorari Denied. (See also No. 81-1078, *supra.*)

No. 80-1499. COMMISSIONER OF INTERNAL REVENUE *v.* DELTA METALFORMING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 442.

No. 81-551. ZAMBUTO *v.* UNITED STATES;
No. 81-617. D'ANGELO *v.* UNITED STATES;
No. 81-754. VALLONE *v.* UNITED STATES; and
No. 81-805. TODISCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 667 F. 2d 255.

No. 81-649. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 652 F. 2d 735.

No. 81-605. CITY OF LAFAYETTE *v.* HERNANDEZ. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 1188.

No. 81-630. CRYAN, DBA DENTURIST-DENTURE LAB *v.* BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA. Sup. Ct. Okla. Certiorari denied. Reported below: 638 P. 2d 437.

No. 81-650. KULIK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-685. GRIEG *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, 640 F. 2d 1261.

No. 81-701. TAYLOR DIVING & SALVAGE CO., INC., ET AL. *v.* GASPARD. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 372.

No. 81-702. GOLDFIELD DEEP MINES COMPANY OF NEVADA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 1307.

No. 81-721. SCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 1145.

No. 81-722. OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 650 F. 2d 140.

No. 81-726. CHAGRA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 653 F. 2d 26.

No. 81-751. MANDELKORN ET AL. *v.* WARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 45.

No. 81-755. BURLINGTON NORTHERN INC. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 796.

No. 81-772. READER'S DIGEST ASSN., INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 662 F. 2d 955.

No. 81-775. NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND *v.* BUNNELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 655 F. 2d 451.

No. 81-783. TECLAW *v.* WATT, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 207, 659 F. 2d 253.

No. 81-812. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1343.

No. 81-828. CRUDE CO. ET AL. *v.* UNITED STATES;
No. 81-936. GOSS ET AL. *v.* UNITED STATES;
No. 81-952. CORBITT *v.* UNITED STATES; and
No. 81-962. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 946.

No. 81-830. GIESEY *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 205, 659 F. 2d 251.

No. 81-849. SPRECHER *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 25.

No. 81-860. YAPALATER *v.* BATES, WESTCHESTER COUNTY COMMISSIONER OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 644 F. 2d 131.

No. 81-873. STRZELECKI ET AL. *v.* SWEATLOCK ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 292 Pa. Super. 565, 433 A. 2d 537.

No. 81-937. DEER PARK MEDICAL GROUP, P.A., MONEY PURCHASE PENSION PLAN *v.* WINCHELL. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1024.

No. 81-938. GRAY, TREASURER OF HARRIS COUNTY, TEXAS (KRIEGEL, SUCCESSOR IN OFFICE) *v.* VAN OOTEGHEM. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 304.

No. 81-941. D. W. BROWNING CONTRACTING CO. ET AL. *v.* NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 401, 655 F. 2d 1218.

No. 81-943. PRIME MOVERS, INC., ET AL. *v.* KENTUCKY BOARD OF ELECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1072.

No. 81-965. GUTTER *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 1194.

No. 81-967. MARGOLES *v.* JOHNS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 291.

No. 81-968. WITCO CHEMICAL CORP. ET AL. *v.* COTTEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 274.

No. 81-975. CHENG *v.* GAF CORP. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 899.

No. 81-977. SCHNEIDER TRANSPORT, INC. *v.* CATTANACH, SECRETARY, WISCONSIN DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 128.

No. 81-1006. VIBRANT SALES, INC. *v.* NEW BODY BOUTIQUE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 299.

No. 81-1083. SARCINELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 920.

No. 81-1094. KRETCHMAR ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 106.

No. 81-1102. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 655 F. 2d 580.

No. 81-1141. RIBOTSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 23.

No. 81-5532. WHALEN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 432 A. 2d 330 and 434 A. 2d 1346.

No. 81-5540. STEPHENS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-5567. LEONARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1074.

No. 81-5594. PIATT *v.* LOVETT ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 81-5605. LEONARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1074.

No. 81-5615. SPARKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 702.

No. 81-5736. LEE *v.* HARRIS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1060.

No. 81-5744. BUSH *v.* MUNCY, SUPERINTENDENT, POWHATAN CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 659 F. 2d 402.

No. 81-5747. POOLE *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 730.

No. 81-5750. BOAG *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 939.

No. 81-5751. WEAVER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 1197, 419 N. E. 2d 1274.

No. 81-5752. MCBROOM *v.* MCCARTHY. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 730.

No. 81-5753. MARTINEZ *v.* OHIO BUREAU OF EMPLOYMENT SERVICES. C. A. 5th Cir. Certiorari denied.

No. 81-5754. DUNBAR *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 406 So. 2d 227.

No. 81-5758. GRANT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-5760. PENNSYLVANIA EX REL. ZAPATA *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 494 Pa. 143, 430 A. 2d 1157.

No. 81-5762. GASTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 761, 443 N. Y. S. 2d 491.

No. 81-5763. HAMLIN *v.* WARREN. C. A. 4th Cir. Certiorari denied. Reported below: 664 F. 2d 29.

No. 81-5764. BRANNON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 620 S. W. 2d 321.

No. 81-5765. BRYANT *v.* DEFRANCIS, WARDEN, GEORGIA EARNED RELEASE CENTER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 702.

No. 81-5768. WEST *v.* MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81-5769. DILLARD *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1039.

No. 81-5770. HILLIARD *v.* SIMPSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-5824. BETHEA *v.* HANBERRY, WARDEN, ATLANTA FEDERAL PRISON. C. A. D. C. Cir. Certiorari denied.

No. 81-5854. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81-5860. CRENSHAW *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1328.

No. 81-5862. VANDETTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81-5866. MORRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81-5875. WINTER, AKA GOODHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 749.

No. 81-5878. QUARRY *v.* GENERAL ACCOUNTING OFFICE. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 32, 661 F. 2d 253.

No. 81-5879. WARE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 408.

No. 81-5889. RYNDAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-604. CAMPAGNO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 402 So. 2d 1380.

No. 81-5890. SIMKO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 662 F. 2d 656.

No. 81-940. BURTON ET AL. *v.* CITY OF JACKSON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 650 F. 2d 91.

No. 81-974. THEATRES WEST, INC., DBA WESTWORLD CINEMA, THEATRE DEAUVILLE, AND CINEMA WEST, ET AL. *v.* HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 648 F. 2d 1020.

No. 81-934. ARRINGTON, MAYOR OF BIRMINGHAM, ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC., ET AL. Sup. Ct. Ala. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 403 So. 2d 893.

Rehearing Denied

No. 81-5585. LUNZ *v.* JIMENEZ ET AL., 454 U. S. 1101; and

No. 81-5627. WILLIAMS *v.* UNITED STATES, 454 U. S. 1090. Petitions for rehearing denied.

No. 80-2074. WORRELL, DBA CHEROKEE HOMES APARTMENTS *v.* UNITED STATES, 454 U. S. 881. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81-500. WORRELL *v.* B. F. GOODRICH CO., 454 U. S. 969. Motion for leave to file petition for rehearing denied.

JANUARY 25, 1982

Affirmed on Appeal

No. 81-1031. TREEN ET AL. *v.* KAREN B. ET AL. Affirmed on appeal from C. A. 5th Cir. Reported below: 653 F. 2d 897.

Appeals Dismissed

No. 81-476. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA, ET AL. *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE STEVENS would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 494 Pa. 129, 430 A. 2d 1151.

No. 81-639. REGIRA ET AL. *v.* FALSETTA ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 401 So. 2d 1183.

No. 81-840. PETERS *v.* SJOHOLM ET AL. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 95 Wash. 2d 871, 631 P. 2d 937.

No. 81-1002. CLEVELAND ELECTRIC ILLUMINATING CO. *v.* OFFICE OF CONSUMERS' COUNSEL ET AL. Sup. Ct. Ohio. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of a properly presented federal question. Reported below: 67 Ohio St. 2d 153, 423 N. E. 2d 820.

Certiorari Granted—Vacated and Remanded

No. 80-6725. LEGARE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Eddings* v. *Oklahoma, ante,* p. 104.

Miscellaneous Orders

No. — — —. LOCAL 806, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO *v.* CATERPILLAR TRACTOR CO. ET AL. C. A. 7th Cir. Motion of petitioner to direct the Clerk to file the petition for writ of certiorari denied.

No. A–574. AMIS *v.* UNITED STATES ET AL. D. C. M. D. Fla. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 80–1924. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* ROSSI ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 813.] Motion of William V. Chappell, Jr., et al. for leave to file a brief as *amici curiae* granted.

No. A–610. LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSN., ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. D. C. S. D. N. Y. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] Motion of petitioner in No. 80–951 for leave to file a supplemental brief after argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 80–1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. [Certiorari granted, 451 U. S. 982.] Motion of Lowell P. Weicker, Jr., et al. to reconsider denial of leave to file a brief as *amici curiae* out of time denied.

No. A-593. CHING YEE *v.* SHINTAKU, JUDGE, ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 81-55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motions of Covenant House and Charles H. Keating, Jr., et al. for leave to file briefs as *amici curiae* granted.

No. 81-150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81-546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. D. C. Minn. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of Commercial Law League of America for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81-225. BLUE SHIELD OF VIRGINIA ET AL. *v.* MCCREADY. C. A. 4th Cir. [Certiorari granted, 454 U. S. 962.] Motion of American Psychological Association for leave to file a brief as *amicus curiae* granted.

No. 81-341. GREENE ET AL. *v.* LINDSEY ET AL. C. A. 6th Cir. [Probable jurisdiction noted, 454 U. S. 938.] Motion of National Housing Law Project for leave to file a brief as *amicus curiae* granted.

No. 81-451. HATHORN ET AL. *v.* LOVORN ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1122.] Motion of the parties to dispense with printing the joint appendix denied.

No. 81-1112. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. *v.* JOHNSON ET AL. C. A. 4th Cir. Motion of petitioners to expedite consideration of the petition for certiorari denied.

No. 81-349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 81-411. JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC. C. A. 6th Cir. [Certiorari granted, 454 U. S. 1079.] Motions of Public Service Research Council, National Institute of Municipal Law Officers, and American Public Transit Association for leave to file briefs as *amici curiae* granted.

No. 81-420. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* LONBERGER. C. A. 6th Cir. [Certiorari granted, 454 U. S. 1141.] Motion for appointment of counsel granted, and it is ordered that John Czarnecki, Esquire, of Toledo, Ohio, be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted or Postponed

No. 81-708. CITY OF PORT ARTHUR, TEXAS *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Motion of appellees Jenkins and Douglas for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 517 F. Supp. 987.

No. 81-750. FIDELITY FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* DE LA CUESTA ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Probable jurisdiction noted. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 121 Cal. App. 3d 328, 175 Cal. Rptr. 467.

No. 81–1282. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL.; and

No. 81–1312. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL. Appeals from D. C. Idaho. Motion of appellants in No. 81–1282 to expedite consideration of the jurisdictional statement granted. The motion, in all other respects including the request to expedite plenary consideration, is denied. Motion of Democratic National Committee for leave to file a brief as *amicus curiae* in No. 81–1282 granted. Motions for leave to file briefs as *amici curiae* in Nos. 81–1282 and 81–1283 by the following are granted: American Federation of Labor and Congress of Industrial Organizations et al.; Thomas P. O'Neill, Jr., et al.; Jake Garn et al.; Joseph E. Brennan, Governor of Maine, et al.; American Bar Association; and ERAmerica et al. Motion of Charles Robb, Governor of Virginia, et al. for leave to join the motion of Joseph E. Brennan, Governor of Maine, et al. in Nos. 81–1282 and 81–1283 is granted. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. The cases are consolidated with Nos. 81–1283 and 81–1313, *infra*. The judgment of the United States District Court for the District of Idaho is stayed pending the sending down of the judgment of this Court. Reported below: 529 F. Supp. 1107.

Certiorari Granted

No. 81–1283. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL.; and

No. 81–1313. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL. C. A. 9th Cir. Motion of petitioners in No. 81–1283 to expedite consideration of the petition for writ of certiorari before judgment granted. The motion, in all other respects including the request to expedite plenary consideration, is denied. Certiorari before judgment granted, and cases consolidated with Nos. 81–1282 and 81–1312, *supra*. The judgment of the United States District Court for the District of Idaho is stayed pending the sending down of the judgment of this Court.

No. 81-1003. WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: —— Mass. ——, 425 N. E. 2d 346.

Certiorari Denied. (See also Nos. 81-476 and 81-840, *supra.*)

No. 81-423. ALANDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 402 So. 2d 620.

No. 81-644. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 328.

No. 81-718. SUMNER ET UX. *v.* SHEPPARD. Sup. Ct. Kan. Certiorari denied. Reported below: 230 Kan. 146, 630 P. 2d 1121.

No. 81-762. ESTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 181.

No. 81-779. HOLLAND *v.* SEA-LAND SERVICE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 655 F. 2d 556.

No. 81-781. SEA-LAND SERVICE, INC., ET AL. *v.* ALASKA RAILROAD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 197, 659 F. 2d 243.

No. 81-796. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-814. CADY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 290.

No. 81-856. SCHRIEVER *v.* UNITED STATES; and
No. 81-870. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 1000.

No. 81-877. ZWEGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 657 F. 2d 248.

No. 81-886. SAILORS' UNION OF THE PACIFIC, AFL-CIO *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-910. MURPHY, SHERIFF OF OSCEOLA COUNTY, ET AL. *v.* ADAMS. C. A. 11th Cir. Certiorari denied. Reported below: 653 F. 2d 224.

No. 81-921. KESSINGER ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 81-923. TANT, T/A SUPER DUPER FOOD STORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 2d 961.

No. 81-945. SCOLES, DBA COLLEGE EXXON SERVICE STATION *v.* DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 16.

No. 81-954. FIRST PENTECOSTAL CHURCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1070.

No. 81-971. WYNN OIL CO. *v.* SOUTHERN UNION EXPLORATION CO. Ct. App. N. M. Certiorari denied. Reported below: 95 N. M. 594, 624 P. 2d 536.

No. 81-976. LOWE *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 2d 335, 423 N. E. 2d 867.

No. 81-978. GLITSCH, INC. *v.* JONES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 698.

No. 81-988. COMMODORE BUSINESS MACHINES, INC., ET AL. *v.* MCDONNELL DOUGLAS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1309.

No. 81-997. CHARLTON *v.* CORTEZ DEVELOPMENT CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-1007. LEKTRO-VEND CORP. ET AL. *v.* VENDO CO. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 255.

No. 81-1009. AUBURN NEWS CO., INC., ET AL. *v.* PROVIDENCE JOURNAL CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 659 F. 2d 273.

No. 81-1013. JOHNSON *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (BANK OF AMERICA ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81-1018. VORBECK ET AL. *v.* SCHICKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 660 F. 2d 1260.

No. 81-1025. WATTS ET AL. *v.* COOK ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 402 So. 2d 324.

No. 81-1053. COUF ET AL. *v.* DEBLAKER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 585.

No. 81-1057. BARNES, SHERIFF OF WASHINGTON COUNTY, OREGON *v.* CARDEN. Sup. Ct. Ore. Certiorari denied. Reported below: 291 Ore. 515, 635 P. 2d 341.

No. 81-1072. HARPER *v.* BARNES GROUP, INC. C. A. 11th Cir. Certiorari denied. Reported below: 653 F. 2d 175.

No. 81-1117. RUFENACHT ET AL. *v.* IOWA BEEF PROCESSORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 198.

No. 81-1125. SEDIGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 1011.

No. 81-1147. LERMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 786.

No. 81-1165. LEADER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1332.

No. 81-1169. DEARMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81-1199. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 2d 317.

No. 81-5519. AYERS *v.* COLLINS, WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1022.

No. 81-5576. PALMER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 401 So. 2d 266.

No. 81-5604. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 632 P. 2d 79.

No. 81-5624. ARNOLD *v.* MARSHALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 83.

No. 81-5629. MURTISHAW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 29 Cal. 3d 733, 631 P. 2d 446.

No. 81-5648. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 81-5670. GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81-5694. CRICK *v.* SMITH, WARDEN, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 860.

No. 81-5708. MAZYAK ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 650 F. 2d 788.

No. 81–5713. CORTEZ, AKA CORTEZ-ESPINOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1253.

No. 81–5721. MCCLENDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–5746. YAZZIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 422.

No. 81–5771. WINTERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 288, 422 N. E. 2d 972.

No. 81–5774. VASQUEZ-GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 628.

No. 81–5775. JILES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 194.

No. 81–5776. ANTONELLI *v.* OLD REPUBLIC INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1077.

No. 81–5778. KELLY *v.* OKLAHOMA PARDON AND PAROLE BOARD ET AL. Ct. Crim. App. Okla. Certiorari denied. Reported below: 637 P. 2d 858.

No. 81–5781. BENNETT *v.* FORD MOTOR CO. C. A. 6th Cir. Certiorari denied.

No. 81–5782. CHICCO *v.* PECK ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5785. MCINTYRE *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 81–5791. AMIR *v.* SACRED HEART HOSPITAL. C. A. 3d Cir. Certiorari denied.

No. 81–5796. BROMWELL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 445 A. 2d 334.

No. 81–5797. EVANS *v.* REED ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 498.

No. 81–5798. JOHNSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5800. MOORE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 295.

No. 81–5803. PHILLIPS ET AL. *v.* PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 554.

No. 81–5804. RENEER *v.* SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1073.

No. 81–5805. CHICCO *v.* CITY OF NEW BEDFORD ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5806. PLEASANT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 972, 430 N. E. 2d 905.

No. 81–5808. TINKLE *v.* UNITED STATES; and
No. 81–5913. GARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 617.

No. 81–5809. SCOTT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 404 So. 2d 1255.

No. 81–5811. CUNNINGHAM *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 655 F. 2d 98.

No. 81–5814. GOETZ *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 312 N. W. 2d 1.

No. 81-5816. MOYE *v.* BARNES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 500.

No. 81-5818. SHABAZZ *v.* MAYNARD, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 81-5819. PENOYER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 11th Cir. Certiorari denied.

No. 81-5821. ALFORD *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 497.

No. 81-5825. HAWKINS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 280 S. E. 2d 222.

No. 81-5829. SPRADLIN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 160 Ga. App. 132, 286 S. E. 2d 310.

No. 81-5835. KRUPP *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 88 N. J. 476, 443 A. 2d 695.

No. 81-5842. MOSS *v.* POLLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 698.

No. 81-5843. MYERS *v.* JOHNSTON ET AL. C. A. 2d Cir. Certiorari denied.

No. 81-5850. WATSON *v.* BUSBEE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81-5851. WATSON *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1077.

No. 81-5856. REDDISH *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81-5881. FODDRELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 493.

No. 81-5891. BEST *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 881, 422 N. Y. S. 2d 109.

No. 81-5909. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 914.

No. 81-5911. TODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 212.

No. 81-5915. POOL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81-5916. TORRES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1012.

No. 81-5918. HOLLINGSHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81-5923. GREATHOUSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 655 F. 2d 1032.

No. 81-5932. MYRICK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 1328.

No. 81-5933. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81-5945. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 612.

No. 81-5948. RAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81-5950. GAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 498.

No. 80-6843. HIGH *v.* GEORGIA. Sup. Ct. Ga.;

No. 81-5628. ROACH *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C.;

No. 81-5687. COPPOLA *v.* WARDEN, VIRGINIA STATE PENITENTIARY. Sup. Ct. Va.;

No. 81-5749. MORGAN *v.* MONTGOMERY, WARDEN, GEORGIA STATE PRISON. Sup. Ct. Ga.; and

No. 81-5801. WALLACE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80-6843, 247 Ga. 289, 276 S. E. 2d 5; No. 81-5687, 222 Va. 369, 282 S. E. 2d 10; No. 81-5801, 248 Ga. 255, 282 S. E. 2d 325.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81-347. MICHIGAN *v.* DUGAN. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 102 Mich. App. 497, 302 N. W. 2d 209.

No. 81-1067. SMITH'S MOVING & TRUCKING CO. ET AL. *v.* SVENDSEN. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 54 N. Y. 2d 865, 429 N. E. 2d 411.

No. 81-1131. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* SELLERS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 651 F. 2d 1074.

No. 81-811. AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORP. *v.* ALFORD ET AL. C. A. 5th Cir. Motion of Kaiser Aluminum & Chemical Sales, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 642 F. 2d 807 and 655 F. 2d 86.

No. 81–711. MESA PETROLEUM CO. *v.* KANSAS POWER & LIGHT CO., INC., ET AL. Sup. Ct. Kan. Motions of Kansas Independent Oil & Gas Association et al. and Legal Foundation of America for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 229 Kan. 631, 629 P. 2d 190, and 230 Kan. 166, 630 P. 2d 1129.

No. 81–973. UNITED STATES *v.* DAHLSTRUM. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR would grant certiorari and summarily reverse the judgment. Reported below: 655 F. 2d 971.

No. 81–1043. FEDERAL PRESCRIPTION SERVICE, INC., ET AL. *v.* AMERICAN PHARMACEUTICAL ASSN. C. A. D. C. Cir. Motion of National Association of Mail Service Pharmacies for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 663 F. 2d 253.

No. 81–5899. GATES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL., 454 U. S. 235; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL., 454 U. S. 235. Petition for rehearing denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81–5186. SALAMA *v.* VIRGINIA ET AL., 454 U. S. 874. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 80-2049. RALSTON, WARDEN *v.* ROBINSON, 454 U. S. 201;

No. 80-6692. BUSBEE *v.* TEXAS, 454 U. S. 1074;

No. 81-16. CALDWELL ET AL. *v.* MISSOURI ET AL., 454 U. S. 1081;

No. 81-204. ROBERTS *v.* UNITED STATES, 454 U. S. 1031;

No. 81-217. MORGAN *v.* UNITED STATES, 454 U. S. 1031;

No. 81-274. ZAVALA-PIZANO *v.* UNITED STATES, 454 U. S. 1031;

No. 81-427. DAVIS *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 454 U. S. 942;

No. 81-589. MCCLUNEY *v.* JOS. SCHLITZ BREWING CO., 454 U. S. 1071;

No. 81-780. ACKERMAN ET AL. *v.* NATIONAL BUREAU OF STANDARDS ET AL., 454 U. S. 1086;

No. 81-5441. BROWN *v.* NEW YORK, 454 U. S. 1126;

No. 81-5478. HARDY *v.* GEORGIA, 454 U. S. 1114;

No. 81-5504. GALIS *v.* WAINWRIGHT, SECRETARY OF THE DEPARTMENT OF OFFENDER REHABILITATION, ET AL., 454 U. S. 1088; and

No. 81-5545. WEBB *v.* ALBERTO-CULVER CO., INC., 454 U. S. 1089. Petitions for rehearing denied.

No. 80-812. MESCALERO APACHE TRIBE *v.* O'CHESKEY, COMMISSIONER OF REVENUE OF NEW MEXICO, ET AL., 450 U. S. 959. Motion for leave to file petition for rehearing denied.

JANUARY 29, 1982

Dismissal Under Rule 53

No. 81-864. L/P/G BENGHAZI ET AL. *v.* VELIBOR ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 653 F. 2d 812.

FEBRUARY 9, 1982

Dismissal Under Rule 53

No. 81-625. MISSOURI *v.* MCGEE [and other cases under this Court's Rule 19.4]. Sup. Ct. Mo. Certiorari dismissed as to Bobby Joe McGee under this Court's Rule 53. Reported below: 619 S. W. 2d 70.

FEBRUARY 18, 1982

Dismissal Under Rule 53

No. 81-924. J. P. STEVENS EMPLOYEES EDUCATION COMMITTEE ET AL. *v.* DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 669 F. 2d 171.

FEBRUARY 19, 1982

Appeal Dismissed

No. ——. HALDEMAN, TRUSTEE OF LEHIGH VALLEY RAILROAD CO. *v.* UNITED STATES RAILWAY ASSN. ET AL. Appeal from Sp. Ct. R. R. R. A. dismissed without prejudice, it appearing that the appeal would not be in the interest of an expeditious conclusion to the proceedings.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 455 U. S., Part 2)

ADDRESS LISTS OF CENSUS BUREAU AS SUBJECT TO DISCLOSURE. See **Census Act.**

AGREEMENT LIQUIDATING DAMAGES AS MOOTING CASE. See **Mootness.**

AIRLINE FLIGHT ATTENDANTS. See **Civil Rights Act of 1964.**

AMENDMENT OF CHALLENGED ORDINANCE AS MOOTING CASE. See **Mootness.**

AMENDMENT OF JUDGMENTS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

AMISH. See **Constitutional Law; Internal Revenue Code.**

ATTORNEY'S FEES. See **Civil Rights Attorney's Fees Awards Act of 1976.**

BAIL. See **Mootness.**

BANKRUPTCY ACT. See **Mootness.**

BANKRUPTCY CLAUSE. See **Constitutional Law.**

BURDENS ON INTERSTATE COMMERCE. See **Constitutional Law.**

BUREAU OF THE CENSUS. See **Census Act.**

CENSUS ACT.

Address lists—Confidentiality.—Under Act's confidentiality provisions, address lists compiled by Census Bureau for 1980 census are not subject to disclosure to local government officials under Freedom of Information Act; nor are such lists subject to disclosure, in a suit by local officials, under discovery provisions of Federal Rules of Civil Procedure. Baldrige v. Shapiro, p. 345.

CIVIL RIGHTS ACT OF 1964.

Sex discrimination—Flight attendants—Failure to file timely charge with EEOC.—Filing a timely discrimination charge with Equal Employment Opportunity Commission is not a jurisdictional prerequisite to suit in federal court under Title VII of Act, but is a requirement that is subject to

CIVIL RIGHTS ACT OF 1964—Continued.

waiver, estoppel, and equitable tolling; and, in a class action arising from an airline's policy that discriminated between female and male flight attendants, District Court, after finding discrimination by airline, had authority, in approving a settlement between airline and plaintiff class, to award retroactive seniority to subclass consisting of members who had not filed timely claims with EEOC, notwithstanding objection by intervenor union that had not itself been found guilty of discrimination. Zipes v. Trans World Airlines, Inc., p. 385.

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

Motion for award of attorney's fees—Applicability of Federal Rule of Civil Procedure 59(e).—Where District Court approved parties' consent decree in petitioner's action based on respondent New Hampshire Department of Employment Security's failure to make timely determinations of certain entitlements to unemployment compensation, petitioner's motion, filed approximately four and one-half months after entry of District Court's judgment, requesting an award of attorney's fees under Act is not governed by Federal Rule of Civil Procedure 59(e)'s requirement that a motion to alter or amend a judgment be served not later than 10 days after entry of judgment. White v. New Hampshire Dept. of Employment Security, p. 445.

CLASS ACTIONS. See **Civil Rights Act of 1964.**

COIN-OPERATED AMUSEMENT ESTABLISHMENTS. See **Constitutional Law; Mootness.**

COMMERCE CLAUSE. See **Constitutional Law.**

CONFIDENTIALITY OF CENSUS BUREAU'S ADDRESS LISTS. See **Census Act.**

CONSENT ORDER AS MOOTING CASE. See **Mootness.**

CONSTITUTIONAL LAW. See also **Mootness.**

Bankruptcy Clause—Uniformity of laws—Validity of Rock Island Railroad Transition and Employee Assistance Act.—Rock Island Railroad Transition and Employee Assistance Act (RITA), which governs relationships between bankrupt Chicago, Rock Island and Pacific Railroad Co. and its creditors, as amended by Staggers Rail Act of 1980, which—in response to District Court's preliminary injunction against enforcement of RITA provisions that require trustee of Railroad's estate to pay benefits to Railroad's employees who were not hired by other carriers and that provide for guarantee by United States of Railroad's employee protection obligations—re-enacted such RITA provisions, is repugnant to provision of Constitution empowering Congress to enact "uniform laws on the subject of

CONSTITUTIONAL LAW—Continued.

Bankruptcies throughout the United States." Railway Labor Executives' Assn. v. Gibbons, p. 457.

Commerce Clause—Exportation of hydroelectric energy—Validity of state statute.—New Hampshire statute prohibiting a hydroelectric energy corporation from transmitting such energy out of State unless approved by New Hampshire Public Utilities Commission, which can withhold approval if it determines that such energy is needed within State, conflicts with Commerce Clause, and saving clause of Federal Power Act does not provide an affirmative grant of authority for such state action. New England Power Co. v. New Hampshire, p. 331.

Due process—Employment discrimination—Failure of state agency to act within statutory period—Effect on employee's rights.—Under Illinois statute which barred employment discrimination on basis of physical handicap unrelated to ability and which required Illinois Fair Employment Practices Commission to convene factfinding conference within 120 days from receipt of an employee's charge against his employer, Illinois Supreme Court's interpretation of statute as requiring dismissal of an employee's charge when Commission failed to comply with 120-day convening requirement violates employee's rights under Due Process and Equal Protection Clauses of Fourteenth Amendment. Logan v. Zimmerman Brush Co., p. 422.

Due process—Vagueness of ordinance--License for coin-operated amusement establishment.—A city ordinance directing that Chief of Police consider whether applicant for license for coin-operated amusement establishment has any "connections with criminal elements" before Chief of Police makes recommendations to City Manager, who decides whether to grant a license, is not unconstitutionally vague. City of Mesquite v. Aladdin's Castle, Inc., p. 283.

Equal protection of the laws—Limitation of actions—Foreign corporations—Validity of state statute tolling limitation period.—A New Jersey statute which tolls limitation period for an action against a foreign corporation that is not represented in State by any person upon whom process may be served does not violate Equal Protection Clause notwithstanding subsequent institution of long-arm jurisdiction in New Jersey; however, Court of Appeals' judgment upholding validity of tolling statute is vacated, and case is remanded for initial consideration of whether statute violates Commerce Clause. G. D. Searle & Co. v. Cohn, p. 404.

Freedom of religion—Social security taxes—Members of Amish faith.—Imposition of social security taxes is not unconstitutional as applied to such persons as appellee—a member of Old Order Amish who employed other Amish to work on his farm and in his carpentry shop—who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. United States v. Lee, p. 252.

CONVICTION AS MOOTING CONSTITUTIONAL CLAIM ARISING FROM DENIAL OF PRETRIAL BAIL. See Mootness.

CRIMINAL LAW. See Mootness.

"DEEMING" SPOUSE'S INCOME AS AVAILABLE TO MEDICAID APPLICANT. See Social Secuity Act.

DENIAL OF PRETRIAL BAIL. See Mootness.

DENVER, COLO. See Census Act.

DISCLOSURE OF CENSUS BUREAU'S ADDRESS LISTS. See Census Act.

DISCOVERY. See Census Act.

DISCRIMINATION AGAINST BLACKS. See Fair Housing Act of 1968; Mootness.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See Constitutional Law.

DISCRIMINATION AGAINST PHYSICALLY HANDICAPPED PERSONS. See Constitutional Law.

DISCRIMINATION AGAINST WOMEN. See Civil Rights Act of 1964.

DISCRIMINATION IN HOUSING. See Fair Housing Act of 1968; Mootness.

DUE PROCESS. See Constitutional Law; Mootness.

EIGHTH AMENDMENT. See Mootness.

ELECTRIC ENERGY. See Constitutional Law.

ELIGIBILITY FOR MEDICAID. See Social Security Act.

EMERGENCY PETROLEUM ALLOCATION ACT. See Federal-State Relations.

EMPLOYER AND EMPLOYEES. See Civil Rights Act of 1964; Constitutional Law; Internal Revenue Code; Mootness.

EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1964; Constitutional Law.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See Civil Rights Act of 1964.

EQUAL PROTECTION OF THE LAWS. See Constitutional Law.

ESSEX COUNTY, N. J. See Census Act.

EXCESSIVE BAIL CLAUSE. See Mootness.

EXEMPTIONS FROM SOCIAL SECURITY TAXES. See Internal Revenue Code.

EXEMPTION 3 OF FREEDOM OF INFORMATION ACT. See **Census Act.**

EXPORTATION OF HYDROELECTRIC ENERGY. See **Constitutional Law.**

FAIR HOUSING ACT OF 1968. See also **Mootness.**

Racial discrimination in housing—Standing to sue—Limitation of actions.—A black person employed as a "tester" by a corporation organized to ensure equal housing opportunity has standing to sue under Act in capacity as a "tester" on basis of alleged misrepresentation by apartment complex owner and its employee that apartments were not available, but such claim was time barred under Act's requirement that suit be brought within 180 days after alleged discriminatory act; a white person, also employed by corporation, has no standing to sue in "tester" capacity since he alleged that he was informed that apartments *were* available; both individual testers' claims, as area residents, that defendants' alleged acts deprived them of benefits of interracial association were not subject to dismissal on pretrial motion, and were not time barred since they were based on a "continuing" violation extending into 180-day period; and corporation has standing to sue for damages on asserted basis that defendants' alleged acts injured corporation's housing counseling and referral services, with a consequent drain on its resources, and such claim is not barred since it was based on a "continuing" violation theory. Havens Realty Corp. v. Coleman, p. 363.

FEDERAL GIFT TAXES.

Treasury Regulation—Transfer of property interest by will—Refusal to accept.—"Transfer," under Treasury Regulation excepting from federal gift tax a refusal to accept ownership of an interest in property transferred by will if such refusal is effective under local law and made within a reasonable time after knowledge of existence of transfer, occurs when interest is created, not at later time when interest vests or becomes possessory. Jewett v. Commissioner, p. 305.

FEDERAL POWER ACT. See **Constitutional Law.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Census Act; Civil Rights Attorney's Fees Awards Act of 1976.**

FEDERAL-STATE RELATIONS. See also **Constitutional Law; Social Security Act.**

State gross-receipts tax—Pre-emption by federal law—Expiration of federal law.—Temporary Emergency Court of Appeals' judgment—affirming from passing on cost of New York's gross-receipts tax on revenues derived from activities within State in prices of their products sold in State was pre-empted by federal price control authority under Emergency Petroleum

FEDERAL-STATE RELATIONS—Continued.

Allocation Act—was vacated, and case was remanded for reconsideration in light of subsequent expiration of federal price control authority. Tully v. Mobil Oil Corp., p. 245.

FINAL JUDGMENTS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

FIRST AMENDMENT. See **Constitutional Law.**

FLIGHT ATTENDANTS. See **Civil Rights Act of 1964.**

FOREIGN CORPORATIONS. See **Constitutional Law.**

FOURTEENTH AMENDMENT. See **Constitutional Law; Mootness.**

FREEDOM OF INFORMATION ACT. See **Census Act.**

FREEDOM OF RELIGION. See **Constitutional Law.**

GIFT TAXES. See **Federal Gift Taxes.**

GROSS-RECEIPTS TAXES. See **Federal-State Relations.**

HANDICAPPED PERSONS. See **Constitutional Law.**

HOUSING DISCRIMINATION. See **Fair Housing Act of 1968; Mootness.**

HUSBAND AND WIFE. See **Social Security Act.**

HYDROELECTRIC ENERGY. See **Constitutional Law.**

ILLINOIS. See **Constitutional Law.**

INJUNCTIONS. See **Mootness.**

INTERNAL REVENUE CODE. See also **Constitutional Law; Federal Gift Taxes.**

Social security taxes—Exemption—Self-employed Amish.—Exemption under § 1402(g) of Code of self-employed Amish and others from payment of social security taxes was not applicable to appellee, a member of Old Order Amish, and his employees, other Amish who worked on appellee's farm and in his carpentry shop. United States v. Lee, p. 252.

INTERSTATE COMMERCE. See **Constitutional Law.**

IOWA. See **Social Security Act.**

JURISDICTION. See **Constitutional Law; Mootness.**

LABOR UNIONS. See **Civil Rights Act of 1964.**

LICENSES FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS. See **Constitutional Law; Mootness.**

LIMITATION OF ACTIONS. See **Civil Rights Act of 1964; Constitutional Law; Fair Housing Act of 1968.**

LONG-ARM JURISDICTION. See **Constitutional Law.**

MEDICAID. See **Social Security Act.**

MESQUITE, TEX. See **Constitutional Law; Mootness.**

MOOTNESS.

Action under Fair Housing Act of 1968—Effect of consent order and agreement liquidating damages.—In an action under Fair Housing Act of 1968 against petitioners, an apartment complex owner and one of its employees for alleged "racial steering" in rental of apartments, claims of respondents, a corporation organized to ensure equal housing opportunity and two "testers" employed by it, were not rendered moot by either (1) District Court's entry of a consent order granting relief to another plaintiff, a black person who attempted to rent an appartment but was allegedly falsely told none were available, or (2) an agreement between petitioners and respondents—reached prior to grant of certiorari—liquidating respondents' damages if certiorari was denied or if lower court's judgment was affirmed upon review. Havens Realty Corp. v. Coleman, p. 363.

Reorganization of railroad—Enactment of Staggers Rail Act—Mootness of preliminary injunction.—In bankruptcy reorganization proceedings by Chicago, Rock Island and Pacific Railroad Co. where court ordered abandonment of Railroad's system, disallowed any claim or arrangement for employee labor protection payable out of Railroad assets, and issued a peliminary injunction against enforcement of Rock Island Railroad Transition and Employee Assistance Act's provisions requiring trustee of Railroad's estate to pay benefits to Railroad's employees who were not hired by other carriers and providing for guarantee by United States of Railroad's employee protection obligations, injunction was rendered moot by subsequent enactment of Staggers Rail Act of 1980. Railway Labor Executives' Assn. v. Gibbons, p. 457.

State criminal prosecution—Denial of pretrial bail—Effect of conviction.—Where appellee, pending trial on state sexual-offense charges, filed suit in Federal District Court under 42 U. S. C. § 1983, seeking declaratory and injunctive relief on ground that his federal constitutional rights were violated by a Nebraska constitutional provision prohibiting bail in certain cases of first-degree sexual offenses, such as appellee's, and where appellee was convicted in state prosecutions before Court of Appeals, in reversing District Court's dismissal of complaint, held that exclusion of violent sexual offenses from pretrial bail violated Excessive Bail Clause of Eighth Amendment, appellee's constitutional claim became moot following his state-court convictions. Murphy v. Hunt, p. 478.

Validity of ordinance—Amendment pending appeal.—In an action where District Court held unconstitutional for vagueness a city ordinance directing that consideration be given to any "connections with criminal elements" of applicants for license for coin-operated amusement establishments, case is not rendered moot by fact that quoted phrase was eliminated from ordinance while case was pending in Court of Appeals. City of Mesquite v. Aladdin's Castle, Inc., p. 283.

MOTIONS FOR AWARD OF ATTORNEY'S FEES. See Civil Rights Attorney's Fees Awards Act of 1976.

MOTIONS TO ALTER OR AMEND JUDGMENTS. See Civil Rights Attorney's Fees Awards Act of 1976.

NEBRASKA. See Mootness.

NEW HAMPSHIRE. See Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law.

NEW JERSEY. See Constitutional Law.

NEW YORK. See Federal-State Relations.

OIL. See Federal-State Relations.

ORDINANCES GOVERNING AMUSEMENT ESTABLISHMENTS. See Constitutional Law; Mootness.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See Federal-State Relations.

PRELIMINARY INJUNCTIONS. See Mootness.

PRETRIAL BAIL. See Mootness.

PRIVILEGED INFORMATION. See Census Act.

PUBLIC DISCLOSURE OF INFORMATION. See Census Act.

RACIAL DISCRIMINATION IN HOUSING. See Fair Housing Act of 1968; Mootness.

RAILROADS. See Constitutional Law; Mootness.

REFUSAL TO ACCEPT TRANSFER OF PROPERTY BY WILL. See Federal Gift Taxes.

RELIGIOUS FREEDOM. See Constitutional Law.

REORGANIZATION OF RAILROADS. See Constitutional Law; Mootness.

RIGHT TO BAIL. See Mootness.

ROCK ISLAND RAILROAD TRANSITION AND EMPLOYEE ASSISTANCE ACT. See Constitutional Law; Mootness.

SELF-EMPLOYED AMISH. See Internal Revenue Code.

SENIORITY RIGHTS. See Civil Rights Act of 1964.

SEX DISCRIMINATION. See Civil Rights Act of 1964.

SEXUAL OFFENSES. See Mootness.

SOCIAL SECURITY ACT.

Eligibility for Medicaid—"Deeming" spouse's income as available to applicant.—District Court's order prohibiting Iowa from "deeming" income of spouse in determining Medicaid applicant's eligibility and requiring factual determination in each instance of amount of spouse's income actually available to applicant conflicts with Act's provisions; and federal regulations that impose time limitations upon State's ability to "deem" income between spouses who do not share same household are not precluded by Act. Herweg v. Ray, p. 265.

SOCIAL SECURITY TAXES. See **Constitutional Law; Internal Revenue Code.**

SPOUSE'S INCOME AS AFFECTING MEDICAID APPLICANT'S ELIGIBILITY. See **Social Security Act.**

STAGGERS RAIL ACT OF 1980. See **Constitutional Law; Mootness.**

STANDING TO SUE. See **Fair Housing Act of 1968.**

STATE GROSS-RECEIPTS TAXES. See **Federal-State Relations.**

STATUTES OF LIMITATIONS. See **Constitutional Law; Fair Housing Act of 1968.**

TAXES. See **Constitutional Law; Federal Gift Taxes; Federal-State Relations; Internal Revenue Code.**

TOLLING STATUTES OF LIMITATIONS. See **Constitutional Law.**

"TRANSFER" OF PROPERTY BY WILL. See **Federal Gift Taxes.**

TREASURY REGULATIONS. See **Federal Gift Taxes.**

UNEMPLOYMENT COMPENSATION. See **Civil Rights Attorney's Fees Awards Act of 1976.**

UNIFORM BANKRUPTCY LAWS. See **Constitutional Law.**

UNIONS. See **Civil Rights Act of 1964.**

VAGUENESS. See **Constitutional Law; Mootness.**

WELFARE BENEFITS. See **Social Security Act.**

WORDS AND PHRASES.

"Specifically exempted from disclosure by statute." Freedom of Information Act, 5 U. S. C. § 552(b)(3). Baldrige v. Shapiro, p. 345.

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 455 U. S., Parts 1 and 2)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Abshire; Fiorini *v.*	991
Ackerman *v.* National Bureau of Standards	929
Adams; Murphy *v.*	920
Adamson *v.* Hill	992
Ahmed *v.* Kunkle	991
Akers *v.* United States	941
Akron; Hybud Equipment Corp. *v.*	931
Alabama; Palmer *v.*	922
Alabama; Suggs *v.*	938
Alabama Dept. of Public Safety; Jackson *v.*	956
Aladdin's Castle, Inc.; Mesquite *v.*	283
Alander *v.* Florida	919
Alaska Railroad; Sea-Land Service, Inc. *v.*	919
Alberici Construction Co. *v.* Sisco	976
Alberici Construction Co.; Sisco *v.*	976
Alberto-Culver Co.; Webb *v.*	929
Alderson *v.* United States	955
Alexander *v.* Texas	954
Alford; American Bridge Division, United States Steel Corp. *v.*	927
Alford *v.* Garrison	925
Alfred L. Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Quiros	933, 986
Alioto's Fish Co. *v.* Human Rights Comm'n of San Francisco	944
Allen; Truck Drivers *v.*	989

Page
American Bridge Division, United States Steel Corp. *v.* Alford .. 927
American Pharmaceutical Assn.; Federal Prescription Service *v.* 928
Americans for Change; Federal Election Comm'n *v.* 129
American Tel. & Tel. Co.; Northeastern Telephone Co. *v.* 943
Amir *v.* Sacred Heart Hospital 923
Amis *v.* United States 915
Amoco Production Co. *v.* Jicarilla Apache Tribe 130
Anderson *v.* Baird 951
Anderson; Blackwell *v.* 947
Andrews *v.* United States 919
Angelilli *v.* United States 945
Anthon *v.* United States 984
Antonelli *v.* Drug Enforcement Administration 955
Antonelli *v.* Lippman 993
Antonelli *v.* Old Republic Ins. Co. 923
Antwine *v.* Estelle 955
Archie *v.* United States 951
Arizona; Gates *v.* 928
Arizona; Schad *v.* 983
Arkansas Gazette Co.; Southern State College *v.* 931
Armand; Robinson *v.* 931
Arnold *v.* Marshall 922
Arrington *v.* Associated General Contractors of America 913
Ascione; Fischetti *v.* 995
Associated General Contractors of America; Arrington *v.* 913
Associated Gen. Contractors of Cal. *v.* Cal. Council of Carpenters 986
Association Against Discrimination in Employment; Bridgeport *v.* 988
Association Against Discrimination in Employment; Firefighters *v.* 988
Attorney General of Ill.; Nuclear Engineering Co. *v.* 993
Attorney General of Neb.; Sporhase *v.* 935
Attorney General of R. I. *v.* New Hampshire 331
Auburn News Co. *v.* Providence Journal Co. 921
Avagliano *v.* Sumitomo Shoji America, Inc. 933
Avagliano; Sumitomo Shoji America, Inc. *v.* 933
Avedisian *v.* Hubbard 949
Ayers *v.* Collins 922
B.; Treen *v.* 913
Badgett *v.* Erspan 945
Bailey *v.* Redman 995
Baird; Anderson *v.* 951
Bakewell; Rucker *v.* 956
Baldrige; McNichols *v.* 345
Baldrige *v.* Shapiro 345
Baldrige; Young *v.* 939

Page
Balla, *In re* 936
Ballet *v.* Pence 957
Banco Nacional de Cuba; First Nat. Bank of Boston (Int'l) *v.* 936
Banco para el Comercio Exterior de Cuba; First Nat. City Bank *v.* 936
Bankers Trust Co.; BP Oil, Inc. *v.* 942
Bankers Trust Co. *v.* Villaneuva Compania Naviera, S.A. 942
Bankers Trust Co.; Villaneuva Compania Naviera, S.A. *v.* 942
Bank of America; Johnson *v.* 921
Bank of Miami *v.* Meason 939
Bankston; Crown Paint Co. *v.* 936
Barnes *v.* Carden 921
Barnes; Moye *v.* 925
Barnes Group, Inc.; Harper *v.* 921
Barrett *v.* Bureau of Customs 950
Baszner *v.* United States 945
Bates; Yapalater *v.* 908
Beach, *In re* 906, 995
Beans; Piscanio *v.* 958
Bechtel Power Corp. *v.* Pennsylvania 905
Be-Down Home Designs *v.* Musidor, B.V. 944
Bennett; Capitol Industries-EMI, Inc. *v.* 943
Bennett; EMI Ltd. *v.* 943
Bennett *v.* Ford Motor Co. 923
Benslimane *v.* United States 949
Best *v.* New York 926
Bethea *v.* Hanberry 912
Beth Israel Hospital and Geriatric Center; Nurses *v.* 987
Bethlehem Steel Corp.; Goins *v.* 940
B. F. Goodrich Co.; Worrell *v.* 913
Bickel; Craig *v.* 901
Bird; Ross *v.* 995
Bixby *v.* Ross 931
Blackburn; Bornes *v.* 954
Blackburn; Hegwood *v.* 984
Blackie's House of Beef, Inc. *v.* Castillo 940
Blackwell *v.* Anderson 947
Blechman *v.* Federal Communications Comm'n 954
Bliss Dairy, Inc.; United States *v.* 906, 987
Bloch *v.* Veteran Corps of Artillery 943
Blue Shield of Virginia *v.* McCready 916
Blum *v.* Yaretsky 933
Boag *v.* California 910
Board of Ed., Island Trees Union School Dist. No. 26 *v.* Pico 903
Board of Ed. of Chicago; Johnson *v.* 936

Page
Board of Ed. of Guilderland School Dist.; Brandon *v.* 983
Board of Ed. of Hendrick Hudson School Dist. *v.* Rowley..... 932
Board of Ed. of Los Angeles; Crawford *v.* 904
Board of Govs. of Reg. Dentists of Okla.; Cryan *v.* 907
Board of Govs. of Reg. Dentists of Okla.; Denturist-Denture Lab *v.* 907
Bochniak; Illinois *v.* 938
Boggs *v.* McDonald 990
Bohemian Distributing Co. *v.* Norman Williams Co. 933
Bollow *v.* Federal Reserve Bank of San Francisco 948
Bolton; Mitchell *v.* 953
Bonnes; Long *v.* 961
Bonnette *v.* United States 951
Bornes *v.* Blackburn 954
Bosch *v.* Spalding 955
Boulder; Community Communications Co. *v.* 40
Bowen *v.* U. S. Postal Service 987
Bowen *v.* Zant 983
Bowers; Weaver *v.* 942
Bowling *v.* United States 960
BP Oil, Inc. *v.* Bankers Trust Co. 942
Brandon *v.* Board of Ed. of Guilderland School Dist. 983
Brannon *v.* Kentucky 911
Bridgeport *v.* Association Against Discrimination in Employment 988
Bridgeport Firefighters for Merit Emp. *v.* Assn. Against Discrim. 988
Bromwell *v.* Delaware 924
Brown *v.* Commissioners of Kent County 990
Brown; Ivie *v.* 990
Brown *v.* New York 929
Browning Contracting Co. *v.* National Stabilization Agreement of Sheet Metal Industry Trust Fund 909
Bruce *v.* Duckworth 955
Bruschi *v.* United States 989
Bryant *v.* DeFrancis 911
Bucyrus-Erie Co.; Messenger *v.* 944
Bulger; Denman *v.* 946
Bullock; Enserch Exploration, Inc. *v.* 946
Bunnell; New England Teamsters Pension Fund *v.* 908
Bureau of Customs; Barrett *v.* 950
Bureau of Revenue of N. M.; Ramah Navajo School Bd. *v.* 934
Burlington Northern Inc. *v.* United States 907, 988
Burton *v.* Jackson 913
Busbee *v.* Texas 929
Busbee; Watson *v.* 925
Bush *v.* Muncy 910

Page
Butler *v.* United States 945
Bynum *v.* United States 960
Byrne; Reese *v.* 953
Cady *v.* United States 919
Caggiano *v.* United States 945
Caldwell *v.* Missouri 929
California; Boag *v.* 910
California *v.* Grace Brethren Church 904
California; Hein *v.* 931
California; Kulik *v.* 907
California; Murtishaw *v.* 922
California; Russell *v.* 954
California *v.* Standard Oil Co. of California 990
California; Stephens *v.* 910
California; Talamantez *v.* 954
California *v.* Winson 975
California State Council of Carpenters; Assoc. Gen. Contractors *v.* 986
Campagno *v.* Florida 912
Capitol Industries-EMI, Inc. *v.* Bennett 943
Caraballo *v.* Secretary of Health and Human Services 995
Carden; Barnes *v.* 921
Carlsen *v.* Utah 958
Carmen *v.* Idaho 918
Carmen; Williams *v.* 992
Carney *v.* United States 991
Carter *v.* Garrison 952
Carter *v.* United States 926, 955
Castillo; Blackie's House of Beef, Inc. *v.* 940
Castro *v.* United States 960
Catalina *v.* Columbus 989
Catalina *v.* Moody 989
Caterpiliar Tractor Co.; Chicago Bridge & Iron Co. *v.* 905, 917
Caterpillar Tractor Co.; Industrial Workers *v.* 915
Cattanach; Schneider Transport, Inc. *v.* 909
Central Bank of Nigeria; Verlinden B. V. *v.* 936
Central Intelligence Agency *v.* Holy Spirit Assn. 906
Cepulonis *v.* Massachusetts 931
Certain-Teed Piping Materials, Inc. *v.* Hydroaire, Inc. 946
Chadha; Immigration and Naturalization Service *v.* 903
Chagra *v.* United States 907
Charlton *v.* Cortez Development Corp. 920
Chelsea House Publishers *v.* Nicholstone Book Bindery, Inc. 994
Cheng *v.* GAF Corp. 909
Cherokee Homes Apartments *v.* United States 913

Page
Chicago Bd. of Ed.; McCutcheon *v.* 946
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 905, 917
Chicago, M., St. P. & P. R. Co. *v.* Leer 939
Chicco *v.* New Bedford 924
Chicco *v.* Peck 923
Chief Justice, Cal. Supreme Court; Ross *v.* 95
Childers *v.* Illinois 947
Ching Yee *v.* Shintaku 916
Chrisman; Washington *v.* 1
City. See name of city.
Civil Service Comm'n of New York City; Guardians Assn. *v.* 935
Claiborne Hardware Co.; NAACP *v.* 904, 934
Clark *v.* Municipal Employees Credit Union of Baltimore 951
Clark; United States *v.* 985
Clarkson Co.; Shaheen *v.* 990
Clay *v.* Texas 954
Clayborne, *In re* 906
Clements *v.* Logan 942
Cleveland *v.* Palmby 941
Cleveland Elec. Illuminating Co. *v.* Office of Consumers' Counsel 914
Click *v.* Idaho *ex rel.* Evans 987
Coats *v.* United States 991
Coen *v.* Harrison County School Bd. 938
Cohen *v.* Disciplinary Bd. of Supreme Court of Pa. 914
Cohen; Ernest *v.* 985
Cohn; G. D. Searle & Co. *v.* 404, 932
Coleman; Havens Realty Corp. *v.* 363
Coleman *v.* Montana 983
College Exxon Service Station *v.* Donovan 920
Colling; Friendly Retirement Center, Inc. *v.* 940
Collins; Ayers *v.* 922
Collins *v.* Ohio 956
Collins *v.* United States 906
Colorado; Gomez *v.* 943
Colorado *v.* New Mexico 932
Colorado; Razatos *v.* 930
Columbus; Catalina *v.* 989
Columbus; Nellie-Jeanne Corp. *v.* 946
Comay *v.* Illinois 944
Commissioner *v.* Delta Metalforming Co. 906
Commissioner; Hillsboro National Bank *v.* 906, 986
Commissioner; Jewett *v.* 305
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents and Trademarks; Davis *v.* 984

Page
Commodore Business Machines, Inc. *v.* McDonnell Douglas Corp. 920
Common Cause *v.* Schmitt 129
Commonwealth. See name of Commonwealth.
Community Communications Co. *v.* Boulder 40
Community Television of Southern California *v.* Gottfried 935
Comptroller of Public Accounts of Tex.; Enserch Exploration *v.* .. 946
Concerned Democrats of Florida; Reno *v.* 938
Connecticut *v.* Gordon 989
Connecticut *v.* Johnson 937
Connecticut *v.* Smith 945
Connecticut *v.* Teal 903
Connor *v.* Phillips 991
Conover; Marshall & Ilsley Corp. *v.* 981
Consolidated Edison Co. of New York; Jones *v.* 952
Consolidated Freightways Corp. of Delaware *v.* Kassel 329
Continental Illinois National Bank & Trust Co.; Weit *v.* 988
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania 905
Cook; Watts *v.* 921
Cooper *v.* Estelle 953
Cooper *v.* Illinois 945
Cooper *v.* Sowders 957
Coopers & Lybrand *v.* Sharp 938
Coppola *v.* Warden 927
Corbitt *v.* United States 908
Cordle *v.* Virginia 951
Corrections Commissioner. See name of commissioner.
Cortez *v.* United States 923
Cortez Development Corp.; Charlton *v.* 920
Cortez-Espinoza *v.* United States 923
Cotten; Witco Chemical Corp. *v.* 909
Couf *v.* DeBlaker 921
County. See name of county.
County Comm'rs of Kent Cty.; Brown *v.* 990
County Comm'rs of Kent Cty.; Thunderguards Motorcycle Club *v.* 990
Coweta News, Inc. *v.* Memphis 990
Cowgill *v.* Florida 995
Cox *v.* Missouri 976
Cox Enterprises, Inc. *v.* Vascocu 994
Craig *v.* Bickel 901
Crawford *v.* Board of Ed. of Los Angeles 904
Creasy *v.* Virginia 957
Crenshaw *v.* United States 912, 995
Crick *v.* Smith 922
Crist; McGuinn *v.* 990

Page
Crown Paint Co. *v.* Bankston 946
Crude Co. *v.* United States 908
Cryan *v.* Board of Governors of Registered Dentists of Okla. 907
Cucchiara *v.* Secretary of Treasury 948
Cumberland, Md., Area Teamsters Pension Fund; Kagarise *v.* 947
Cunningham *v.* Perini 924
Curtis *v.* Illinois 992
Cuyler; Pennsylvania *ex rel.* Zapata *v.* 911
Dahlstrum; United States *v.* 928
Dalsheim; Donaldson *v.* 951
D'Angelo *v.* United States 906
Davidson *v.* Roadway Express, Inc. 947
Davis *v.* Commissioner of Patents and Trademarks 984
Davis *v.* District Director, INS 929
Davis *v.* United States 919
Davis *v.* Zant 983
Dearmas *v.* United States 922
DeBlaker; Couf *v.* 921
Deer Park Medical Gp., Money Purchase Pension Plan *v.* Winchell 908
DeFrancis, *In re* 902
DeFrancis; Bryant *v.* 911
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 917
Delaware; Bromwell *v.* 924
Delaware; Whalen *v.* 910
Delta Metalforming Co.; Commissioner *v.* 906
Dema *v.* Internal Revenue Service 941
Denman *v.* Bulger 946
Denningham *v.* Denningham 990
Denturist-Denture Lab *v.* Board of Govs. of Reg. Dentists of Okla. 907
Department of State *v.* Washington Post Co. 936
Department of Treasury; Tabcor Sales Clearing, Inc. *v.* 941
Devine; Giesey *v.* 908
DeVito *v.* Harrington 993
Devon Corp. *v.* Miller 993
Diamond M Co. *v.* Raines 938
Diaz *v.* New York 957
Diaz *v.* United States 910
DiLapi *v.* United States 938
Dillard *v.* Martin 912
Director, OWCP *v.* Perini North River Associates 937
Director of Institutions, N. D. State Prisons; Green *v.* 957
Director of penal or correctional institution. See also name or title of director.
Disciplinary Bd. of Supreme Court of Pa.; Cohen *v.* 914

Page
District Director, INS; Davis *v.* 929
District Judge, Fourth Judicial Dist. of Neb. *v.* Hunt 478
Dixon *v.* MacDougall 955
Donaldson *v.* Dalsheim 951
Donovan; College Exxon Service Station *v.* 920
Donovan; J. P. Stevens Employees Education Committee *v.* 930
Donovan; Ramsey *v.* 940
Donovan; Scoles *v.* 920
Dotson; Indianola *v.* 936
Douglas; Sporhase *v.* 935
Downing *v.* United States 950
Drake Univ.; Eaton *v.* 990
Dressel *v.* United States 991
Drug Enforcement Administration; Antonelli *v.* 955
Duckworth; Bruce *v.* 955
Dugan; Michigan *v.* 927
Dumas *v.* United States 990
Dunbar *v.* Louisiana 911
Duncan; Poythress *v.* 937
Dunn *v.* Texas 971
Duty; East Coast Tender Service, Inc. *v.* 945
D. W. Browning Contracting Co. *v.* National Stabilization Agreement of Sheet Metal Industry Trust Fund 909
Eagerton; Exchange Oil & Gas Corp. *v.* 987
Eagerton; Exxon Corp. *v.* 987
East Coast Tender Service, Inc. *v.* Duty 945
Eaton *v.* Drake Univ. 990
Eckerhart; Hensley *v.* 988
Eddings *v.* Oklahoma 104
Eden *v.* United States 949
Ehl *v.* Estelle 953
Eicher *v.* Florida Dept. of Corrections 954
Elder-Beerman Stores Corp.; Moyer *v.* 942
Ellis, *In re* 937
Ellis *v.* United States 960
E. L. Wiegand Division, Emerson Electric Co. *v.* NLRB 939
EMI Ltd. *v.* Bennett 943
Endeco, Inc.; Herzog *v.* 943
Engle; Mack *v.* 954
Englemen *v.* Englemen 956
Enmund *v.* Florida 937
Enserch Exploration, Inc. *v.* Bullock 946
Equal Employment Opportunity Comm'n *v.* Wyoming 935
Ernest *v.* Cohen 985

Page
Erspan; Badgett *v.* 945
Esprit de Corp.; St. Joe Paper Co. *v.* 982
Estelle; Antwine *v.* 955
Estelle; Cooper *v.* 953
Estelle; Ehl *v.* 953
Estelle; Grant *v.* 911
Estelle; Hernandez *v.* 952
Estelle; Holloway *v.* 984
Estelle; Johnson *v.* 924
Estelle; Madison *v.* 953
Estelle; Rumph *v.* 956
Estelle *v.* Sellers 927
Estelle; Smith *v.* 958
Estes *v.* United States 919
Eubank *v.* Virginia 943
Evans; Click *v.* 987
Evans *v.* Reed 924
Evans; Watson *v.* 925
Exchange Oil & Gas Corp. *v.* Eagerton 987
Exxon Corp. *v.* Eagerton 987
Fahner; Nuclear Engineering Co. *v.* 993
Falls City Industries, Inc. *v.* Vanco Beverage, Inc. 988
Falsetta; Regira *v.* 914
Farace *v.* New York 949
Farmer *v.* Strickland 944
Federal Communications Comm'n; Blechman *v.* 954
Federal Communications Comm'n *v.* Gottfried 935
Federal Election Comm'n *v.* Americans for Change 129
Federal Labor Relations Authority; Government Employees *v.* 945
Federal Prescription Service, Inc. *v.* American Pharm. Assn. 928
Federal Reserve Bank of San Francisco; Bollow *v.* 948
Fed Sea/Fed Pac Line; North River Ins. Co. *v.* 948
Fenner *v.* General Motors Corp. 942
Ferber; New York *v.* 904, 916, 934
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 917
Finnegan *v.* Leu 903
Fiorini *v.* Abshire 991
First National Bank of Alabama-Huntsville *v.* Haile 949
First National Bank of Boston (Int'l) *v.* Banco Nacional de Cuba 936
First Nat. City Bank *v.* Banco para el Comercio Exterior de Cuba 936
First Pentecostal Church *v.* United States 920
Fischetti *v.* Ascione 995
Fisher *v.* United States 908
Fleming *v.* United States 950, 959

Page
Flenner *v.* Pontifex 954
Flight Attendants *v.* Trans World Airlines 385, 915, 932
Florida; Alander *v.* 919
Florida; Campagno *v.* 912
Florida; Cowgill *v.* 995
Florida; Enmund *v.* 937
Florida; Katz *v.* 938
Florida; Leicht *v.* 989
Florida; Locke *v.* 985
Florida *v.* Royer 986
Florida; Tafero *v.* 983
Florida Dept. of Corrections; Eicher *v.* 954
Florida Dept. of Revenue; Stan Musial & Biggies, Inc. 931
Foddrell *v.* United States 925
Foley; Schnapper *v.* 948
Fontana *v.* United States 957
Ford Motor Co.; Bennett *v.* 923
400 E. Baltimore Street, Inc. *v.* Maryland 940
Fowler *v.* Garrahy 984
Franzen; U. S. *ex rel.* Tolbert *v.* 955
Frazier *v.* S/S Delta Mar 952
Friendly Retirement Center, Inc. *v.* Colling 940
Futuronics Corp.; Israel & Raley *v.* 941
F. W. Woolworth Co. *v.* National Labor Relations Bd. 989
GAF Corp.; Cheng *v.* 909
Galis *v.* Wainwright 929
Gallo *v.* Massachusetts 995
Ganley *v.* Maryland 942
Garcia *v.* Illinois 953
Garden State Bar Assn.; Middlesex County Ethics Committee *v.* . 936
Garrahy; Fowler *v.* 984
Garrett *v.* United States 924
Garrison; Alford *v.* 925
Garrison; Carter *v.* 952
Garrison; Watkins *v.* 992
Garza *v.* United States 993
Gaspard; Taylor Diving & Salvage Co. *v.* 907
Gaston *v.* New York 911
Gates *v.* Arizona 928
Gates; Illinois *v.* 986
Gaylor *v.* United States 926, 950
G. D. Searle & Co. *v.* Cohn 494, 932
Geller *v.* Merit Systems Protection Bd. 901
General Accounting Office; Quarry *v.* 912

Page
General Atomic Co. *v.* United Nuclear Corp. 948
General Building Contractors Assn. *v.* Pennsylvania 905
General Motors Corp.; Fenner *v.* 942
General Motors Corp.; Williams *v.* 943
Generix Drug Corp.; United States *v.* 988
Georgia; Hardy *v.* 929
Georgia; High *v.* 927
Georgia; Sliger *v.* 945
Georgia; Speight *v.* 947
Georgia; Spradlin *v.* 925
Georgia; Tookes *v.* 945
Georgia; Wallace *v.* 927
Gerard *v.* Louisiana 939
Getch *v.* Hammock 954
Gibbons; Railway Labor Executives' Assn. *v.* 457
Gibbs *v.* United States 960
Giesey *v.* Devine 908
Gillespie; Turner *v.* 959
Glasgow, Inc. *v.* Pennsylvania 905
Glitsch, Inc. *v.* Jones 920
Goetz *v.* North Dakota 924
Goins *v.* Bethlehem Steel Corp. 940
Goldfield Deep Mines Co. of Nevada *v.* United States 907
Goldstein *v.* Norfolk 981
Goldstein *v.* Nunez 949
Gomez *v.* Colorado 943
Gomez *v.* United States 922, 989
Gonzalez *v.* Hilton 952
Goodhead *v.* United States 912
Goodrich Co.; Worrell *v.* 913
Gordon; Connecticut *v.* 989
Goss *v.* United States 908
Goss, Inc. *v.* Pennsylvania Dept. of Agriculture 930
Gottfried; Community Television of Southern California *v.* 935
Gottfried; Federal Communications Comm'n *v.* 935
Government Employees *v.* Federal Labor Relations Authority 945
Governor of Idaho; Click *v.* 987
Governor of Iowa; Herweg *v.* 265
Governor of R. I.; Fowler *v.* 984
Grace Brethren Church; California *v.* 904
Grace Brethren Church *v.* United States 904
Grace Brethren Church; United States *v.* 904
Granato *v.* New York 949
Grant *v.* Estelle 911

Page
Gray *v.* Van Ooteghem 909
Great American Screen *v.* Musidor, B.V. 944
Greathouse *v.* United States 926
Green *v.* Director of Institutions, N. D. State Prisons 957
Green *v.* Ohio 976
Green *v.* Zant 983
Greene *v.* Lindsey 916
Grieg *v.* United States 907
Griffin *v.* United States 960
Guardians Assn. *v.* Civil Service Comm'n of New York City 935
Gutter *v.* Merrill Lynch, Pierce, Fenner & Smith, Inc. 909
Haile; First National Bank of Alabama-Huntsville *v.* 949
Haldeman *v.* United States Railway Assn. 930
Hale *v.* Illinois 953
Haley *v.* United States 949
Hall *v.* Oklahoma 951
Hamlen *v.* United States 960
Hamlin *v.* Warren 911
Hammock; Getch *v.* 954
Hanberry; Bethea *v.* 912
Haner *v.* United States 960
Hardy *v.* Georgia 929
Harper *v.* Barnes Group, Inc. 921
Harrington; DeVito *v.* 993
Harris; Lee *v.* 910
Harris *v.* United States 959
Harris; Washington *v.* 951
Harrison County School Bd.; Coen *v.* 938
Hartzell Propeller, Inc. *v.* Reyno 928
Hathorn *v.* Lovorn 916, 935
Havens Realty Corp. *v.* Coleman 363
Hawg-N-Action *v.* Trustees, Teamsters Health & Welf. Tr. Fund 941
Hawkins *v.* West Virginia 925
H & D, Inc.; National Labor Relations Bd. *v.* 902
Hegewald; St. Martin *v.* 944
Hegwood *v.* Blackburn 984
Hein *v.* California 931
Helms; McDaniel *v.* 946
Henderson; McMichael *v.* 950
Henrique *v.* U. S. Marshal 950
Henry *v.* United States 992
Hensley *v.* Eckerhart 988
Hepke *v.* Schweiker 948
Hernandez *v.* Estelle 952

Page
Hernandez *v.* Lafayette 901
Hernandez; Lafayette *v.* 907
Herrera *v.* White 959
Herweg *v.* Ray 265
Herzog *v.* Endeco, Inc. 943
Hester *v.* Martindale-Hubbell, Inc. 981
Hicks *v.* Rose 992
High *v.* Georgia 927
Hightower *v.* Searcy 984
Hill; Adamson *v.* 992
Hilliard *v.* Simpson 912
Hillsboro National Bank *v.* Commissioner 906, 986
Hilton; Gonzalez *v.* 952
Hilton; Simmons *v.* 958
Hoagland *v.* Lumbermens Mutual Casualty Co. 946
Hoehn, *In re* 937
Hogan; Mississippi Univ. for Women *v.* 935
Holland *v.* Sea-Land Service, Inc. 919
Hollingshead *v.* United States 926
Holloway *v.* Estelle 984
Holman, *In re* 902
Holmes; Theatres West, Inc. *v.* 913
Holmes; Westworld Cinema *v.* 913
Holy Spirit Assn.; Central Intelligence Agency *v.* 906
Home State Savings Assn.; Zan-Car Enterprises, Inc. *v.* 947
Hopkins; Kelsey-Hayes, Inc. *v.* 985
Hopkins *v.* United States 956
Hopkinson *v.* Wyoming 922
Horne *v.* South Carolina 985
Horton *v.* United States 960
House *v.* United States 956
Hubbard; Avedisian *v.* 949
Hughes *v.* United States 922
Human Rights Comm'n of San Francisco; Alioto's Fish Co. *v.* 944
Hunt; Murphy *v.* 478
Hurd; Michigan *v.* 976
Hybud Equipment Corp. *v.* Akron 931
Hydroaire, Inc.; Certain-Teed Piping Materials, Inc. *v.* 946
Idaho; Carmen *v.* 918
Idaho; National Organization for Women, Inc. *v.* 901, 918
Idaho *ex rel.* Evans; Click *v.* 987
Illinois *v.* Bochniak 938
Illinois; Childers *v.* 947
Illinois; Comay *v.* 944

Page
Illinois; Cooper *v.* 945
Illinois; Curtis *v.* 992
Illinois; Garcia *v.* 953
Illinois *v.* Gates 986
Illinois; Hale *v.* 953
Illinois; Johnson *v.* 951
Illinois; Lee *v.* 955
Illinois; Mitchell *v.* 944
Illinois; Purrazzo *v.* 948
Illinois; Rosa *v.* 952
Illinois; Spann *v.* 954
Illinois; Weaver *v.* 911
Illinois; Winters *v.* 923
Immigration and Naturalization Service *v.* Chadha 903
Immigration and Naturalization Service; U. S. House of Reps. *v.* 903
Immigration and Naturalization Service; U. S. Senate *v.* 903
Indiana; Townsend *v.* 992
Indianapolis; Richardson *v.* 945
Indianola *v.* Dotson 936
Industrial Workers *v.* Caterpillar Tractor Co. 915
In re. See name of party.
Internal Revenue Service; Dema *v.* 941
Iowa Beef Processors, Inc.; Rufenacht *v.* 921
Israel *v.* McMorris 967
Israel & Raley *v.* Futuronics Corp. 941
Ivie *v.* Brown 990
J., *In re* 191
Jackson *v.* Alabama Dept. of Public Safety 956
Jackson; Burton *v.* 913
Jackson Transit Authority *v.* Transit Union 917, 986
Jacob *v.* United States 942
Jacques Syl Knitwear, Inc. *v.* National Labor Relations Bd. 946
Jewett *v.* Commissioner 305
Jicarilla Apache Tribe; Amoco Production Co. *v.* 130
Jicarilla Apache Tribe; Merrion *v.* 130
Jicarilla Apache Tribe; Merrion & Bayless *v.* 130
Jiles *v.* United States 923
Jimenez; Lunz *v.* 913
Jimenez *v.* Montez 950
Job *v.* United States 939
Johns; Margoles *v.* 909
Johns *v.* Ohio 944
Johnson *v.* Bank of America 921
Johnson *v.* Board of Ed. of Chicago 936

Page
Johnson; Connecticut *v.* 937
Johnson *v.* Estelle 924
Johnson *v.* Illinois 951
Johnson *v.* Johnson 952
Johnson *v.* Louisiana 984
Johnson *v.* Maryland 948
Johnson; Mayor and City Council of Baltimore *v.* 916, 944
Johnson *v.* Ohio 955
Johnson *v.* Superior Court of Cal., City & County of San Francisco 921
Johnston; Myers *v.* 925
Jones *v.* Consolidated Edison Co. of New York 952
Jones; Glitsch, Inc. *v.* 920
Jones *v.* New Jersey 952
Jones *v.* United States 956, 957
Jos. Schlitz Brewing Co.; McCluney *v.* 929
J. P. Stevens Employees Education Committee *v.* Donovan 930
J. Ray McDermott & Co. *v.* Signal Oil & Gas Co. 944
J. R. Simplot Co. *v.* Occupational Safety and Health Admin. 939
J. S. Alberici Construction Co. *v.* Sisco 976
J. S. Alberici Construction Co.; Sisco *v.* 976
Judge, District Court of Angelina County; Cox Enterprises, Inc. *v.* 994
Judge, District Court of Angelina County; Lufkin News *v.* 994
Justus *v.* Virginia 983
Kagarise *v.* Cumberland, Md., Area Teamsters Pension Fund 947
Kaiser Steel Corp. *v.* Mullins 72
Kansas City Parks and Recreation Dept.; Reliford *v.* 958
Kansas Power & Light Co.; Mesa Petroleum Co. *v.* 928
Karen B.; Treen *v.* 913
Kassel; Consolidated Freightways Corp. of Delaware *v.* 329
Katz *v.* Florida 938
Kelly *v.* Oklahoma Pardon and Parole Bd. 923
Kelsey-Hayes, Inc. *v.* Hopkins 985
Kendall *v.* United States 941
Kenley *v.* Young 961
Kentucky; Brannon *v.* 911
Kentucky; Kessinger *v.* 920
Kentucky; Langford *v.* 948
Kentucky; Yunker *v.* 946
Kentucky Bd. of Elections; Prime Movers, Inc. *v.* 909
Kessinger *v.* Kentucky 920
Kester *v.* United States 941
King, *In re* 906
Kinner *v.* United States 952
Kleinschmidt *v.* Sun Bank of Miami 956

Page
Kops *v.* Wisconsin 958
Krall *v.* Philadelphia 951
Kretchmar *v.* United States 910
Kriegel *v.* Van Ooteghem 909
Krupp *v.* New Jersey 925
Kulik *v.* California 907
Kunkle; Ahmed *v.* 991
Kutner; Stewart *v.* 945
Labor Union. See name of trade.
Ladmer *v.* United States 938
Lafayette *v.* Hernandez 907
Lafayette; Hernandez *v.* 901
Laird *v.* South Carolina 985
Langford *v.* Kentucky 948
Larsen *v.* Van Slootev 901
Leader *v.* United States 922
Lee *v.* Harris 910
Lee *v.* Illinois 955
Lee; United States *v.* 252
Leer; Chicago, M., St. P. & P. R. Co. *v.* 939
Legare *v.* Zant 914
Leicht *v.* Florida 989
Lektro-Vend Corp. *v.* Vendo Co. 921
Leonard *v.* United States 910
Lerma *v.* United States 921
Leu; Finnegan *v.* 903
Leuschner *v.* Maryland 951
Levison *v.* Levison 984
Lewis *v.* United States 955
Lindsey; Greene *v.* 916
Lippman; Antonelli *v.* 993
Local. For labor union, see name of trade.
Locke *v.* Florida 985
Lockhart *v.* United States 987
Lockheed Corp. *v.* Schneider 994
Lodge; Rogers *v.* 985
Loesch *v.* United States 984
Logan; Clements *v.* 942
Logan *v.* Zimmerman Brush Co. 422
Lonberger; Marshall *v.* 917
Long *v.* Bonnes 961
Longo *v.* United States 991
Longshoremen *v.* Waterfront Comm'n of N. Y. Harbor 915
Loretto *v.* Teleprompter Manhattan CATV Corp. 904

Page
Los Angeles *v.* Lyons 937
Los Angeles Airways; Lummis *v.* 988
Louisiana; Dunbar *v.* 911
Louisiana; Gerard *v.* 939
Louisiana; Johnson *v.* 984
Louisiana; Scott *v.* 924
Louisiana Power & Light Co.; Sessums *v.* 948
Lovett; Piatt *v.* 910
Lovorn; Hathorn *v.* 916, 935
Lowe *v.* New York City Dept. of Social Services 953
Lowe *v.* Ohio State Bar Assn. 920
L/P/G Benghazi *v.* Velibor 929
Lufkin News *v.* Vascocu 994
Lumbermens Mutual Casualty Co.; Hoagland *v.* 946
Lummis *v.* Los Angeles Airways 988
Lunz *v.* Jimenez 913
Lyons; Los Angeles *v.* 937
Ma, *In re* 987
Mabry; West *v.* 911
MacArthur *v.* Philippine Air Lines 957
MacDougall; Dixon *v.* 955
Mack *v.* Engle 954
Madison *v.* Estelle 953
Maguire *v.* United States 949
Maine Caterers, Inc. *v.* National Labor Relations Bd. 940
Mandelkorn *v.* Ward 907
Marathon Oil Co.; Mobil Corp. *v.* 982
Marathon Pipe Line Co.; Northern Pipeline Construction Co. *v.* 916, 934
Marathon Pipe Line Co.; United States *v.* 916, 934
Marchese *v.* United States 949
Maren Engineering Corp. *v.* Velmohos 985
Margoles *v.* Johns 909
Marshall; Arnold *v.* 922
Marshall *v.* Lonberger 917
Marshall & Ilsley Corp. *v.* Conover 981
Martin; Dillard *v.* 912
Martindale-Hubbell, Inc.; Hester *v.* 981
Martinez *v.* Ohio Bureau of Employment Services 911
Maryland; 400 E. Baltimore Street, Inc. *v.* 940
Maryland; Ganley *v.* 942
Maryland; Johnson *v.* 948
Maryland; Leuschner *v.* 951
Maryland; McMillion *v.* 956
Maryland; Simons *v.* 958

Page
Massachusetts; Cepulonis *v.* 931
Massachusetts; Gallo *v.* 995
Massachusetts *v.* New Hampshire 331
Massachusetts Council of Construction Employers, Inc.; White *v.* 919
Matthews *v.* United States 959
Matthews Bros., Inc. *v.* Pierce 947
Maynard; Shabazz *v.* 925, 984
Maynard *v.* United States 991
Mayor and City Council of Baltimore *v.* Johnson 916, 944
Mayor of Birmingham *v.* Associated Gen. Contractors of America 913
Mayor of Boston *v.* Massachusetts Council of Constr. Employers 919
Mayor of Columbus; Ohio *ex rel.* Catalina *v.* 989
Mayor of Denver *v.* Baldrige 345
Mayor of Detroit *v.* Baldrige 939
Mazyak *v.* United States 922
McBroom *v.* McCarthy 911
McCarthy; McBroom *v.* 911
McClendon *v.* United States 923
McCluney *v.* Jos. Schlitz Brewing Co. 929
McCready; Blue Shield of Virginia *v.* 916
McCutcheon *v.* Chicago Bd. of Ed. 946
McDaniel *v.* Helms 946
McDermott & Co. *v.* Signal Oil & Gas Co. 944
McDonald; Boggs *v.* 990
McDonald *v.* Metropolitan Govt. of Nashville & Davidson County 957
McDonnell Douglas Corp.; Commodore Business Machines, Inc. *v.* 920
McEwen; National Photo Services *v.* 942
McEwen; Wood *v.* 942
McGee; Missouri *v.* 930
McGuinn *v.* Crist 990
McIntosh *v.* United States 948
McIntyre *v.* Morris 923
McLister *v.* United States 990
McMichael *v.* Henderson 950
McMillion *v.* Maryland 956
McMorris; Israel *v.* 967
McNeely *v.* United States 950
McNichols *v.* Baldrige 345
McQuade *v.* United States 958
Meason; Bank of Miami *v.* 939
Melia *v.* United States 902
Memphis; Coweta News, Inc. *v.* 990
Memphis; Playmate Visual Center *v.* 990
Mercury Construction Corp.; Moses H. Cone Memorial Hospital *v.* 937

Page
Merit Systems Protection Bd.; Geller *v.* 901
Merrill Lynch, Pierce, Fenner & Smith, Inc.; Gutter *v.* 909
Merrion *v.* Jicarilla Apache Tribe 130
Merrion & Bayless *v.* Jicarilla Apache Tribe 130
Merski *v.* New Hampshire 943
Mesa Petroleum Co. *v.* Kansas Power & Light Co. 928
Mescalero Apache Tribe *v.* O'Cheskey 929
Mesquite *v.* Aladdin's Castle, Inc. 283
Messenger *v.* Bucyrus-Erie Co. 944
Metropolitan Govt. of Nashville & Davidson County; McDonald *v.* 957
Meyer *v.* Wilson 993
Meyers; Sherrod *v.* 943
Michigan *v.* Dugan 927
Michigan *v.* Hurd 976
Middlebury Associates *v.* Pike Industries, Inc. 947
Middlesex County Ethics Committee *v.* Garden State Bar Assn. 936
Midwest Growers Cooperative *v.* United States 942
Miller; Devon Corp. *v.* 993
Minton *v.* United States 950
Mississippi Univ. for Women *v.* Hogan 935
Missouri; Caldwell *v.* 929
Missouri; Cox *v.* 976
Missouri *v.* McGee 930
Missouri Bd. of Probation and Parole *v.* Williams 993
Mitchell *v.* Bolton 953
Mitchell *v.* Illinois 844
Mobil Corp. *v.* Marathon Oil Co. 982
Mobil Oil Corp.; Tully *v.* 245
Monroe *v.* New York 947
Montana; Coleman *v.* 983
Montana Wilderness Assn. *v.* U. S. Forest Service 989
Montez; Jimenez *v.* 950
Montgomery; Morgan *v.* 927
Moody; Ohio *ex rel.* Catalina *v.* 989
Moore *v.* Scurr 983
Moore *v.* Wainwright 924
Morgan *v.* Montgomery 927
Morgan *v.* United States 929
Morris; McIntyre *v.* 923
Morrison *v.* United States 912
Morrone *v.* United States 941
Morter *v.* United States 942
Moses H. Cone Memorial Hospital *v.* Mercury Construction Corp. 937
Moss *v.* Polland 925

Page
Moye *v.* Barnes 925
Moyer *v.* Elder-Beerman Stores Corp. 942
Mullins; Kaiser Steel Corp. *v.* 72
Muncy; Bush *v.* 910
Municipal Employees Credit Union of Baltimore; Clark *v.* 951
Murphy *v.* Adams 920
Murphy *v.* Hunt 478
Murphy *v.* United States 960
Murtishaw *v.* California 922
Musial & Biggies, Inc. *v.* Florida Dept. of Revenue 931
Musidor, B.V.; Be-Down Home Designs *v.* 944
Musidor, B.V.; Great American Screen *v.* 944
MWP Limited Partnership; Whitelaw *v.* 955
Myers *v.* Johnston 925
Myers; Skruzny *v.* 990
Myrick *v.* United States 926
NAACP *v.* Claiborne Hardware Co. 904, 934
National Bureau of Standards; Ackerman *v.* 929
National Labor Relations Bd.; E. L. Wiegand Div., Emerson Elec. *v.* 939
National Labor Relations Bd.; F. W. Woolworth Co. *v.* 989
National Labor Relations Bd. *v.* H & D, Inc. 902
National Labor Relations Bd.; Jacques Syl Knitwear, Inc. *v.* 946
National Labor Relations Bd.; Maine Caterers, Inc. *v.* 940
National Labor Relations Bd.; Ortiz Funeral Home Corp. *v.* 946
National Labor Relations Bd.; Permanent Label Corp. *v.* 940
National Labor Relations Bd.; Wright Line *v.* 989
National Organization for Women, Inc. *v.* Idaho 901, 918
National Photo Services *v.* McEwen 942
National Stabilization Agreement of Sheet Metal Industry Trust Fund; D. W. Browning Contracting Co. *v.* 909
Nearis, *In re* 993
Nebraska *ex rel.* Douglas; Sporhase *v.* 935
Nellie-Jeanne Corp. *v.* Columbus 946
New Bedford; Chicco *v.* 924
New Body Boutique, Inc.; Vibrant Sales, Inc. *v.* 909
New England Power Co. *v.* New Hampshire 331
New England Teamsters Pension Fund *v.* Bunnell 908
New Hampshire; Massachusetts *v.* 331
New Hampshire; Merski *v.* 943
New Hampshire; New England Power Co. *v.* 331
New Hamphire; Roberts *v.* 331
New Hampshire Dept. of Employment Security; White *v.* 445
New Jersey; Jones *v.* 952
New Jersey; Krupp *v.* 925

Page
New Mexico; Colorado *v.* 932
New York; Best *v.* 926
New York; Brown *v.* 929
New York; Diaz *v.* 957
New York; Farace *v.* 949
New York *v.* Ferber 904, 916, 934
New York; Gaston *v.* 911
New York; Granato *v.* 949
New York; Monroe *v.* 947
New York; Pleasant *v.* 924
New York; Vasquez *v.* 953
New York; Williams *v.* 992
New York City Dept. of Social Services; Lowe *v.* 953
New York State Chiropractic Assn. *v.* Pireno 935
Nicholstone Book Bindery, Inc.; Chelsea House Publishers *v.* 994
Norfolk; Goldstein *v.* 981
Norman Williams Co.; Bohemian Distributing Co. *v.* 933
Norman Williams Co.; Rice *v.* 933
Norman Williams Co.; Wine & Spirits Wholesalers of Cal. *v.* 933
North Dakota; Goetz *v.* 924
North Dakota *v.* United States 987
Northeastern Telephone Co. *v.* American Tel. & Tel. Co. 943
Northern Pipeline Construction Co. *v.* Marathon Pipe Line Co. 916, 934
North River Ins. Co. *v.* Fed Sea/Fed Pac Line 948
Northwest Excavating, Inc. *v.* Waggoner 931
Nuclear Engineering Co. *v.* Fahner 993
Nunez; Goldstein *v.* 949
Nurses *v.* Beth Israel Hospital and Geriatric Center 987
Nurses *v.* Presbyterian/St. Luke's Medical Center 987
Nurses *v.* St. Anthony Hospital Systems 987
Occupational Safety and Health Admin.; J. R. Simplot Co. *v.* 939
O'Cheskey; Mescalero Apache Tribe *v.* 929
Ochoa *v.* United States 959
Odom *v.* United States 960
Office of Consumers' Counsel; Cleveland Elec. Illuminating Co. *v.* 914
Oglala Sioux Tribe of Pine Ridge *v.* United States 907
Ohio; Collins *v.* 956
Ohio; Green *v.* 976
Ohio; Johns *v.* 944
Ohio; Johnson *v.* 955
Ohio; Ruppert *v.* 941
Ohio Bureau of Employment Services; Martinez *v.* 911
Ohio *ex rel.* Catalina *v.* Moody 989
Ohio State Bar Assn.; Lowe *v.* 920

Page
Oklahoma; Eddings *v.* 104
Oklahoma; Hall *v.* 951
Oklahoma; Texas *v.* 932
Oklahoma Pardon and Parole Bd.; Kelly *v.* 923
Old Republic Ins. Co.; Antonelli *v.* 923
Ortiz Funeral Home Corp. *v.* National Labor Relations Bd. 946
Ostrer *v.* United States 940
Outler *v.* United States 950
Owens *v.* United States 958
Owens *v.* Zimmerman 953
Palamone *v.* United States 949
Palmby; Cleveland *v.* 941
Palmby; Zinser *v.* 941
Palmer *v.* Alabama 922
Pardue *v.* United States 957
Parratt; Reed *v.* 956
Patterson *v.* Youngstown Sheet & Tube Co. 983
Paul, *In re* 906
Paxton National Ins. Co. *v.* Transport Indemnity Co. 982
Peck; Chicco *v.* 923
Pence; Ballet *v.* 957
Pennsylvania; Bechtel Power Corp. *v.* 905
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 905
Pennsylvania; General Building Contractors Assn. *v.* 905
Pennsylvania; Glasgow, Inc. *v.* 905
Pennsylvania; United Engineers & Constructors, Inc. *v.* 905
Pennsylvania; Upsher *v.* 959
Pennsylvania Dept. of Agriculture; S. H. Goss, Inc. *v.* 930
Pennsylvania *ex rel.* Zapata *v.* Cuyler 911
Pennsylvania Higher Education Assistance Agency; Phillips *v.* 924
Penoyer *v.* Wainwright 925, 984
Perini; Cunningham *v.* 924
Perini; Poole *v.* 910
Perini North River Associates; Director, OWCP *v.* 937
Permanent Label Corp. *v.* National Labor Relations Bd. 940
Perry *v.* United States 960
Peters *v.* Sjoholm 914
Peterson *v.* United States 947
Philadelphia; Krall *v.* 951
Philippine Air Lines; MacArthur *v.* 957
Phillips; Connor *v.* 991
Phillips *v.* Pennsylvania Higher Education Assistance Agency 924
Phillips; Smith *v.* 209
Phillips *v.* United States 912

Page
Piatt *v.* Lovett 910
Pico; Board of Ed., Island Trees Union School Dist. No. 26 *v.* 903
Pierce; Matthews Bros., Inc. 947
Pike Industries, Inc.; Middlebury Associates *v.* 947
Piper Aircraft Co. *v.* Reyno 928
Pireno; New York State Chiropractic Assn. *v.* 935
Pireno; Union Labor Life Ins. Co. *v.* 935
Pisani *v.* United States 959
Piscanio *v.* Beans 958
Pitoniak; Vigilant Ins. Co. *v.* 901
Playmate Visual Center *v.* Memphis 990
Pleasant *v.* New York 924
Polland; Moss *v.* 925
Pontifex; Flenner *v.* 954
Pool *v.* United States 926
Poole *v.* Perini 910
Port Arthur *v.* United States 917
Portland; Stanley *v.* 952
Posey *v.* United States 959
Poythress *v.* Duncan 937
Presbyterian/St. Luke's Medical Center; Nurses *v.* 987
President of Mass. Senate; Denman *v.* 946
Press-Enterprise Co. *v.* Superior Court of Cal., San Francisco 982
Prime Movers, Inc. *v.* Kentucky Bd. of Elections 909
Princeton Univ. *v.* Schmid 100
Providence Journal Co.; Auburn News Co. *v.* 921
Puerto Rico; Thayer *v.* 958
Puerto Rico *ex rel.* Quiros; Alfred L. Snapp & Son, Inc. *v.* 933, 986
Pullman-Standard *v.* Swint 903
Purrazzo *v.* Illinois 948
Quarry *v.* General Accounting Office 912
Quiros; Alfred L. Snapp & Son, Inc. *v.* 933, 986
Rabalais; Smith *v.* 992
Ragins *v.* United States 959
Railway Labor Executives' Assn. *v.* Gibbons 457
Raines; Diamond M Co. *v.* 938
Raines; Soule *v.* 982
Ralston *v.* Robinson 929
Ramah Navajo School Bd. *v.* Bureau of Revenue of N. M. 934
Ramsey *v.* Donovan 940
Randolph T., *In re* 993
Rapides Parish School Bd. *v.* Valley 939
Ray; Herweg *v.* 265
Ray *v.* United States 926

Page
Razatos *v.* Colorado 930
Reader's Digest Assn. *v.* United States 908
Reddish *v.* Wainwright 925
Redman; Bailey *v.* 995
Reed; Evans *v.* 924
Reed *v.* Parratt 956
Reese *v.* Byrne 953
Regira *v.* Falsetta 914
Reliford *v.* Kansas City Parks and Recreation Dept. 958
Reneer *v.* Smith 924
Reno *v.* Concerned Democrats of Florida 938
Reyno; Hartzell Propeller, Inc. *v.* 928
Reyno; Piper Aircraft Co. *v.* 928
Rhodes *v.* Stewart 991
Rhodes *v.* U. S. Navy 958
Ribotsky *v.* United States 910
Rice *v.* Norman Williams Co. 933
Richardson *v.* Indianapolis 945
R. M. J., *In re* 191
Roach *v.* South Carolina 927
Roadway Express, Inc.; Davidson *v.* 947
Roberts *v.* New Hampshire 331
Roberts *v.* United States 929
Robinson *v.* Armand 931
Robinson; Ralston *v.* 929
Rodrigues *v.* United States 993
Rogers *v.* Lodge 985
Romeo; Youngberg *v.* 915
Rosa *v.* Illinois 952
Rose; Hicks *v.* 992
Ross *v.* Bird 995
Ross; Bixby *v.* 931
Ross *v.* San Diego County Superior Court 995
Ross *v.* United States 926
Rossi; Weinberger *v.* 915
Rowley; Board of Ed. of Hendrick Hudson School Dist. *v.* 932
Royer; Florida *v.* 986
Rucinski *v.* United States 939
Rucker *v.* Bakewell 956
Rufenacht *v.* Iowa Beef Processors, Inc. 921
Rumph *v.* Estelle 956
Ruppert *v.* Ohio 941
Rushen *v.* Taylor 988
Russell *v.* California 954

Page
Ryndak *v.* United States 912
Sacred Heart Hospital; Amir *v.* 923
Sailors *v.* Schweiker 920
St. Anthony Hospital Systems; Nurses *v.* 987
St. Joe Paper Co. *v.* Superior Court of Cal., San Francisco 982
St. Louis County *v.* Simon 976
St. Martin *v.* Hegewald 944
Salama *v.* Virginia 928
Sanders *v.* United States 959
San Diego County Superior Court; Ross *v.* 995
Sanford *v.* United States 991
Sangiacomo *v.* Zigas 943
Sarcinelli *v.* United States 909
Schad *v.* Arizona 983
Schicker; Vorbeck *v.* 921
Schlitz Brewing Co.; McCluney *v.* 929
Schmid; Princeton Univ. *v.* 100
Schmidt *v.* United States 991
Schmitt; Common Cause *v.* 129
Schnapper *v.* Foley 948
Schneider; Lockheed Corp. *v.* 994
Schneider Transport, Inc. *v.* Cattanach 909
Schriever *v.* United States 919
Schweiker; Hepke *v.* 948
Schweiker; Sailors *v.* 920
Schweiker; Ware *v.* 912
Scoles *v.* Donovan 920
Scott *v.* Louisiana 924
Scott *v.* United States 907
Scull *v.* United States 950
Scurr; Moore *v.* 983
Seafood Workers *v.* United States 941
Sea-Land Service, Inc. *v.* Alaska Railroad 919
Sea-Land Service, Inc.; Holland *v.* 919
Searcy; Hightower *v.* 984
Searle & Co. *v.* Cohn 404, 932
Seattle School Dist. No. 1; Washington *v.* 923
Secretary of Commerce; McNichols *v.* 345
Secretary of Commerce *v.* Shapiro 345
Secretary of Commerce; Young *v.* 939
Secretary of Defense *v.* Rossi 915
Secretary of Health and Human Services; Caraballo *v.* 995
Secretary of Health and Human Services; Hepke *v.* 948
Secretary of Health and Human Services; Sailors *v.* 920

Page
Secretary of Health and Human Services; Ware *v.* 912
Secretary of Interior; Teclaw *v.* 908
Secretary of Labor; College Exxon Service Station *v.* 920
Secretary of Labor; J. P. Stevens Employees Ed. Committee *v.* ... 930
Secretary of Labor; Ramsey *v.* 940
Secretary of Labor; Scoles *v.* 920
Secretary of State of Ga.; Poythress *v.* 937
Secretary of Treasury; Cucchiara *v.* 948
Securities and Exchange Comm'n; Sprecher *v.* 908
Security Industrial Bank; United States *v.* 986
Sedigh *v.* United States 921
Sellers; Estelle *v.* 927
Sere *v.* Welsh 952
Seregos *v.* United States 940
Sessums *v.* Louisiana Power & Light Co. 948
Shabazz *v.* Maynard 925, 984
Shaheen *v.* Clarkson Co. 990
Shamy *v.* United States 939
Shapiro; Baldrige *v.* 345
Sharp; Coopers & Lybrand *v.* 938
Sheikh *v.* United States 991
Sheppard; Sumner *v.* 919
Sherrod *v.* Meyers 943
S. H. Goss, Inc. *v.* Pennsylvania Dept. of Agriculture 930
Shintaku; Ching Yee *v.* 916
Shipping Corp. of India; Williams *v.* 982
Shores; Sklar *v.* 936
Short *v.* United States 960
Siegel *v.* United States 989
Signal Oil & Gas Co.; J. Ray McDermott & Co. *v.* 944
Signal Oil & Gas Co.; Sun Oil Co. *v.* 944
Simko *v.* United States 913
Simmons *v.* Hilton 958
Simmons *v.* Winsberg 954
Simon; St. Louis County *v.* 976
Simons *v.* Maryland 958
Simplot Co. *v.* Occupational Safety and Health Administration ... 939
Simpson; Hilliard *v.* 912
Sisco *v.* J. S. Alberici Construction Co. 976
Sisco; J. S. Alberici Construction Co. *v.* 976
Sjoholm; Peters *v.* 914
Sklar *v.* Shores 936
Skruzny *v.* Myers 990
Sliger *v.* Georgia 945

Page
Smith; Connecticut *v.* 945
Smith; Crick *v.* 922
Smith *v.* Estelle 958
Smith *v.* Phillips 209
Smith *v.* Rabalais 992
Smith; Reneer *v.* 924
Smith; Stinson *v.* 951
Smith *v.* United States 949, 950
Smith's Moving & Trucking Co. *v.* Svendsen 927
Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Quiros 933, 986
Sohyde Drilling & Workover, Inc.; Valero Energy Corp. *v.* 983
Soule *v.* Raines 982
South Carolina; Horne *v.* 985
South Carolina; Laird *v.* 985
South Carolina; Roach *v.* 927
Southern State College *v.* Arkansas Gazette Co. 931
Southern Union Exploration Co.; Wynn Oil Co. *v.* 920
Sowders; Cooper *v.* 957
Spalding; Bosch *v.* 955
Spann *v.* Illinois 954
Sparks *v.* United States 910
Speight *v.* Georgia 947
Spieler *v.* United States 989
Sporhase *v.* Nebraska *ex rel.* Douglas 935
Spradlin *v.* Georgia 925
Spradling *v.* Texas 971
Sprecher *v.* Securities and Exchange Comm'n 908
S/S Delta Mar; Frazier *v.* 952
Standard Oil Co. of California; California *v.* 990
Stanley *v.* Portland 952
Stan Musial & Biggies, Inc. *v.* Florida Dept. of Revenue 931
State. See name of State.
Steelworkers *v.* Swint 903
Stephens *v.* California 910
Stewart *v.* Kutner 945
Stewart; Rhodes *v.* 991
Stinson *v.* Smith 951
Stoddard *v.* United States 938
Stone; Wichita Falls *v.* 905
Strickland; Farmer *v.* 944
Stroup *v.* Tucker 946
Strouth *v.* Tennessee 983
Strzelecki *v.* Sweatlock 908
Suggs *v.* Alabama 938

Page
Sumitomo Shoji America, Inc. *v.* Avagliano 933
Sumitomo Shoji America, Inc.; Avagliano *v.* 933
Sumner *v.* Sheppard 919
Sun Bank of Miami; Kleinschmidt *v.* 956
Sun Oil Co. *v.* Signal Oil & Gas Co. 944
Super Duper Food Store *v.* United States 920
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., San Diego County; Press-Enterprise Co. *v.* 982
Superior Court of Cal., San Francisco; Johnson *v.* 921
Superior Court of Cal., San Francisco; St. Joe Paper Co. *v.* 982
Sutherland *v.* United States 949
Sutterer *v.* United States 957, 992
Svendsen; Smith's Moving & Trucking Co. *v.* 927
Sweatlock; Strzelecki *v.* 908
Swint; Pullman-Standard *v.* 903
Swint; Steelworkers *v.* 903
Syl Knitwear, Inc. *v.* National Labor Relations Bd. 946
T., *In re* 993
Tabcor Sales Clearing, Inc. *v.* Department of Treasury 941
Tafero *v.* Florida 983
Tage *v.* United States 991
Talamantez *v.* California 954
Talley, *In re* 937
Tant *v.* United States 920
Tavelman *v.* United States 939
Taylor; Rushen *v.* 988
Taylor Diving & Salvage Co. *v.* Gaspard 907
Teal; Connecticut *v.* 903
Teclaw *v.* Watt 908
Teleprompter Manhattan CATV Corp.; Loretto *v.* 904
Tennessee; Strouth *v.* 983
Texas; Alexander *v.* 954
Texas; Busbee *v.* 929
Texas; Clay *v.* 954
Texas; Dunn *v.* 971
Texas *v.* Oklahoma 932
Texas; Spradling *v.* 971
Thayer *v.* Puerto Rico 958
Theatres West, Inc. *v.* Holmes 913
Thompson *v.* United States 959
Thoreen *v.* United States 938
Thunderguards Motorcycle Club *v.* Commissioners of Kent Cty... 990
Tinkle *v.* United States 924

Page
Todd *v.* United States 926
Todisco *v.* United States 906
Tolbert *v.* Franzen *v.* 955
Tookes *v.* Georgia 945
Torres *v.* United States 926
Toughill *v.* United States 953
Townsend *v.* Indiana 992
Transit Union; Jackson Transit Authority *v.* 917, 986
Transport Indemnity Co.; Paxton National Ins. Co. *v.* 982
Trans World Airlines; Flight Attendants *v.* 385, 915, 932
Trans World Airlines; Zipes *v.* 385, 915, 932
Treen *v.* Karen B. 913
Truck Drivers *v.* Allen 989
Trustees, Teamsters Health & Welf. Tr. Fund; Hawg-N-Action *v.* 941
Tsui *v.* United States 991
Tucker; Stroup *v.* 946
Tully *v.* Mobil Oil Corp. 245
Turchi *v.* United States 941
Turner *v.* Gillespie 959
Undetermined Quantities of Articles of Drugs; United States *v.* .. 902
Union. For labor union, see name of trade.
Union Labor Life Ins. Co. *v.* Pireno 935
United. For labor union, see name of trade.
United Engineers & Constructors, Inc. *v.* Pennsylvania 905
United Nuclear Corp.; General Atomic Co. *v.* 948
United States. See name of other party.
U. S. Forest Service; Montana Wilderness Assn. *v.* 989
U. S. House of Representatives *v.* INS 903
U. S. Marshal; Henrique *v.* 950
U. S. Navy; Rhodes *v.* 958
U. S. Parole Comm'n; Warren *v.* 950
U. S. Postal Service; Bowen *v.* 987
United States Railway Assn.; Haldeman *v.* 930
U. S. Senate *v.* Immigration and Naturalization Service 903
Upsher *v.* Pennsylvania 959
Utah; Carlsen *v.* 958
Valero Energy Corp. *v.* Sohyde Drilling & Workover, Inc. 983
Valley; Rapides Parish School Bd. *v.* 939
Vallone *v.* United States 906
Vanco Beverage, Inc.; Falls City Industries, Inc. *v.* 988
Vandetti *v.* United States 912
Van Ooteghem; Gray *v.* 909
Van Ooteghem; Kriegel *v.* 909
Van Slooten; Larsen *v.* 901

Page
Vargas *v.* United States 953
Vascocu; Cox Enterprises, Inc. *v.* 994
Vascocu; Lufkin News *v.* 994
Vasquez *v.* New York 953
Vasquez-Gonzalez *v.* United States 923
Velibor; L/P/G Benghazi *v.* 929
Velmohos; Maren Engineering Corp. *v.* 985
Vendo Co.; Lektro-Vend Corp. *v.* 921
Verlinden B. V. *v.* Central Bank of Nigeria 936
Veteran Corps of Artillery; Bloch *v.* 943
Vibrant Sales, Inc. *v.* New Body Boutique, Inc. 909
Vigilant Ins. Co. *v.* Pitoniak 901
Villaneuva Compania Naviera, S.A. *v.* Bankers Trust Co. 942
Villaneuva Compania Naviera, S.A.; Bankers Trust Co. *v.* 942
Virginia; Cordle *v.* 951
Virginia; Creasy *v.* 957
Virginia; Eubank *v.* 943
Virginia; Justus *v.* 983
Virginia; Salama *v.* 928
Vite *v.* Wisconsin 955
Vogel Fertilizer Co.; United States *v.* 16
Vorbeck *v.* Schicker 921
Waggoner; Northwest Excavating, Inc. *v.* 931
Wainwright; Galis *v.* 929
Wainwright; Moore *v.* 924
Wainwright; Penoyer *v.* 925, 984
Wainwright; Reddish *v.* 925
Wainwright; Walker *v.* 958
Walker *v.* United States 908, 949
Walker *v.* Wainwright 958
Wallace *v.* Georgia 927
Ward; Mandelkorn *v.* 907
Ward *v.* United States 922, 995
Warden. See also name of warden.
Warden; Coppola *v.* 927
Ware *v.* Schweiker 912
Warren; Hamlin *v.* 911
Warren *v.* U. S. Parole Comm'n 950
Washburn *v.* Washburn 902
Washington *v.* Chrisman 1
Washington *v.* Harris 951
Washington *v.* Seattle School Dist. No. 1 934
Washington *v.* United States 936
Washington Post Co.; Department of State *v.* 936

Page
Waterfront Comm'n of N. Y. Harbor; Longshoremen *v.* 915
Waters *v.* United States 947
Watkins *v.* Garrison 992
Watkins *v.* United States 989
Watson *v.* Busbee 925
Watson *v.* Evans 925
Watt; Teclaw *v.* 908
Watts *v.* Cook 921
Weaver *v.* Bowers 942
Weaver *v.* Illinois 911
Webb *v.* Alberto-Culver Co. 929
Weigand *v.* United States 940
Weinberger *v.* Rossi 915
Weinstein *v.* United States 942
Weit *v.* Continental Illinois National Bank & Trust Co. 988
Welsh; Sere *v.* 952
West *v.* Mabry 911
West Virginia; Hawkins *v.* 925
Westworld Cinema *v.* Holmes 913
Whalen *v.* Delaware 910
White; Herrera *v.* 959
White *v.* Massachusetts Council of Construction Employers, Inc. . 919
White *v.* New Hampshire Dept. of Employment Security 445
White *v.* United States 940
Whitelaw *v.* MWP Limited Partnership 955
Wichita Falls *v.* Stone 905
Widemon, *In re* 905
Wiegand Division, Emerson Electric Co. *v.* NLRB 939
Williams *v.* Carmen 992
Williams *v.* General Motors Corp. 943
Williams; Missouri Bd. of Probation and Parole *v.* 993
Williams *v.* New York 992
Williams *v.* Shipping Corp. of India 982
Williams *v.* United States 913, 919, 933
Williams *v.* Williams 930
Williams *v.* Wyrick 992
Williams Co.; Bohemian Distributing Co. *v.* 933
Williams Co.; Rice *v.* 933
Williams Co.; Wine & Spirits Wholesalers of California *v.* 933
Willoughby *v.* United States 956
Wilson; Meyer *v.* 993
Wilson *v.* United States 951
Winchell; Deer Park Medical Gp., Money Purchase Pension Plan *v.* 908
Wine & Spirits Wholesalers of California *v.* Norman Williams Co. 933

Page
Winley *v.* United States 959
Winsberg; Simmons *v.* 954
Winson; California *v.* 975
Winter *v.* United States 912
Winters *v.* Illinois 923
Wisconsin; Kops *v.* 958
Wisconsin; Vite *v.* 955
Witco Chemical Corp. *v.* Cotten 909
Wolf *v.* United States 960
Wolff *v.* United States 957
Wood *v.* McEwen 942
Woolworth Co. *v.* National Labor Relations Bd. 989
Worrell *v.* B. F. Goodrich Co. 913
Worrell *v.* United States 913
Wright Line *v.* National Labor Relations Bd. 989
Wynn Oil Co. *v.* Southern Union Exploration Co. 920
Wyoming; Equal Employment Opportunity Comm'n *v.* 935
Wyoming; Hopkinson *v.* 922
Wyrick; Williams *v.* 992
Yapalater *v.* Bates 908
Yaretsky; Blum *v.* 933
Yazzie *v.* United States 923
Yee *v.* Shintaku 916
Young *v.* Baldrige 939
Young; Kenley *v.* 961
Young *v.* United States 926
Youngberg *v.* Romeo 915
Youngstown Sheet & Tube Co.; Patterson *v.* 983
Yunker *v.* Kentucky 946
Zambuto *v.* United States 906
Zan-Car Enterprises, Inc. *v.* Home State Savings Assn. 947
Zant; Bowen *v.* 983
Zant; Davis *v.* 983
Zant; Green *v.* 983
Zant; Legare *v.* 914
Zapata *v.* Cuyler 911
Zavala-Pizano *v.* United States 929
Zia *v.* United States 959
Zigas; Sangiacomo *v.* 943
Zimmerman; Owens *v.* 953
Zimmerman Brush Co.; Logan *v.* 422
Zinser *v.* Palmby 941
Zipes *v.* Trans World Airlines 385, 915, 932
Zwego *v.* United States 919

TULLY ET AL. v. MOBIL OIL CORP. ET AL.

ON APPEAL FROM THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

No. 81-96. Decided February 22, 1982

Appellees, oil companies that are subject to New York State's gross receipts tax on their revenues derived from activities within the State, filed suit in Federal District Court challenging the provision of the tax statute that prohibits oil companies from passing on the cost of the tax in the prices of their products sold in the State. The statute also provides that the tax shall self-destruct if the antipassthrough provision is adjudged to be invalid or if its enforcement is enjoined. The court held that the antipassthrough provision was pre-empted by federal price control authority under the Emergency Petroleum Allocation Act and enjoined its enforcement. The Temporary Emergency Court of Appeals affirmed, but noted that the federal statute would expire by its own terms on September 30, 1981, and that expiration of the Act would signal the end of federal concern in the area.

Held: The judgment is vacated, and the case is remanded for reconsideration in light of the expiration of federal price control authority. Since the District Court's injunction did not terminate with the expiration of the federal statute, in its present form the declaration of the invalidity of the antipassthrough provision and the injunction against its enforcement have no current validity and must be set aside. The Temporary Emergency Court of Appeals should decide in the first instance what effect, if any, the expiration of federal price authority has on collateral matters raised by the parties concerning appellees' authority to pass through to consumers taxes that were paid or accrued prior to October 1, 1981, and the validity of the tax itself in view of the statute's "self-destruct" provisions.

653 F. 2d 497, vacated and remanded.

PER CURIAM.

In June 1980, New York State established a two percent tax on the gross receipts of oil companies limited to their revenues derived from their activities within the State. N. Y. Tax Law § 182, ch. 272 (McKinney Supp. 1980). Desiring that the tax actually be borne by the oil companies, its intended objects, rather than by consumers, the New York

Legislature prohibited the companies from passing on the cost of the tax in the prices of their products sold in New York. *Ibid.* The passthrough prohibition was sufficiently vital that the law provided that if the prohibition was "adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review" the tax would cease to exist on the 10th day thereafter. Ch. 272, § 12(a). All tax liabilities accrued to that day, however, would remain in full force and effect. It was also provided that the tax would self-destruct 10 days after any court "issues any order, judgment, injunction or stay prohibiting" the enforcement of the antipassthrough provision. Ch. 272, § 12(b).

The appellees are 10 oil companies subject to the tax who instituted suit to enjoin the antipassthrough provision, claiming that it was in conflict with and therefore pre-empted by federal price control authority under the Emergency Petroleum Allocation Act (EPAA), 15 U. S. C. § 751 *et seq.* The District Court agreed with that position and enjoined enforcement of the provision. 499 F. Supp. 888 (NDNY 1980). The Court of Appeals for the Second Circuit held that appellate consideration of the pre-emption issue was a matter for the Temporary Emergency Court of Appeals (TECA). 639 F. 2d 912, cert. denied *sub nom. Tully* v. *New England Petroleum Corp.*, 452 U. S. 967 (1981). That court, in turn, affirmed the District Court's decision, but noted that the federal statute would expire by its own terms in September 1981, and that expiration of the Act "will signal the end of federal concern in this area." 653 F. 2d 497, 502 (1981).

New York State tax officials then appealed TECA's decision to this Court. We now vacate the judgment and remand the case to TECA for reconsideration in light of the expiration of federal price control authority.[1]

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[1] We find that this is a proper appeal under 28 U. S. C. § 1254(2). The appellees argue that this Court only has jurisdiction to review TECA deci-

The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision. *Kremens* v. *Bartley*, 431 U. S. 119, 129 (1977); *Fusari* v. *Steinberg*, 419 U. S. 379, 387 (1975). The expiration date for the federal statute has come and gone; the only barrier to the enforcement of the antipassthrough provision no longer exists. However, the injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area. Thus, in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside.[2]

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sions by writ of certiorari. They point to the jurisdictional provisions incorporated in the Act which provide that "[w]ithin thirty days after entry of any judgment or order by the [TECA], a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in [28 U. S. C. § 1254]." § 211(g) of the Economic Stabilization Act of 1970 (ESA), 84 Stat. 800, note following 12 U. S. C. § 1904, incorporated by reference in the EPAA, 15 U. S. C. § 754(a). There is no indication that this provision, obviously directed at expediting review, was intended to substitute for § 1254(2)'s general grant of appellate jurisdiction over decisions from the "courts of appeals" invalidating state statutes on federal constitutional grounds. Congress has granted TECA "the powers of a circuit court of appeals with respect to the jurisdiction conferred upon it." ESA § 211(b)(1). It is logical that Congress intended its exercise of such powers to be subject to the same review.

[2] To be sure, the expiration provision contained in the EPAA states that "such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date." 15 U. S. C. § 760g.

Whatever bearing this saving clause may have upon other aspects of the case, it surely cannot mean that, despite the expiration of the pre-empting federal law, New York should be permanently enjoined from enforcing its antipassthrough provision.

Ordinarily, the determination that the law has so changed as to eliminate a conflict between federal and state law would conclude the dispute. In this case, however, both parties insist that an important controversy continues over the appellees' legal authority to pass through to consumers taxes that were paid or accrued prior to October 1. They also suggest that the validity of the New York tax itself is in question because of the "self-destruct" provisions of the statute. These matters are relevant to this litigation because, being predicated on the declaration of invalidity of the New York statute with respect to the period prior to October 1, 1981, they may constitute "remaining live issues [which] supply the constitutional requirement of a case or controversy." *Powell* v. *McCormack*, 395 U. S. 486, 497 (1969). Now that the operation of the passthrough prohibition is not blocked by conflicting federal law, a question arises as to the degree to which the resolution of these secondary issues will turn on the earlier finding of pre-emption, even if correct. Is there, for example, any federal interest that would prevent the State of New York from now enforcing its law so as to prevent appellees from passing through taxes which accrued prior to October 1?

We express no opinion on the ultimate merit of these contentions. We leave to TECA, a court intimately familiar with the intricacies of federal energy regulation, the task of deciding in the first instance what effect, if any, the expiration of federal price authority has on these collateral matters.[3]

Regardless of what TECA may decide with respect to those issues, it is clear that the judgment and injunction are not appropriately framed for this Court to review. There-

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[3] One question which arises is whether the saving clause in the federal statute, see n. 2, *supra*, applies here or whether it should be read as concerned only with administrative or judicial proceedings brought under the EPAA to enforce or otherwise adjudicate liabilities under that statute.

fore, the judgment of the Court of Appeals is vacated, and the case is remanded to TECA for reconsideration in light of the expiration of federal price control authority under the EPAA.

So ordered.

JUSTICE BRENNAN would set the case for oral argument.

JUSTICE STEVENS, dissenting.

Federal price control authority under the Emergency Petroleum Allocation Act, 15 U. S. C. § 751 *et seq.*, pre-empted the authority of the State of New York to control prices of petroleum products. In this case, the Temporary Emergency Court of Appeals held that the antipassthrough provision of N. Y. Tax Law § 182 (McKinney Supp. 1980) was "clearly a price control measure"[1] that could not be enforced while the federal authority was effective. The court recognized, however, that the federal bar would expire on September 30, 1981, and that the import of its decision was limited to the period prior to that date.[2]

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[1] "The anti-passthrough provision is clearly a price control measure in exercise of the State's police power. The stated purpose of the provision is to prevent 'further increases in the price of petroleum products to consumers,' and to prevent the tax from 'fueling inflation by prohibiting pass through of such tax to the consumers of this state.' N. Y. Act, Ch. 272, § 1. As the Court of Appeals noted in another context, '[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products.' *Mobil Oil Corp.* v. *Tully*, *supra*, at 918. We agree with this observation." 653 F. 2d 497, 501 (TECA 1981).

[2] "Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA expires by its terms on September 30, 1981. 15 U. S. C. § 760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price control and in con-

In its appeal to this Court, the New York State Tax Commission does not ask us to consider any question concerning the meaning or enforceability of its laws during the period after the expiration of federal price control authority. Such questions are not our business and are not presented by this litigation. Rather, the appeal by the Commission presents the question whether the then-existing federal price control authority prevented the State from fixing the economic burden of a tax imposed upon companies that sell petroleum products.[3] The Temporary Emergency Court of Appeals

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flict with the objectives of the program. See *Ray* v. *Atlantic Richfield*, 435 U. S. 151, 178 . . . (1978).

"When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations." *Id.*, at 502.

[3] The three questions presented in the jurisdictional statement read as follows:

"1. Does the Tax Injunction Act, 28 U. S. C. § 1341, deprive federal district courts of jurisdiction to enjoin enforcement of a provision of a New York State tax law when the effect of the injunction would be to terminate the assessment, levy, and collection of the tax?

"2. Did the Energy Policy and Conservation Act of 1975 and the revocation, pursuant to its terms, by the Department of Energy of regulations that had set maximum allowable prices for certain petroleum products, prohibit the states from fixing the economic burden of a tax imposed upon companies that sell petroleum products?

"3. Did those federal regulations, when they were effective, prevent the states from exercising such a power?" Juris. Statement ii.

I am satisfied that the Court of Appeals for the Second Circuit correctly answered the first question when it held that the antipassthrough provision of the New York statute was an exercise of the State's police power and not its taxing power. 639 F. 2d 912, 917–918, cert. denied *sub nom. Tully* v. *New England Petroleum Corp.*, 452 U. S. 967 (1981). The injunction entered by the District Court did not enjoin New York from collecting the tax; it merely enjoined the enforcement of the antipassthrough provision. Unless that injunction is construed to have expired by its terms, it will, of course, be subject to modification, on the Commission's motion, to eliminate any federal objection to the enforcement of the antipassthrough provision subsequent to the expiration of federal price control authority.

correctly answered that question. Since the subsequent expiration of the federal authority has no bearing on that question, I simply would affirm its judgment.[4]

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[4] I agree with the Court that our appellate jurisdiction has properly been invoked. See *ante*, at 246–247, n. 1.

UNITED STATES *v.* LEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 80-767. Argued November 2, 1981—Decided February 23, 1982

Appellee, a farmer and carpenter, is a member of the Old Order Amish, which believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. During certain years when he employed other Amish to work on his farm and in his carpentry shop, appellee failed to withhold social security taxes from his employees or to pay the employer's share of such taxes because he believed that payment of the taxes and receipt of benefits would violate the Amish faith. After the Internal Revenue Service assessed him for the unpaid taxes, appellee paid a certain amount and then sued in Federal District Court for a refund, claiming that imposition of the taxes violated his First Amendment free exercise of religion rights and those of his employees. The District Court held the statutes requiring appellee to pay social security taxes unconstitutional as applied, basing its holding on both 26 U. S. C. § 1402(g), which exempts from social security taxes, on religious grounds, self-employed Amish and others, and the First Amendment.

Held:

1. The exemption provided by § 1402(g), being available only to self-employed individuals, does not apply to employers or employees, and hence appellee and his employees are not within its provisions. P. 256.

2. The imposition of social security taxes is not unconstitutional as applied to such persons as appellee who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. Pp. 256–261.

(a) While there is a conflict between the Amish faith and the obligations imposed by the social security system, not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. Pp. 256–258.

(b) Widespread individual voluntary coverage under social security would undermine the soundness of the social security system, and would make such system almost a contradiction in terms and difficult, if not impossible, to administer. Pp. 258–259.

(c) It would be difficult to accommodate the social security system with myriad exceptions flowing from a wide variety of religious beliefs such as the Amish. *Wisconsin* v. *Yoder*, 406 U. S. 205, distinguished. There is no principled way for purposes of this case to distinguish between general taxes and those imposed under the Social Security Act. The tax system could not function if denominations were allowed to challenge it because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax. Pp. 259–260.

(d) Congress in § 1402(g) has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress explicitly provides otherwise. Pp. 260–261.

497 F. Supp. 180, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 261.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Acting Assistant Attorney General Murray*, *Stuart A. Smith*, and *Gary R. Allen*.

Francis X. Caiazza argued the cause and filed a brief for appellee.*

**William Bentley Ball* and *Phillip J. Murren* filed a brief for the National Committee for Amish Religious Freedom as *amicus curiae* urging affirmance.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to determine whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. 450 U. S. 993 (1981). The District Court concluded that the Free Exercise Clause prohibits forced payment of social security taxes when payment of taxes and receipt of benefits violate the taxpayer's religion. We reverse.

I

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish to work on his farm and in his carpentry shop. He failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes.[1]

In 1978, the Internal Revenue Service assessed appellee in excess of $27,000 for unpaid employment taxes; he paid $91—

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[1] The Social Security Act and its subsequent amendments provide a system of old-age and unemployment benefits. 26 U. S. C. § 3101 *et seq.* (1976 ed. and Supp. III). These benefits are supported by various taxes, including, relevant to this appeal, the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) taxes. FICA is a tax paid in part by employees through withholding, 26 U. S. C. § 3101 (1976 ed., Supp. III), and in part by employers through an excise tax. 26 U. S. C. § 3111 (1976 ed., Supp. III), FUTA is an excise tax imposed only on employers. 26 U. S. C. § 3301. Both taxes are based on the wages paid to employees, and the recordkeeping and transmittal of funds are obligations of the employer. Only FICA is collected from self-employed individuals.

In this case appellee failed to pay the employer's portion of FICA and FUTA taxes and failed to withhold his employee's contributions to FICA. An employer is liable for payment of the employee's share of FICA whether or not he withholds the required amount of the employee's contribution. 26 U. S. C. § 3102(b).

the amount owed for the first quarter of 1973—and then sued in the United States District Court for the Western District of Pennsylvania for a refund, claiming that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees.[2]

The District Court held the statutes requiring appellee to pay social security and unemployment insurance taxes unconstitutional as applied. 497 F. Supp. 180 (1980). The court noted that the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system.[3] The court also accepted appellee's contention that the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system. The District Court observed that in light of their beliefs, Congress has accommodated self-employed Amish and self-employed members of other religious groups with similar beliefs by providing exemptions from social security taxes. 26 U. S. C. § 1402(g).[4] The court's holding was based on both

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[2] Appellee also requested injunctive relief to prevent the Commissioner of Internal Revenue from attempting to collect the unpaid balance of the assessments. Under the Internal Revenue Code, injunctive relief is to be granted sparingly and only in exceptional circumstances. 26 U. S. C. § 7421(a) (1976 ed., Supp. III). The District Court therefore denied injunctive relief, but noted that should the Government attempt to collect the remaining payments "further Court relief could be requested." 497 F. Supp. 180, 184 (1980).

[3] Appellee indicates that his scriptural basis for this belief was: "But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5: 8)

[4] Title 26 U. S. C. § 1402(g) provides, in part:

"(1) Exemption

Any individual may file an application . . . for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes

the exemption statute for the self-employed and the First Amendment; appellee and others "who fall within the carefully circumscribed definition provided in 1402(g) are relieved from paying the employer's share of [social security taxes] as it is an unconstitutional infringement upon the free exercise of their religion."[5] 497 F. Supp., at 184.

Direct appeal from the judgment of the District Court was taken pursuant to 28 U. S. C. § 1252.

II

The exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees. Consequently, appellee and his employees are not within the express provisions of § 1402(g). Thus any exemption from payment of the employer's share of social security taxes must come from a constitutionally required exemption.

A

The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment

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payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act)."

In order to qualify for the exemption, the applicant must waive his right to all Social Security benefits and the Secretary of Health and Human Services must find that the particular religious group makes sufficient provision for its dependent members.

[5] The precise basis of the District Court opinion is not clear. The court recognized that on its face § 1402(g) does not apply to appellee because he is not a self-employed individual. The District Court nonetheless used the language of § 1402(g) to provide an exemption for appellee. The court's decision to grant appellee an exemption, however, appears to be based on its view that the statute was unconstitutional as applied. Consequently, this Court has jurisdiction under 28 U. S. C. § 1252 to hear the appeal. See also *United States* v. *American Friends Service Committee*, 419 U. S. 7, 9, n. 4 (1974).

of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. Although the Government does not challenge the sincerity of this belief, the Government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 716 (1981).[6] We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. See, *e. g.*, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Reynolds* v. *United States*, 98 U. S. 145 (1879). The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental inter-

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[6] This is not an instance in which the asserted claim is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S., at 715. At least one other religious organization has sought an exemption under § 1402(g). See also *Henson* v. *Commissioner*, 66 T. C. 835 (1976) (member of Sai Baba denied exemption because although opposed to insurance on religious grounds, the faith did not provide for its dependent members).

est. *Thomas, supra*; *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Gillette* v. *United States*, 401 U. S. 437 (1971); *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

B

Because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees.[7] The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans.[8] The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965). Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in as-

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[7] The Social Security Act was enacted in 1935 to provide supplementary retirement benefits. Over the following 45 years coverage has broadened, and the cost of the system has increased dramatically. See A. Abraham & D. Kopelman, Federal Social Security (1979). In 1939 the Act was amended to provide insurance benefits for retired workers, auxiliaries of retired workers, and survivors of deceased workers. In 1950 coverage was extended to self-employed workers and to select other employees previously excluded. In 1954 and 1956 disability benefits were added and in 1965 Medicare benefits were made available to participants in the system.

[8] National Commission on Social Security, Social Security in America's Future 5 (1981).

suring mandatory and continuous participation in and contribution to the social security system is very high.[9]

C

The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. In *Braunfeld* v. *Brown*, 366 U. S. 599, 605 (1961), this Court noted that "to make accommodation between the religious action and an exercise of state authority is a particularly delicate task . . . because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing . . . prosecution." The difficulty in attempting to accommodate religious beliefs in the area of taxation is that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld, supra*, at 606. The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, *e. g.*, *Thomas, supra; Sherbert, supra*, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld, supra*, at 606.[10]

Unlike the situation presented in *Wisconsin* v. *Yoder*, *supra*, it would be difficult to accommodate the comprehen-

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[9] The fiscal soundness of the social security system has been the subject of several studies and of congressional concern. See, *e. g.*, Congressional Budget Office, Paying for Social Security: Funding Options for the Near Term (1981).

[10] See, *e. g.*, *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944) (preacher not entitled to be free from taxes); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943) (same).

sive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference—in theory at least—is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. See, *e. g.*, *Lull* v. *Commissioner*, 602 F. 2d 1166 (CA4 1979), cert. denied, 444 U. S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F. 2d 586 (CA9 1969), cert. denied, 397 U. S. 1036 (1970). Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

III

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others.[11] Confining the § 1402(g) exemption to the self-

[11] The District Court read this as extending to the present claims. We need not decide whether the Free Exercise Clause compelled an exemption as provided by § 1402(g); Congress' grant of the exemption was an effort toward accommodation. Nor do we need to decide whether, if Congress had, as the District Court believed, intended § 1402(g) to reach this case, conflicts with the Establishment Clause would arise.

employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage earners employed by others.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.[12]

Accordingly, the judgment of the District Court is reversed, and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE STEVENS, concurring in the judgment.

The clash between appellee's religious obligation and his civic obligation is irreconcilable. He must violate either an Amish belief or a federal statute. According to the Court, the religious duty must prevail unless the Government shows

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[12] We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits. Indeed, it would be possible for an Amish member, upon qualifying for social security benefits, to receive and pass them along to an Amish fund having parallel objectives. It is not for us to speculate whether this would ease or mitigate the perceived sin of participation.

that enforcement of the civic duty "is essential to accomplish an overriding governmental interest." *Ante*, at 257–258. That formulation of the constitutional standard suggests that the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors. In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability.

Congress already has granted the Amish a limited exemption from social security taxes. See 26 U. S. C. § 1402(g). As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits. In view of the fact that the Amish have demonstrated their capacity to care for their own, the social cost of eliminating this relatively small group of dedicated believers would be minimal. Thus, if we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard as formulated by the Court has not been met.

The Court rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process. The Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an established welfare system of its own.[1]

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[1] The Amish claim is readily distinguishable from the typical claim to an exemption from general tax obligations on the ground that the taxpayer objects to the government's use of his money; in the typical case the taxpayer is not in any position to supply the government with an equivalent substitute for the objectionable use of his money.

Nevertheless, I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim.[2] I believe, however, that this reasoning supports the adoption of a different constitutional standard than the Court purports to apply.

The Court's analysis supports a holding that there is virtually no room for a "constitutionally required exemption" on religious grounds from a valid tax law that is entirely neutral in its general application.[3] Because I agree with that holding, I concur in the judgment.

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[2] In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

[3] Today's holding is limited to a claim to a tax exemption. I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court's holdings than does the standard articulated by the Court today. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437 (selective service laws); *Braunfeld* v. *Brown*, 366 U. S. 599 (Sunday closing laws); *Prince* v. *Massachusetts*, 321 U. S. 158 (child labor laws); *Jacobson* v. *Massachusetts*, 197 U. S. 11 (compulsory vaccination laws); *Reynolds* v. *United States*, 98 U. S. 145 (polygamy law). The principal exception is *Wisconsin* v. *Yoder*, 406 U. S. 205, in which the Court granted the Amish an exemption from Wisconsin's compulsory school-attendance law by actually applying the subjective balancing approach it purports to apply today. The Court's attempt to distinguish *Yoder* is unconvincing because precisely the same religious interest is implicated in both cases, and Wisconsin's interest in requiring its children to attend school until they reach the age of 16 is surely not inferior to the federal interest in collecting these social security taxes.

There is also tension between this standard and the reasoning in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, and

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Sherbert v. *Verner*, 374 U. S. 398. Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability. Cf. *Harris* v. *McRae*, 448 U. S. 297, 349–357 (STEVENS, J., dissenting). A tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects. No comparable economic motivation could explain the conduct of the employees in *Sherbert* and *Thomas*. In both of those cases changes in work requirements dictated by the employer forced the employees to surrender jobs that they would have preferred to retain rather than accept unemployment compensation. In each case the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect. In all events, the decision in *Thomas* was clearly compelled by *Sherbert*.

HERWEG ET VIR v. RAY, GOVERNOR OF IOWA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-60. Argued January 13, 1982—Decided February 23, 1982

Section 1902(a)(17)(D) of the Social Security Act (Act) provides that, in calculating benefits, state Medicaid plans must not "take into account the financial responsibility of any individual for any applicant or recipient under the plan unless such applicant or recipient is such individual's spouse." Section 1902(a)(17)(B) provides that participating States must grant benefits to eligible individuals "taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of Health and Human Services (HHS)], available to the applicant or recipient." Section 1902(a)(10)(A) requires States that have not exercised the so-called § 209(b) option to provide Medicaid assistance to all recipients of benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program. A federal regulation governing the "optional categorically needy" provides that if only one spouse is eligible for Medicaid, the States must "deem" income of the other spouse, *i. e.*, consider the latter's income as "available" to the Medicaid applicant, for one month after the spouses cease to live together, following which period only the income actually contributed may be considered. After petitioner wife, as a result of cerebral hemorrhages, was placed in a long-term care facility in Iowa, which has not exercised the § 209(b) option, her petitioner husband applied for Medicaid assistance on her behalf. She is part of the optional categorically needy since she is eligible for, but does not receive, SSI benefits. Iowa, in calculating the wife's Medicaid benefits, "deemed" or attributed income earned by the husband to the wife in a manner inconsistent with the federal regulation. Petitioners then filed suit in Federal District Court, challenging Iowa's "deeming" of the husband's income. After certifying a class of plaintiffs which included SSI recipients as well as the optional categorically needy, the District Court held that § 1902(a)(17) required Iowa's procedures to "provide for a factual determination in each instance of the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse," and that the federal time-limitation regulation was inconsistent with § 1902(a)(17), because it disabled the States in certain instances from considering the spouse's income as available to the applicant. In response to this order, Iowa adopted a procedure for making individualized factual determinations of the amount of income available to an institu-

tionalized spouse, and the District Court approved the plan. On petitioners' appeal, the Court of Appeals affirmed.

Held:

1. With regard to SSI recipients, the District Court's order conflicts with § 1902(a)(10)(A) of the Act, because it permits Iowa to deny Medicaid benefits to SSI recipients. To the extent that the order forbids "deeming" under any circumstances, it conflicts with the holding in *Schweiker* v. *Gray Panthers*, 453 U. S. 34, that Congress intended to permit a state Medicaid plan to deem the income from the applicant's spouse as part of the available income that the state plan may consider in determining eligibility. Pp. 272–273.

2. Section 1902(a)(17)(D) does not preclude the Secretary of HHS from promulgating regulations that impose time limitations upon the States' ability to "deem" income between spouses who do not share the same household. In imposing such time limitations, the Secretary has done nothing more than define what income is "available," pursuant to § 1902(a)(17)(B). There is nothing in § 1902(a)(17)(D) that precludes the Secretary from imposing these limitations or that either disables him from defining the term "available" in circumstances where the applicant and spouse no longer live together or gives the States authority to "deem" income unimpeded by the Secretary's broad authority under § 1902(a)(17)(B) to determine what income should be considered available to the Medicaid applicant. The Secretary has not exceeded his authority in promulgating the time-limitation regulation applicable in this case, and such regulation is neither arbitrary nor capricious. Pp. 273–278.

619 F. 2d 1265, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part, *post*, p. 278. BURGER, C. J., filed a dissenting opinion, *post*, p. 279.

Neal S. Dudovitz argued the cause for petitioners. With him on the briefs were *Christine M. Luzzie* and *Gill Deford*.

Brent R. Appel, First Assistant Attorney General of Iowa, argued the cause for respondents. With him on the brief were *Thomas J. Miller*, Attorney General, *John Black*, Special Assistant Attorney General, and *Stephen C. Robinson*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee*, *Deputy Solicitor General Geller*, and *Robert P. Jaye* for the United States; and by *Silvia Drew Ivie* for the Gray Panthers.

JUSTICE REHNQUIST delivered the opinion of the Court.

Last Term in *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 49–50 (1981), we upheld the validity of federal Medicaid regulations that permit "deeming" of income between spouses in those States that have exercised the so-called "§ 209(b) option" provided for in the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. III). "Deeming," in the parlance of the Social Security laws and regulations, means that a State determines eligibility by assuming that a portion of the spouse's income is "available" to the applicant. Because an individual's eligibility for Medicaid benefits depends in part on the financial resources that are "available" to him, "[d]eeming . . . has the effect of reducing both the number of eligible individuals and the amount of assistance paid to those who qualify." *Schweiker* v. *Gray Panthers*, *supra*, at 36. We rejected contentions that these regulations were arbitrary or capricious and that the regulations were inconsistent with § 1902(a)(17) of the Social Security Act, 42 U. S. C. § 1396a(a)(17).[1] 453 U. S., at 43. In

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[1] Section 1902(a)(17) provides that a state plan for medical assistance must

"include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any

the present case, we are called upon to decide to what extent the State of Iowa, an "SSI State," may consider the income of the institutionalized Medicaid applicant's non-institutionalized spouse in determining eligibility for Medicaid.

As we explained in greater detail in *Gray Panthers*, *supra*, Medicaid as originally enacted "required participating States to provide medical assistance to 'categorically needy' individuals who received cash payments under one of four welfare programs established elsewhere in the [Social Security] Act." *Id.*, at 37. This program was restructured in 1972 by Congress, when it replaced three of the four categorical programs with Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.* (1976 ed. and Supp. III). Fearing that some States might withdraw from the Medicaid program rather than bear the increased costs imposed by the restructuring, Congress offered the States the "§ 209(b) option." 42 U. S. C. § 1396a(f). Under the § 209(b) option, the States may elect to provide Medicaid assistance only to those individuals who would have been eligible under the State's Medicaid plan in effect on January 1, 1972. In other words, the § 209(b) option allows the States to avoid the effect of the link between the SSI and Medicaid programs: States may become either "§ 209(b) States" or "SSI States."

If a State participates in the Medicaid program without exercising the § 209(b) option, the State is required to make Medicaid assistance available to all recipients of SSI benefits. 42 U. S. C. § 1396a(a)(10)(A); 42 CFR § 435.120 (1980).[2] SSI States, however, are not limited to providing Medicaid benefits to SSI recipients. The Medicaid program offers participating States the option of providing Medicaid assist-

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other type of remedial care recognized under State law." 42 U. S. C. § 1396a(a)(17).

[2] The SSI program, in turn, has its own eligibility requirements, which include "deeming" provisions. See 42 U. S. C. §§ 1382, 1382c(b), (f)(1).

ance to certain other groups of individuals, see 42 U. S. C. § 1396a(a)(10)(C), one of which is the "optional categorically needy." See 42 CFR §§ 435.200–435.231 (1980).[3] Included among the "optional categorically needy," are (1) individuals who would be eligible for, but for some reason are not receiving, SSI benefits and (2) individuals who would be eligible for SSI benefits but for their institutionalized status. 42 CFR §§ 435.210–435.211 (1980).

With regard to the "optional categorically needy," the Secretary's regulations require the States to "deem" the income and resources of spouses who share the same household. 42 CFR § 435.723(b) (1980). Where both spouses are eligible for Medicaid, the States must "deem" income for the first six months after the spouses cease to live together. After this 6-month period, the States may consider only the income and resources actually contributed by one spouse to the other. § 435.723(c). If only one spouse is eligible for Medicaid, a similar rule applies but the time period is one month instead of six. § 435.723(d).[4] In effect, § 435.723 places time limita-

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[3] The States, if they choose to do so, may extend Medicaid coverage to the "medically needy." 42 U. S. C. § 1396a(a)(10)(C); 42 CFR §§ 435.300–435.325; 435.800–435.845 (1980). Since Iowa does not extend Medicaid assistance to the medically needy, the Secretary's deeming regulations applicable to this optional program are not at issue in this case. See 42 CFR § 435.822 (1980).

[4] Title 42 CFR § 435.723 (1980) provides:

"(a) If the agency provides Medicaid to SSI recipients, it must meet the requirements of this section in determining eligibility of aged, blind, and disabled individuals under the optional coverage provisions of §§ 435.210, 435.211, and 435.231.

"(b) The agency must consider income and resources of spouses living in the same household as available to each other, whether or not they are actually contributed.

"(c) If both spouses apply or are eligible as aged, blind, or disabled and cease to live together, the agency must consider their income and resources as available to each other for the first 6 months after the month they cease to live together. After this 6-month period, the agency must

tions on the States' ability to consider the spouse's income as "available" to the applicant after the spouses cease to live together. The question addressed by the lower courts, and now presented for our decision, is whether this regulation is a permissible exercise of the Secretary's authority under the Act to define what income is "available."

I

Petitioner Elvina Herweg has been in a comatose state since August 1976 as a result of two cerebral hemorrhages. When she was placed in a long-term care facility, her husband, petitioner Darrell Herweg, applied for Medicaid assistance on Elvina's behalf. Elvina does not receive SSI benefits, although the parties and the United States as *amicus curiae* agree that she is eligible to receive such benefits.[5] Iowa applied its own formula to determine Elvina's eligibility for Medicaid and to ascertain the amount Darrell would be required to contribute toward his wife's care. This formula was based on the income Darrell earned as a butcher and on standard living allowances allowed Darrell and his three children living at home. In other words, Iowa was "deeming," or attributing, income earned by one spouse to the other.

Iowa, however, was deeming in a manner inconsistent with the Secretary's regulations, which place time limitations upon the States' ability to consider as available to the applicant his spouse's income where the spouses do not share the same household. *Supra*, at 269 and this page, and n. 4. Because Elvina was institutionalized and because Darrell is not

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consider only the income and resources that are actually contributed by one spouse to the other.

"(d) If only one spouse in a couple applies or is eligible and they cease to live together, the agency must consider only the income and resources of the ineligible spouse that are actually contributed to the eligible spouse after the month in which they cease to live together."

[5] Elvina, therefore, is considered part of the optional categorically needy. 42 CFR § 435.210 (1980).

eligible for Medicaid, the Secretary's regulations prohibit Iowa from considering Darrell's income after one month from the time the couple ceased to live together. See 42 CFR § 435.723(d) (1980).

Petitioners filed the instant suit in the United States District Court for the Southern District of Iowa challenging Iowa's "deeming" of the income of a Medicaid applicant's spouse.[6] After certifying a class of plaintiffs,[7] the District Court held that § 1902(a)(17) of the Social Security Act, 42 U. S. C. § 1396a(a)(17), required Iowa's procedures to "provide for a factual determination in each instance of the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse. . . . Such determination must give due consideration to the individual obligations and the particular needs of each spouse and family." 443 F. Supp. 1315, 1319 (1978). In interpreting § 1902(a)(17), the District Court concluded that "'deeming' is contrary to congressional intent whether income of the non-institutionalized spouse is deemed available or unavailable." *Id.*, at 1320. The District Court noted that the predecessor to 42 CFR 435.723 (1980)[8] was inconsistent with its interpretation of § 1902(a)(17). In the District Court's view, therefore, the Secretary's regulation was inconsistent with

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[6] Petitioners' challenge was based both on statutory and constitutional grounds. Petitioners contended that Iowa's procedures were in conflict with § 1902(a)(17) of the Social Security Act and with the Secretary's regulations, now codified at 42 CFR § 435.723 (1980). Petitioners also contended that Iowa's procedures violated the Equal Protection Clause and the Due Process Clause. Petitioners' constitutional claims were not considered either by the District Court or by the Court of Appeals and are not before this Court.

[7] The District Court certified a class consisting of "all married couples residing in Iowa of which: (1) one spouse is eligible for Medicaid and requires institutionalization; and (2) the other spouse is not institutionalized; and (3) the non-institutionalized spouse has income which is, under current state procedures, being deemed available to the institutionalized spouse." 443 F. Supp. 1315, 1320 (1978).

[8] 45 CFR § 248.3 (1976).

§ 1902(a)(17) because the regulation disabled the States in certain instances from considering the spouse's income as available to the applicant.

In response to this order, Iowa adopted a procedure for making individualized factual determinations of the amount of income available to an institutionalized spouse. The District Court approved this plan and petitioners appealed. The Court of Appeals for the Eighth Circuit affirmed by an equally divided Court. 619 F. 2d 1265 (1980) (en banc). We reverse.

II

Although Elvina Herweg does not receive SSI benefits, the class certified without objection by the District Court includes SSI recipients. We therefore construe the order entered by the District Court, and the plan adopted by Iowa in response, as applying both to SSI recipients and to the optional categorically needy.

A

With regard to recipients of SSI benefits, the District Court's order clearly conflicts with § 1902(a)(10)(A) of the Social Security Act, 42 U. S. C. § 1396a(a)(10)(A), which requires States not having exercised the § 209(b) option to provide Medicaid assistance to all SSI recipients.[9] 42 CFR § 435.120 (1980). See *Beltran* v. *Myers*, 451 U. S. 625, 626, n. 3 (1981). The SSI program, contained in Title XVI of the Social Security Act, 42 U. S. C. § 1382 *et seq.* (1976 ed. and Supp. III), contains its own eligibility provisions. See, *e. g.*, 42 U. S. C. §§ 1382(a)(1), 1382c(b), (f)(1). Pursuant to the District Court's order, however, Iowa is permitted to deny

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[9] Section 1902(a)(10)(A) requires a state Medicaid plan to provide "for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, *or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter* . . . ." 42 U. S. C. § 1396a(a)(10)(A) (emphasis added).

Medicaid benefits to institutionalized SSI recipients if, after making an individualized factual determination, Iowa concludes that the income of the SSI recipient's spouse should be considered available even though it was not actually contributed. Because Congress has clearly spoken in this regard, to the extent it permits Iowa to deny Medicaid assistance to SSI recipients, the District Court's order cannot stand.[10]

In requiring individualized determinations of income available to the Medicaid applicant, the District Court held that the Secretary has exceeded his authority in permitting any "deeming" whatsoever. In *Schweiker* v. *Gray Panthers*, 453 U. S., at 45, however, we held that Congress intended to permit a state Medicaid plan to deem the income from the applicant's spouse as part of the available income which the state plan may consider in determining eligibility. Thus, to the extent that the District Court's order forbids deeming under any circumstances, the order conflicts with our decision in *Gray Panthers*.

B

The issue that remains, therefore, is whether § 1902(a)(17) precludes the Secretary from promulgating regulations that impose time limitations upon the States' ability to consider the income of the institutionalized applicant's spouse.

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[10] Although we do not believe that § 1902(a)(10)(A) can be characterized as ambiguous in this regard, the legislative history to the original Medicaid statute is rather explicit in requiring the participating States to provide medical assistance to recipients under the four categorical welfare programs then in existence. "[A] State plan to be approved must include provision for medical assistance for all individuals receiving aid or assistance under State plans approved under titles I, IV, X, XIV, and XVI. It is only if this group is provided for that States may include medical assistance to the less needy." S. Rep. No. 404, 89th Cong., 1st Sess., 77 (1965). Titles I, X, and XVI were respectively Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled, the three categorical welfare programs replaced by SSI. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 37–38, and nn. 1, 3 (1981). We find nothing in the adoption of the SSI program that would alter the meaning of § 1902(a)(10)(A).

Relying on § 1902(a)(17)(D),[11] respondents argue that the Secretary has exceeded his authority in placing time limitations upon the States' authority to consider the financial responsibility of spouses. Subsection (17)(D), respondents argue, evidences Congress' intent to permit the States to consider the financial responsibility of spouses and parents. Nothing in the statute or the legislative history,[12] respondents contend, suggests that Congress intended to prevent the States from enforcing their financial responsibility policies simply because the Medicaid applicant is institutionalized.

We think, however, that respondents overemphasize the effect of subsection (17)(D). That provision may not be read independently of subsection (17)(B). Subsection (17)(B) provides that participating States must grant benefits to eligible individuals "taking into account only such income and resources as are, *as determined in accordance with standards prescribed by the Secretary*, available to the applicant." 42 U. S. C. § 1396a(a)(17)(B) (emphasis added). In *Gray Panthers*, we recognized that subsection (17)(B) delegates to the Secretary broad authority to prescribe standards setting eligibility requirements for state Medicaid plans. In view of Congress' explicit delegation of authority to give substance to the meaning of "available," the Secretary's definition of the term is "'entitled to more than mere deference or weight.'"

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[11] Section 1902(a)(17)(D) provides that the States' standards for determining eligibility for, and the extent of, Medicaid assistance may "not take into account the financial responsibility of any individual for any applicant or recipient under the plan unless such applicant or recipient is such individual's spouse or such individual's child . . . ." 42 U. S. C. § 1396a(a)(17)(D).

[12] Respondents rely in particular on a portion of the 1965 Senate Report we quoted in *Gray Panthers:*

"The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children." S. Rep. No. 404, 89th Cong., 1st Sess., 78.

Schweiker v. *Gray Panthers*, *supra*, at 44, quoting *Batterton* v. *Francis*, 432 U. S. 416, 426 (1977). Because Congress has entrusted the primary responsibility of interpreting a statutory term to the Secretary rather than to the courts, his definition is entitled to "'legislative effect.'" *Schweiker* v. *Gray Panthers*, *supra*, at 44; *Batterton* v. *Francis*, *supra*, at 426. As in *Gray Panthers* and *Batterton*, our review is limited to determining whether the Secretary has exceeded his statutory authority and whether the regulation is arbitrary and capricious.

Although Congress has approved of some deeming of income between Medicaid applicants and their spouses, *Schweiker* v. *Gray Panthers*, *supra*, at 48, we cannot agree with respondents that Congress intended the States to enforce their spousal responsibility policies wholly unimpeded by the Secretary's congressionally authorized power to give substance to the term "available." In placing time limitations upon the States' ability to consider the spouse's income where the Medicaid applicant and his spouse no longer live together, the Secretary has done nothing more than define what income is "available." Although Congress intended that a spouse's income *could be* part of the income which the Secretary may determine should be considered by the States as available to the Medicaid applicant, *Schweiker* v. *Gray Panthers*, *supra*, at 45, we see nothing in subsection (17)(D) that precludes the Secretary from imposing upon the States the time limits at issue in the instant case. We find nothing in § 1902(a)(17)(D) either that disables the Secretary from defining the term "available" in such circumstances, or that gives the States authority to "deem" income unimpeded by the Secretary's authority under subsection (17)(B).[13] Subsection (17)(D) cannot

[13] Contrary to the dissent, we do not interpret subsection (17)(D) as "authorizing" the States to deem, without any limitation, income between spouses. That subsection simply prohibits the States from considering the financial responsibility of any individual for the Medicaid applicant *unless* that individual is the applicant's spouse or parent. See nn. 1, 11, *supra*.

be read to *require* the Secretary to permit the States to consider the income of a spouse no longer living with the applicant as available to the applicant for an unlimited duration.

Although we do not agree with the contention of the United States, and apparently that of petitioners, that the time limitations in 42 CFR § 435.723 (1980) are *compelled* by the relationship between the Medicaid and SSI programs, we do agree that the Secretary may acknowledge this relationship in defining "availability" of income with regard to Medicaid applicants within the optional categories. As we have explained, the optional categorically needy consists in part of those individuals who are eligible for, but are not receiving, SSI benefits and those individuals who, but for their institutionalization, would be eligible for SSI benefits. *Supra*, at 269. Since these groups are defined in part with regard to SSI income limitations, it is reasonable that the Secretary should determine that States electing to provide Medicaid assistance to the optional categorically needy should apply a similar method for calculating income as that employed in the SSI program. The 1-month and 6-month limitations in 42 CFR § 435.723 (1980) are virtually identical to the SSI requirements. See 42 U. S. C. §§ 1382(a)(1), 1382c(b), (f)(1). We cannot say that it is either arbitrary or capricious for the Secretary to conclude that SSI recipients and the optional categorically needy should be treated similarly with respect to the method used for calculating income in determining whether the State is entitled to receive federal financial assistance under the Medicaid program.

In upholding the Secretary's limitation on deeming, we do not thereby render subsection (17)(D) meaningless. That provision, however, may not be read in isolation from the other provisions of the Social Security Act. We have no doubt that some tension exists between the Secretary's congressionally authorized power under subsection (17)(B) to determine what income is "available" to the applicant and Congress' intent in subsection (17)(D) to permit the States to

enforce their spousal responsibility policies.[14] Because Congress in subsection (17)(B) has delegated broad authority to the Secretary to set eligibility standards for the Medicaid program, however, we cannot say that the Secretary's regulations placing time limitations on the States' ability to deem income between spouses who do not share the same household are unreasonable or contrary to law. A reviewing court may not set aside the Secretary's regulations "simply because it would have interpreted the statute in a different manner." *Batterton* v. *Francis*, 432 U. S., at 425. *A fortiori*, Iowa may not ignore federal regulations simply because it interprets § 1902(a)(17) in a manner it considers preferable to the Secretary's interpretation.

This would be a different case, and respondents' arguments more compelling, if the Secretary had sought to use his authority under subsection (17)(B) to foreclose entirely the States' ability to consider the income of the institutionalized applicant's spouse. Such a reading of the statute could well render subsection (17)(D) superfluous. See *Schweiker* v. *Gray Panthers*, 453 U. S., at 45. The Secretary's regulations, however, impose no such across-the-board limitation on the States' ability to implement their spousal responsibility policies. The challenged regulation applies only to those SSI States that have decided to extend Medicaid benefits to the optional categorically needy, and it prohibits deeming only after the spouses have ceased to live together for prescribed periods of time.

On the contrary, 42 CFR § 435.723 (1980) is simply an exception to the general rule that the spouse's income may be considered available to the applicant. With regard to the optional categorically needy, SSI States are *required* to deem

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[14] As conceded by petitioners at oral argument, Tr. of Oral Arg. 9, Iowa is free to obtain reimbursement from the noninstitutionalized spouse in a lawsuit brought under its family responsibility laws. We recognize that such lawsuits may not be a uniformly practical alternative. See *Schweiker* v. *Gray Panthers*, 453 U. S., at 46.

the income and resources of spouses living in the same household. § 435.723(b). States exercising the § 209(b) option are *required* to deem income to the extent required in SSI States and may deem to the full extent they did before 1972. § 435.734. See *Schweiker* v. *Gray Panthers*, *supra*, at 40.[15] Finally, the SSI applicant is considered to a similar extent to have available to him his spouse's income and financial resources. See n. 2, *supra*.

We conclude that the Secretary need not interpret § 1902(a)(17) to require an individualized factual determination in each instance as to the amount of income of an applicant's spouse that may reasonably be considered available to the applicant. With regard to SSI recipients in SSI States, such an interpretation would be contrary to § 1902(a)(10)(A), 42 U. S. C. § 1396a(a)(10)(A). With regard to the optional categorically needy, we find that the Secretary has not exceeded his authority in promulgating 42 CFR § 435.723 (1980), and that this regulation is neither arbitrary nor capricious. Accordingly, we reverse the judgment of the Court of Appeals for the Eight Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part.

The Court speculates that subsection 17(D) might well be superfluous if subsection 17(B) were read to permit the Secretary to foreclose entirely the States' ability to consider the income of the spouse of an institutionalized applicant. *Ante*,

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[15] To a certain extent, therefore, the barriers Iowa faces in implementing its spousal responsibility policies are attributable to the choices it has made with regard to the Medicaid options available. Iowa has decided to become an SSI State rather than a § 209(b) State. The Secretary permits SSI States to opt for "'§ 209(b) status' at any time." *Schweiker* v. *Gray Panthers*, *supra*, at 39, n. 6. In addition, Iowa is subject to 42 CFR § 435.723 (1980) only because it has decided to extend Medicaid assistance to the optional categorical needy. § 435.700.

at 277. This speculation apparently is predicated on the belief that subsection 17(D) *requires* the States to deem certain income of an applicant's spouse to be available to the applicant.[1] The Court's observation is both unnecessary and misleading.[2] Subsection 17(D), like subsection 17(B), places a limit on the extent to which an applicant's income may be deemed to include contributions from other sources. Nothing in the language of either subsection requires that any spousal income be deemed to be available to an applicant.

Apart from the Court's speculation concerning a regulation that does not exist, I join its opinion.

CHIEF JUSTICE BURGER, dissenting.

Although the Medicaid program is a morass of bureaucratic complexity, I do not believe it is nearly so difficult to apply the Social Security Act in this case as the Court makes it seem. Iowa is an "SSI State." This means that, under § 1902(a)(10)(A) of the Act, 42 U. S. C. § 1396a(a)(10)(A), it must develop a plan "for making medical assistance available to all individuals receiving . . . supplemental security income benefits . . . ." As part of the plan Iowa developed, a non-institutionalized spouse must contribute toward the care of an institutionalized spouse. This is explicitly authorized by § 1902(a)(17)(D), 42 U. S. C. § 1396a(a)(17)(D), which prohibits a state from reducing the amount of Medicaid assistance to be made available to a recipient because of the financial responsibility of another person, *unless the other person is the recipient's spouse* or parent. See *ante*, at 267–268, n. 1.

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[1] In *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 45, the Court noted that subsection 17(D) might be superfluous if the statute were not read to *permit* certain deeming, see also 453 U. S., at 52 (STEVENS, J., dissenting); the Court did not suggest that any amount of deeming was required by the statute.

[2] As THE CHIEF JUSTICE notes in his dissenting opinion, it also is more consistent with his analysis of the case than with the Court's. See *post*, at 280–281, n. 2.

What could be more clear in words and purpose? Any doubt vanishes when we look at what Congress spelled out in the legislative history: "The committee believes it is proper to expect spouses to support each other . . . ." S. Rep. No. 404, 89th Cong., 1st Sess., 78 (1965).[1] In short, I conclude that Iowa's "deeming" procedure is authorized by subsection 17(D).

The Court apparently believes that Iowa overemphasizes the importance of subsection (17)(D). See *ante*, at 274. It bases its conclusion on subsection (17)(B), which delegates the task of determining what income is "available" to an institutionalized spouse to the Secretary of Health and Human Services. The applicable regulation promulgated by the Secretary goes 180 degrees contrary to the expressed will of Congress and prohibits states from taking the income of a noninstitutionalized spouse into account after the month in which the SSI recipient is institutionalized. 42 CFR § 435.723(d) (1980); see *ante*, at 269–270, n. 4. In *Schweiker* v. *Gray Panthers*, 453 U. S. 34 (1981), and *Batterton* v. *Francis*, 432 U. S. 416 (1977), we held that the Secretary's definition of "available" is entitled to great weight. I do not believe, however, that the Secretary may by regulation practically rewrite a portion of the statute. The statute is entitled to greater weight than the regulation, which was promulgated by the Secretary's staff, which apparently regarded the statute as too rigid.[2]

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[1] As applied to the tragic facts of this case, Iowa's plan required Mr. Herweg to contribute $234.80 each month toward the care of his wife in 1976. His gross monthly income was $1,350 at that time, and her monthly medical expenses were approximately $1,374.

[2] The Court admits that this would be a different case if the Secretary issued a regulation totally foreclosing states from "deeming" a noninstitutionalized spouse's income available to an institutionalized spouse. Such a regulation would "render subsection 17(D) superfluous." *Ante*, at 277. Yet the Court approves the prohibition of "deeming" after a prescribed period of institutionalization, in this case a period of one month. Moreover, although the Secretary interprets his regulation to prohibit "deeming"

All the parties agree that Iowa may enforce its family responsibility laws despite the Secretary's regulation. See *ante*, at 277, n. 14. This means that Iowa may sue a noninstitutionalized spouse for partial reimbursement for Medicaid payments under its laws. All Iowa may not do is "deem" a noninstitutionalized spouse's income available to support an institutionalized spouse. We compared the practicality of family responsibility laws and "deeming" in the 1980 Term, and concluded:

> "It is not 'an answer to say that the state can take action against the spouse to recover that which the spouse was legally obligated to pay. [It is] unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover the money that it should not have had to pay out in the first place. [Because States cannot practically do so, there would be] an open invitation for the spouse to decide that he or she does not wish to make the excess payment.' *Brown* v. *Stanton*, 617 F. 2d 1224, 1234 (CA7 1980) (Pell, J., dissenting in part and concurring in part) . . . ." *Schweiker* v. *Gray Panthers*, *supra*, at 46.

There is nothing in the difference between "SSI states" and "§ 209(b) states" that makes enforcement of family responsibility laws more practical in one than in the other.

The effect of the Court's decision will be to reduce the amount of Medicaid assistance available to those most in need. As we noted in *Gray Panthers*, some spouses will accept this open invitation of the "regulators" not to support an institutionalized spouse. In many cases, noncontributing spouses will get away with not contributing because the

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after one month of institutionalization, as written it appears to prohibit "deeming" even sooner. The regulation prohibits "deeming" "after the month in which" a spouse is institutionalized. See *ante*, at 270, n. 4. Thus, a literal interpretation of the regulation would prohibit "deeming" on February 1 in the case of a spouse institutionalized on January 31.

states will decide that it is not worth the effort to attempt to enforce their state laws. In other cases, funds that could go to those most in need will be diverted to pay the salaries of the lawyers and others needed to enforce the family responsibility laws. In both cases, a diversion of funds from those most in need will occur.

The Court's approach also undermines the states' role as partners in this cooperative federal-state program. By deciding to become an "SSI state" rather than a "§ 209(b) state," Iowa has chosen to allocate its resources to cover a greater number of people. By deciding to "deem" a portion of a noninstitutionalized spouse's income available to an institutionalized spouse, Iowa can reduce the cost of the additional coverage. In enacting subsection 17(D), Congress determined that the responsibility of a noninstitutionalized spouse for an institutionalized spouse is a matter best left to the judgment of the states. Yet the Court today moves the determination of spousal responsibility from the states to a federal agency.

In sum, the Court gets lost in the Medicaid maze, and ends up overruling a statute by giving greater weight to a regulation prepared by an agency staff than to the law as drafted by Congress. Subsection 17(D) was enacted expressly to permit the states to choose to require that spouses support each other. The Court seems to overlook that Congress intended to leave these choices to the states, since the regulation for all practical purposes prohibits states from making their own decisions based on their own perceptions of local needs. Since the regulation conflicts with subsection 17(D), it should be held invalid.

CITY OF MESQUITE v. ALADDIN'S CASTLE, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1577. Argued November 10, 1981—Decided February 23, 1982

Section 6 of appellant Texas city's licensing ordinance governing coin-operated amusement establishments directs the Chief of Police to consider whether a license applicant has any "connections with criminal elements." After receiving recommendations from the Chief of Police, the Chief Building Inspector, and the City Planner, the City Manager decides whether to grant a license. If he denies the license, the applicant may appeal to the City Council. If the City Manager denied the application because of the Chief of Police's adverse recommendation as to the applicant's character, the applicant must show to the City Council that he or it is of good character. Section 5 of the ordinance prohibits a licensee from allowing children under 17 years of age to operate amusement devices unless accompanied by a parent or legal guardian. After appellant had been ordered in Texas state-court proceedings to issue appellee amusement center operator a license (its license application having been initially denied under the predecessor to § 6), and after appellant had repealed appellee's exemption from the predecessor to § 5, appellee brought suit in Federal District Court, praying for an injunction against enforcement of the ordinance. The District Court held that § 6 was unconstitutionally vague, but upheld § 5. The Court of Appeals affirmed as to § 6, basing its holding solely on the Due Process Clause of the Fourteenth Amendment, but reversed as to § 5, basing its holding on the Texas Constitution as well as on the Fourteenth Amendment.

Held:

1. The fact that the phrase "connections with criminal elements" was eliminated from the ordinance while the case was pending in the Court of Appeals does not render the case moot. A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Here, appellant's repeal of the objectionable language would not preclude it from reenacting the same provision if the District Court's judgment were vacated. Pp. 288–289.

2. The Court of Appeals erred in holding that § 6 is unconstitutionally vague. It is clear from the procedure to be followed when an application for a license is denied by the City Manager based on the Chief of Police's recommendation, that the phrase "connections with criminal elements" is

not the standard for approval or disapproval of the application. Rather, the applicant's possible connection with criminal elements is merely a subject that § 6 directs the Chief of Police to investigate before he makes a recommendation to the City Manager. The Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations. Pp. 289–291.

3. Because Congress has limited this Court's jurisdiction to review questions of state law and because there is ambiguity in the Court of Appeals' holding as to § 5, a remand for clarification of that holding is necessary. This Court will not decide the federal constitutional question connected with § 5, where (a) the relevant language of the Texas constitutional provisions is different from, and arguably significantly broader than, the language of the corresponding federal provisions; (b) it is unclear whether this Court would apply as a matter of federal law the same standard applied as a matter of state law by the Court of Appeals in reviewing § 5; and (c) it is this Court's policy to avoid unnecessary adjudication of federal constitutional questions, there being no need for decision of the federal issue here if Texas law provides independent support for the Court of Appeals' judgment. Pp. 291–295.

630 F. 2d 1029, reversed in part and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 296, and POWELL, J., *post*, p. 297, filed opinions concurring in part and dissenting in part.

Elland Archer argued the cause and filed briefs for appellant.

Philip W. Tone argued the cause for appellee. With him on the brief were *Louis P. Bickel*, *Thomas L. Case*, *Don R. Sampen*, and *Christopher L. Varner*.*

JUSTICE STEVENS delivered the opinion of the Court.

The United States Court of Appeals for the Fifth Circuit declared unconstitutional two sections of a licensing ordi-

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*Briefs of *amici curiae* urging affirmance were filed by *Lawrence Gunnels*, *James A. Klenk*, and *Rufus King* for the Amusement Device Manufacturers Association; and by *Philip F. Herrick* for the Amusement and Music Operators Association, Inc.

Robert H. Bork and *David E. Springer* filed a brief for Atari, Inc., as *amicus curiae*.

nance governing coin-operated amusement establishments in the city of Mesquite, Texas.[1] Section 6 of Ordinance 1353, which directs the Chief of Police to consider whether a license applicant has any "connections with criminal elements,"[2] was

[1] 630 F. 2d 1029 (1980).

[2] Section 6 of Ordinance 1353 of the Code of the city of Mesquite provided in pertinent part:

"Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

"Upon approval by each of the parties and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferable.

"The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

"The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

"When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

"Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

"In the event of appeal from the City Manager's decision the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant.

"Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V. A. C. S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued.

[*Footnote 2 is continued on page 286*]

held to be unconstitutionally vague. Section 5, which prohibits a licensee from allowing children under 17 years of age to operate the amusement devices unless accompanied by a parent or legal guardian,[3] was held to be without a rational basis. The first holding rests solely on the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals stated that its second holding rested on two provisions of the Texas Constitution as well as the Fourteenth Amendment to the Federal Constitution. Because Congress has limited our jurisdiction to review questions of state law, and because there is ambiguity in the Court of Appeals' second holding, we conclude that a remand for clarification of that holding is necessary. There is, however, no impediment to our review of the first holding.

On April 5, 1976, to accommodate the proposal of Aladdin's Castle, Inc. (Aladdin), to open an amusement center in a shopping mall, the city exempted from the prohibition against operation of amusement devices by unattended children certain amusement centers, the features of which were defined in terms of Aladdin's rules, as long as children under the age of *seven* were accompanied by an adult.[4] Thereafter, Aladdin entered into a long-term lease and made other arrangements to open a center in the mall. In August, how-

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"Upon hearing the Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

"An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

"For violation of any of the requirements of this ordinance the City Manager may upon three (3) days notice of Licensee revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application." App. to Juris. Statement 9–10.

[3] Section 5 provides:

"It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian." *Id.*, at 8.

[4] See Ordinance 1310.

ever, its application for a license was refused because the Chief of Police had concluded that Aladdin's parent corporation was connected with criminal elements. Aladdin then brought suit in a Texas state court and obtained an injunction requiring the city to issue it a license forthwith. The Texas court found that neither Aladdin nor its parent corporation had any connection with criminal elements and that the vagueness in the ordinance contravened both the Texas and the Federal Constitutions.[5]

On February 7, 1977, less than a month after the city had complied with the state-court injunction by issuing the license to Aladdin, the city adopted a new ordinance repealing Aladdin's exemption, thereby reinstating the 17-year age requirement, and defining the term "connections with criminal elements" in some detail.[6] Aladdin then commenced this ac-

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[5] The judgment of the trial court was affirmed by the Texas Court of Civil Appeals, 559 S. W. 2d 92 (1977), and the Texas Supreme Court refused an application for a writ of error, 570 S. W. 2d 377 (1978), finding no reversible error in the conclusion that the denial of the license was not supported by substantial evidence, but declining to reach the vagueness question.

[6] Section 9 of Ordinance 1353 defined terms used in § 6 of the ordinance (quoted in n. 2, *supra*), which had been reenacted without change. Section 9 provided in pertinent part:

"*Connection With Criminal Elements* is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.

"A determination by the United States Department of Justice that a party is a member of the 'mafia' or 'Cosa Nostro' family or that such party is engaged in or affiliated with a nationwide crime organization, whether for-

tion in the United States District Court for the Northern District of Texas, praying for an injunction against enforcement of the new ordinance. After a trial, the District Court held that the language "connections with criminal elements," even as defined, was unconstitutionally vague, but the District Court upheld the age restriction in the ordinance.[7] As already noted, the Court of Appeals affirmed the former holding and reversed the latter.

Invoking our appellate jurisdiction under 28 U. S. C. § 1254(2), the city now asks us to reverse the judgment of the Court of Appeals. After we noted probable jurisdiction, 451 U. S. 981, Aladdin advised us that the ordinance reviewed by the Court of Appeals had been further amended in December 1977 by eliminating the phrase "connections with criminal elements." The age restriction, however, was retained.[8]

I

A question of mootness is raised by the revision of the ordinance that became effective while the case was pending in the Court of Appeals. When that court decided that the term "connections with criminal elements" was unconstitutionally vague, that language was no longer a part of the ordinance. Arguably, if the court had been fully advised, it would have regarded the vagueness issue as moot.[9] It is clear to us, however, that it was under no duty to do so.

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mally or informally, shall be prima facia evidence, so far as the issuance of a license hereunder, that such person has 'connections with criminal elements' and constitute, within the meaning of this ordinance, 'criminal elements'." App. to Juris. Statement 12–13.

[7] 434 F. Supp. 473 (1977), aff'd in part, rev'd and remanded in part, 630 F. 2d 1029 (1980).

[8] See Ordinance 1410, App. to Brief for Appellee A1–A11.

[9] If it becomes apparent that a case has become moot while an appeal is pending, the judgment below normally is vacated with directions to dismiss the complaint. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36.

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.[10] In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.[11] The city followed that course with respect to the age restriction, which was first reduced for Aladdin from 17 to 7 and then, in obvious response to the state court's judgment, the exemption was eliminated. There is no certainty that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction. We therefore must confront the merits of the vagueness holding.

"It is a basic principle of due process that an enactment is void for vagueness if its *prohibitions* are not clearly defined." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (emphasis

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[10] "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); see, *e. g.*, *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. [345 U. S.] at 633–636. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203–204.

[11] Indeed, the city has announced just such an intention. See Tr. of Oral Arg. 18–20.

added).[12] We may assume that the definition of "connections with criminal elements" in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection; we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center. These assumptions are not sufficient, however, to support a holding that this ordinance is invalid.

After receiving recommendations from the Chief of Police, the Chief Building Inspector, and the City Planner, the City Manager decides whether to approve the application for a license; if he disapproves, he must note his reasons in writing. The applicant may appeal to the City Council. If the City Manager disapproved the application because of the Chief of Police's adverse recommendation as to the applicant's character, then the applicant must show to the City Council that "he or it is of good character as a law abiding citizen," which is defined in the ordinance to "mean substantially that standard employed by the Supreme Court of the State of Texas in the

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[12] The Court of Appeals summarized the relevant authorities as follows: "A law is void for vagueness if persons 'of common intelligence must necessarily guess at its meaning and differ as to its application . . . .' *Smith* v. *Goguen*, 415 U. S. 566, 572 n. 8, quoting *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). The offense to due process lies in both the nature and consequences of vagueness. First, vague laws do not give individuals fair notice of the conduct proscribed. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162. *Accord Grayned* v. *City of Rockford*, 408 U. S. 104, 108 & n. 3. Second, vague laws do not limit the exercise of discretion by law enforcement officials; thus they engender the possiblity of arbitrary and discriminatory enforcement. *Grayned* v. *City of Rockford*, 408 U. S. at 108–09 & n. 4; *Papachristou* v. *City of Jacksonville*, 405 U. S. at 168–70. Third, vague laws defeat the intrinsic promise of, and frustrate the essence of, a constitutional regime. We remain 'a government of laws, and not of men,' *Marbury* v. *Madison*, 5 U. S. (1 Cranch.) 137, 163, only so long as our laws remain clear." 630 F. 2d, at 1037 (citations abbreviated).

licensing of attorneys as set forth in [the Texas statutes]." § 9 of Ordinance 1353, App. to Juris. Statement 13. An applicant may further appeal to the state district court. It is clear from this summary[13] that the phrase "connections with criminal elements," as used in this ordinance, is not the standard for approval or disapproval of the application.

The applicant's possible connection with criminal elements is merely a subject that the ordinance directs the Chief of Police to investigate before he makes a recommendation to the City Manager either to grant or to deny a pending application. The Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations. There would be no constitutional objection to an ordinance that merely required an administrative official to review "all relevant information" or "to make such investigation as he deems appropriate" before formulating a recommendation. The judgment of the Court of Appeals was therefore incorrect insofar as it held that the directive to the Chief of Police is unconstitutionally vague.

II

The Court of Appeals stated that its conclusion that the age requirement in the ordinance is invalid rested on its interpretation of the Texas Constitution as well as the Federal Constitution:

> "We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law." 630 F. 2d 1029, 1038–1039 (1980) (footnotes omitted).

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[13] The ordinance is quoted in pertinent part in n. 2, *supra*.

In the omitted footnotes the court quoted two provisions of the Texas Constitution that are similar, but by no means identical, to parts of the Federal Constitution.[14]

Because our jurisdiction of this appeal is based on 28 U. S. C. § 1254(2), we are precluded from reviewing the Court of Appeals' interpretation of the Texas Constitution. For the federal statute provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> . . . . .
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented . . . ."

If the Texas Constitution provides an independent ground for the Court of Appeals' judgment, our possible disagreement with its exposition of federal law would not provide a sufficient basis for reversing its judgment. If that be so, we should simply dismiss the appeal insofar as the city seeks review of the invalidation of the age requirement. Cf. *United States* v. *Hastings*, 296 U. S. 188, 193.[15]

The city contends, however, that the Court of Appeals did not place independent reliance on Texas law but merely

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[14] Article 1, § 19, of the Texas Constitution provides:

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Article 1, § 3, of the Texas Constitution provides in pertinent part:

"All free men, when they form a social compact, have equal rights . . . ."

[15] "Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly."

treated the Texas constitutional protections as congruent with the corresponding federal provisions.[16] Under this reading of the Court of Appeals' opinion, our correction of any federal error automatically would result in a revision of the Court of Appeals' interpretation of the Texas Constitution. Instead of providing independent support for the judgment below, the Texas law, as understood by the Court of Appeals, would be dependent on our reading of federal law. Although the city's contention derives support from the Court of Appeals' greater reliance on federal precedents than on Texas cases, we nevertheless decline, for the reasons that follow, to decide the federal constitutional question now.

It is first noteworthy that the language of the Texas constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions. As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977), and cases cited therein. Because learned members of the Texas Bar sit on the Court of Appeals for the Fifth Circuit, and because that court confronts questions of Texas law in the regular course of its judicial business, that court is in a better position than are we to recognize any special nuances of state law. The fact that the Court of Appeals cited only four Texas cases is an insufficient

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[16] If this contention is correct, we may review the Court of Appeals' interpretation of federal law. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568; *Mental Hygiene Dept.* v. *Kirchner*, 380 U. S. 194, 198; *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5; *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 554–555; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 514.

basis for concluding that it did not make an independent analysis of Texas law.

Second, it is important to take note of the Court of Appeals' interpretation of the Texas "requirement of legislative rationality." That interpretation seems to adopt a standard requiring that a legislative classification rests " '"upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."'" 630 F. 2d, at 1039.[17] This formulation is derived from this Court's opinion in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415. But it is unclear whether this Court would apply the *Royster Guano* standard to the present case. See *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166; *Craig* v. *Boren*, 429 U. S. 190. Therefore, it is surely not evident that the Texas standard and the federal standard are congruent.

Finally, and of greater importance, is this Court's policy of avoiding the unnecessary adjudication of federal constitutional questions. As we recently have noted, see *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, this self-imposed limitation on the exercise of this Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies. No reason for hasty decision of the constitutional question presented by this case has been advanced. If Texas law provides independent sup-

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[17] In a section of its opinion entitled "Rational Basis," the Court of Appeals twice set forth a rational-basis test. See 630 F. 2d, at 1039. In the first paragraph, the court stated that "[t]he test requires that legislative action be rationally related to the accomplishment of a legitimate state purpose," and cited both federal and state decisions in support of that formulation. In the second paragraph, the court stated that "[t]he test requires that legislation constitute a means that is 'reasonable, not arbitrary and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ,"'" quoting from a decision of the Texas Supreme Court, *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d 927, 928 (1975), which in turn quoted from *Reed* v. *Reed*, 404 U. S. 71, 76. A number of this Court's decisions were cited as in accord with this formulation. Although we cannot be sure, we might reasonably infer that the second formulation of the test represents the Court of Appeals' interpretation of Texas law.

port for the Court of Appeals' judgment, there is no need for decision of the federal issue.[18] On the other hand, if the city is correct in suggesting that the Court of Appeals' interpretation of state law is dependent on its federal analysis, that court can so advise us and we can then discharge our responsibilities free of concern that we may be unnecessarily reaching out to decide a novel constitutional question.[19]

The judgment of the Court of Appeals is reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[18] Our dissenting Brethren suggest that our "view allows federal courts overruling state statutes to avoid appellate review here simply by adding citations to state cases when applying federal law," *post*, at 300 (POWELL, J., concurring in part and dissenting in part). We are unwilling to assume that any federal judge would discharge his judicial responsibilities in that fashion. In any event, in this case we merely hold that the Court of Appeals must explain the basis for its conclusion, if there be one, that the state ground is adequate and independent of the federal ground.

[19] Cf. *Mental Hygiene Dept.* v. *Kirchner*, 380 U. S., at 196–197 (footnotes omitted):

"The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case. Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question. For reasons that follow we conclude that further clarifying proceedings in the California Supreme Court are called for under the principles stated in *Minnesota* v. *National Tea Co.*, 309 U. S. 551."

JUSTICE WHITE, concurring in part and dissenting in part.

I concur in the Court's holding that Mesquite's ordinance directing the Chief of Police to consider whether a license applicant has any "connections with criminal elements" is not void for vagueness.*

Like JUSTICE POWELL, however, I dissent from the Court's remand of the challenge to the age requirements in § 5 of the Mesquite ordinance. The sentiment to avoid unnecessary constitutional decisions is wise, but there is no reason in this case to suspect that the Fifth Circuit's standard for evaluating appellee's due process and equal protection claims under the Texas Constitution differed in any respect from federal constitutional standards. I agree with JUSTICE POWELL that "the inclusion of three cursory state-law citations in a full discussion of federal law by a federal court is neither a reference to nor an adoption of an *independent* state ground." *Post*, at 299–300 (concurring in part and dissenting in part).

I refrain from joining JUSTICE POWELL's detailed discussion in support of this position only because I would prefer not to engage in debate over the present health of "the *Roys-*

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*I agree that this issue has not been mooted by the city's revision of the ordinance. This conclusion is not inconsistent with our recent disposition of *Princeton University* v. *Schmid*, *ante*, p. 100 (*per curiam*). In that case, Princeton University's regulations governing solicitation and similar activity on University property were held invalid by the New Jersey Supreme Court. While the case was pending before the New Jersey court, Princeton substantially amended the contested regulations. On appeal to this Court, we held that the validity of the old regulations had become a moot issue. Unlike the city of Mesquite, Princeton gave no indication that it desired to return to the original regulatory scheme and would do so absent a judicial barrier. In this case, as noted in the Court's opinion, Mesquite "has announced just such an intention." *Ante*, at 289, n. 11. Because the test of whether the cessation of allegedly illegal action moots a case requires that we evaluate the likelihood that the challenged action will recur, *County of Los Angeles* v. *Davis*, 440 U. S. 625 (1979), it is on this basis that our disposition of the two cases is consistent.

ter Guano standard." As I understand it, and as expressed in the opinion of the Court, *ante*, at 292 and 294, the rationale for inquiring into the presence of independent and adequate state grounds is to avoid an unnecessary "abstract opinion," *United States* v. *Hastings*, 296 U. S. 188, 193 (1935), and to refrain from "unnecessary adjudication of federal constitutional questions." *Ante*, at 294. This is the sole justification for remanding the case to the Court of Appeals. To justify that disposition, however, the Court finds it necessary to speculate as to whether a formulation of the rational-basis test initially stated in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920), and reiterated in *Reed* v. *Reed*, 404 U. S. 71, 76 (1971), remains good law in light of more recent decisions. *Ante*, at 294. JUSTICE POWELL, in response, declares that "[t]his Court has never rejected either *Royster Guano* or *Reed* v. *Reed*." *Post*, at 301, n. 6.

I fear that we have lost sight of the fact that our reason for pursuing this inquiry is to avoid rendering advisory opinions on federal constitutional law. It is ironic that in seeking to skirt a relatively narrow issue of whether the Mesquite age requirement is constitutional, an issue decided by the Court of Appeals and fully briefed, the Court has instead entered into highly abstract, totally advisory, speculation as to the continuing validity of one of our earlier statements on a matter of no small constitutional importance. If it is necessary to interpret a case twice removed and totally unrelated to the matter before us in order to justify a remand to the Court of Appeals, I would think it clear that no independent nonfederal basis for the decision is present. *Delaware* v. *Prouse*, 440 U. S. 648, 652 (1979).

JUSTICE POWELL, concurring in part and dissenting in part.

I concur in the Court's holding that Mesquite Ordinance 1353, § 6, is not void for vagueness. I dissent, however, from the Court's remand of the challenge to § 5.

I

The jurisdictional basis for the Court's review of this case is 28 U. S. C. § 1254(2), which provides for mandatory Supreme Court review of federal appellate decisions overturning state statutes on federal constitutional grounds. Rather than exercising this jurisdiction, the Court remands the case to the Court of Appeals to clarify whether its decision is based on Texas law. In the past, the Court has not automatically required clarification when the record reveals that the lower court's decisional basis is federal law. In this case, the opinion of the Court of Appeals contains no analysis of state law independent of its clear application of federal law. In my view there is no justification for a remand.

The city of Mesquite, Tex., adopted an ordinance stating that owners of coin-operated pinball machines should not allow their operation by youths of 17 years or less. In the decision below, the Court of Appeals held that this ordinance violated equal protection and due process as well as First Amendment rights of free speech and association. The court's opinion referred to the Texas Constitution's Due Process and Equal Protection Clauses,[1] and quoted the relevant Texas constitutional provisions in the margin.[2] The court then, at some length, applied the Fourteenth Amendment's rational-relationship test to the Mesquite ordinance, citing, quoting, and discussing a total of 18 federal cases in this analysis. In the two initial paragraphs defining the

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[1] 630 F. 2d 1029, 1038–1039 (CA5 1980):

"We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law" (footnotes omitted).

[2] Tex. Const., Art. I, § 3 ("All free men, when they form a social compact, have equal rights . . .") and § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land").

broad principles applied in that analysis, the court cited two Texas cases and quoted briefly from another. 630 F. 2d 1029, 1035 (CA5 1980).

These Texas cases do not suggest an adequate and independent state ground for overruling the Mesquite ordinance. In the quoted case, the Texas court was describing *federal*, not Texas, law. *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d 927, 928 (Tex. 1975) (citing *Reed* v. *Reed*, 404 U. S. 71, 76 (1971)). Of the two other Texas cases cited, one involves an unsuccessful challenge to a zoning ordinance, and in it the Supreme Court of Texas applied the rule that a challenger to a zoning ordinance bears a heavy burden of showing that the exercise of police power is not lawful. *City of University Park* v. *Benners*, 485 S. W. 2d 773, 778–779 (1972). This case actually supports the validity of the Mesquite ordinance under Texas law.

In the other case, *Falfurrias Creamery Co.* v. *City of Laredo*, 276 S. W. 2d 351 (Tex. Civ. App. 1955), the State had established an inspection program for dairies. One municipality then passed an ordinance under which milk could be sold within its borders only if inspected by a local inspector. The Texas Court of Civil Appeals concluded that this requirement was arbitrary, since the local inspector could easily determine whether other inspectors were "[making] inspect[ions] in accordance with the standard ordinance contemplated by the State law." *Id.*, at 355. This single case dealing with a dairy-inspection requirement designed to favor local dairies cannot be the basis for a serious allegation that Texas law would not allow Mesquite to exercise its police power by keeping youths out of pinball parlors.

On the basis of an inference as weak as that afforded by *Falfurrias Creamery*, I would not remand to any court, state or federal. But even if the cited case law provided some support for appellee's challenge, the inclusion of three cursory state-law citations in a full discussion of federal law by a fed-

eral court is neither a reference to nor an adoption of an *independent* state ground. The Court's view allows federal courts overruling state statutes to avoid appellate review here simply by adding citations to state cases when applying federal law.

Nor is the Court's rigid approach today required by earlier decisions. In *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 256–258 (1957), for example, California argued that the California Supreme Court's order dismissing the petitioner's prayer for relief was based on an independent and adequate state ground: the requirements of a state procedural rule. The Court nevetheless proceeded to the merits of the federal question without remanding for clarification of the dismissal order's basis. This Court found the proffered sources of the alleged state procedural rule unconvincing and "conclu[ded] that the constitutional issues are before us and we must consider them." *Id.*, at 258 (footnote omitted).[3]

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[3] See also *Delaware* v. *Prouse*, 440 U. S. 648 (1979) (reaching federal issues when interpretation of State Constitution depends on federal law); *Cicenia* v. *Lagay*, 357 U. S. 504, 507, n. 2 (1958) (After looking at record and opinion below, Court concludes that State Supreme Court's dismissal appears to be based on federal ground); *Williams* v. *Kaiser*, 323 U. S. 471 (1945) (The only cited sources for an independent state ground are considered insubstantial by the Court; Court proceeds to merits of federal issue); *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 69 (1928) (Given that State Constitution has no Equal Protection Clause, Court concludes that federal law must have been determinative).

In *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), the lower court dismissed complaints with no indication of whether the dismissal was based on state or federal law. The Court continued the cases pending clarification of the lower court's decisional basis. In announcing this outcome, the Court stated that it would not review a judgment of a state court "until the fact that [the decision] does not [rest on an adequate and independent state ground] appears of record." *Id.*, at 128. *Pitcairn* did not, however, adopt the rigid rule the Court apparently adopts today. The Court continued to be willing to look at available record evidence (none was available in *Pitcairn*) to determine whether the decision below was based on an ade-

II

The Court gives three reasons for remanding. First, it observes that the language of the State Constitution, quoted in n. 2, *supra*, differs from that in the Federal Constitution and Texas may afford broader protection to individual rights than does the Federal Government. The relevant question is not, however, whether state law could be, or even is, different from federal law, but whether the Court of Appeals decided the case before it on state or federal grounds. In deciding this question, the citation of only three[4] state cases is not, of course, determinative. Here, however, the Court of Appeals failed to discuss, explain, describe, or even state Texas law despite extensive discussion of federal law and cases.

The Court's second point is at least imaginative. It focuses on one sentence from *Reed* v. *Reed*, 404 U. S., at 76, quoted in the Texas case of *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d, at 928, *ante*, at 294, and n. 17. That sentence reiterated a formulation of rational-basis analysis that was stated in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). The Court today then implies that "the *Royster Guano* standard" may no longer be good law, citing *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166 (1980).[5] From this implication,[6] the Court further

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quate and independent state ground. See *Cicenia* v. *Lagay*, *supra*; *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957).

[4] The Court reports that the Court of Appeals cited four Texas cases, but one case was cited as procedural history in the dispute between these parties, not as relevant to any question of Texas law. See 630 F. 2d, at 1034, n. 8.

[5] *Fritz* was decided on December 9, 1980; as the Court of Appeals had decided this case on November 17, 1980, it could not have been influenced by *Fritz*.

[6] This Court has never rejected either *Royster Guano* or *Reed* v. *Reed*. As stated in *Fritz*, "[t]he most arrogant legal scholar would not claim that all [Supreme Court] cases appl[y] a uniform or consistent test under equal

infers that "the Texas standard and the federal standard" may not be congruent. The best answer to this speculative syllogism is found in the discussion of rational-basis analysis by the Court of Appeals. In an Appendix hereto I include the three paragraphs of the opinion that discuss the rational-relationship standard of review. It will be noted that nine United States Supreme Court cases were cited. Although three Texas cases were cited also, there is not the slightest indication that the Court of Appeals was distinguishing between federal and state law. Moreover, in the subsequent pages applying rational-relationship review, the court did not cite or discuss a single Texas case or any aspect of Texas law, though 11 federal cases were cited and discussed. 630 F. 2d, at 1039–1040 (not included in Appendix).

Finally, the Court relies on our traditional reluctance to decide a constitutional question unnecessarily. But we noted jurisdiction to consider the validity of the Mesquite ordinance, and this question is squarely presented. As a general matter, the Court should avoid unnecessary remands; this is particularly true when the Court's mandatory jurisdiction has been invoked under § 1254(2). Neither the Court of Appeals nor appellee has presented any substantial reason for thinking that the Mesquite ordinance is invalid under Texas law independently of federal law that clearly was the basis for the decision below. In these circumstances, we have a duty to decide the substantive questions presented.

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protection principles." 449 U. S., at 177, n. 10. In view of the example we have set, there is no reason to perceive inferences of divergent federal- and state-court views because of the failure of the Court of Appeals or Texas courts to use entirely consistent terminology.

Moreover, after its generalizations as to rational-basis analysis, the Court of Appeals for the Fifth Circuit went on to say that even if "the challenged ordinance had a rational basis . . . we would nevertheless be compelled to strike it down" as an infringement of the fundamental right of association. 630 F. 2d, at 1041. No less than 29 federal cases were cited for this conclusion. No Texas case was cited. *Id.*, at 1041–1044.

APPENDIX TO OPINION OF JUSTICE POWELL*

"1. *Rational Basis*

"Assuming that the rational basis test is the appropriate standard of review, we conclude that no such rationality supports ordinance No. 1353. The test requires that legislative action be rationally related to the accomplishment of a legitimate state purpose. First, the challenged legislation must have a legitimate public purpose based on promotion of the public welfare, health or safety. *See, e. g., Rinaldi* v. *Yeager*, 384 U. S. 305, 309–10 . . . (1966); *Falfurrias Creamery Co.* v. *City of Laredo*, 276 S. W. 2d 351 (Tex. Civ. App. 1955, writ ref'd n.r.e.). Second, the act taken must bear a rational relation to the end it seeks to further. See *e. g., Griswold* v. *Connecticut*, 381 U. S. at 505–507 . . . (WHITE, J., concurring); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 . . . (1957); *City of University Park* v. *Benners*, 485 S. W. 2d 773, 778–79 (Tex. 1972), appeal dismissed 411 U. S. 901 . . . (1973).

"The requirement of legislative rationality in the service of legitimate purposes protects individuals and their liberties from official arbitrariness or unthinking prejudice. As one commentator noted, irrationality at least means 'patently useless in the service of any goal apart from whim or favoritism.' Michelman, *Politics and Values or What's Really Wrong with Rationality Review?* 13 Creighton Law Review 487, 499 (1979). The test requires that legislation constitute a means that is 'reasonable, not arbitrary and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation . . . "' *Texas Woman's University* v. *Chayklintaste*, 530 S.W. 2d 927, 928 (Tex.

*This includes the entire discussion of the rational-basis standard of review by the Court of Appeals. 630 F. 2d, at 1039. It is this portion of the Court of Appeals' opinion that the Court today relies on for saying that "it is surely not evident that the Texas standard and the federal standard are congruent." *Ante*, at 294. See *supra*, at 301–302, and n. 6.

1979), citing *Reed* v. *Reed*, 404 U. S. 71, 76 . . . (1971). *Accord, United States Department of Agriculture* v. *Moreno*, 413 U. S. 528 . . . (1973); *James* v. *Strange*, 407 U. S. 128 . . . (1972); *Jackson* v. *Indiana*, 406 U. S. 715 . . . (1972); *Stanley* v. *Illinois*, 405 U. S. 645 . . . (1972); *Eisenstadt* v. *Baird*, 405 U. S. 438 . . . (1972).

"Examination of ordinance No. 1353 reveals two stated purposes. First, the ordinance seeks to prevent truancy. Second, it seeks to keep minors from being exposed to people 'who would promote gambling, sale of narcotics and other unlawful activities.' We conclude that the seventeen year old age requirement in no way rationally furthers these interests in regulating the associational activity of Mesquite's young citizens, even making the assumption that both of these goals are legitimate." 630 F. 2d, at 1039.

JEWETT ET UX. v. COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1614. Argued December 1, 1981—Decided February 23, 1982

Held: The "transfer" referred to in the Treasury Regulation excepting from the federal gift tax a refusal to accept ownership of an interest in property transferred by will if such refusal is effective under local law and made "within a reasonable time after knowledge of the existence of the transfer," occurs, as indicated by both the text and history of the Regulation, when the interest is created and not at a later time when the interest either vests or becomes possessory. Hence, in this case where disclaimers of a contingent interest in a testamentary trust, though effective under local law, were not made until 33 years, and thus not "within a reasonable time," after the interest was created, the disclaimers were subject to a gift tax under §§ 2501(a)(1) and 2511(a) of the Internal Revenue Code, as indirect gifts to a successor in interest. Pp. 309-319.

638 F. 2d 93, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 319.

James D. St. Clair argued the cause for petitioners. With him on the briefs were *John G. Fabiano*, *Timothy H. Gailey*, and *Christopher T. Carlson*.

Stuart A. Smith argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Murray*, and *Jonathan S. Cohen*.*

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*Briefs of *amici curiae* urging reversal were filed by *Robert L. Stern* for Mayer, Brown & Platt; and by *Charles C. Parlin, Jr.*, and *Robert A. Bergquist* for Adelaide C. Griswold et al.

Coleman Burke, *Wallace B. Liverance, Jr.*, and *Geoffrey J. O'Connor* filed a brief for the Estate of Helen W. Halbach, John Poiner, Executor, as *amicus curiae*.

JUSTICE STEVENS delivered the opinion of the Court.

A trust beneficiary's refusal to accept ownership of property may constitute an indirect gift to a successor in interest subject to federal gift tax liability. 26 U. S. C. §§ 2501, 2511. Under Treasury Regulation § 25.2511-1(c), however, such a refusal is not subject to tax if it is effective under local law and made "within a reasonable time after knowledge of the existence of the transfer." The petitioner in this case executed disclaimers of a contingent interest in a testamentary trust 33 years after that interest was created, but while it was still contingent. The narrow question presented is whether the "transfer" referred to in the Regulation occurs when the interest is created, as the Government contends, or at a later time when the interest either vests or becomes possessory, as argued by petitioner.

Petitioner's grandmother, Margaret Weyerhaeuser Jewett, died in 1939 leaving the bulk of her substantial estate in a testamentary trust. Her will, executed in Massachusetts, provided that the trust income should be paid to petitioner's grandfather during his life, and thereafter to petitioner's parents. Upon the death of the surviving parent, the principal was to be divided "into equal shares or trusts so that there shall be one share for each child of my said son [petitioner's father] then living and one share for the issue then living representing each child of my said son then dead." App. 9. Petitioner's mother is the sole surviving life tenant. Thus, under the testamentary plan, if petitioner survived his mother, he would receive one share of the corpus of the trust; if he predeceased his mother, that share would be distributed to his issue. Since petitioner's parents had two children, his share of the trust amounted to one-half of the principal.

In 1972, when petitioner was 45 years old, he executed two disclaimers. The disclaimers each recognized that petitioner had "an interest in fifty percent (50%) of the trust estate . . . provided that he survives" his mother. *Id.*, at 15. In the

first disclaimer, petitioner renounced his right to receive 95% "of the aforesaid fifty percent (50%) of the remainder of the trust estate," *ibid.*; in the second he renounced his right to the remaining 5%. In 1972 the value of the trust exceeded $8 million.

Petitioner and his wife filed gift tax returns for the third and fourth quarters of 1972 in which they advised the Commissioner of the disclaimers, but did not treat them as taxable gifts.[1] The Commissioner assessed a deficiency of approximately $750,000. He concluded that the disclaimers were indirect transfers of property by gift within the meaning of §§ 2501(a)(1)[2] and 2511(a)[3] of the Internal Revenue Code, and that they were not excepted from tax under Treas. Reg. § 25.2511-1(c)[4] because they were not made "within a

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[1] Petitioner's wife, Lucille M. Jewett, elected to consent to treat the gifts made by her husband as having been made by both husband and wife to the extent allowed by law. App. to Pet. for Cert. A-20.

[2] "A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual resident or nonresident." 26 U. S. C. § 2501(a)(1).

[3] "Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States." 26 U. S. C. § 2511(a).

[4] "The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be

reasonable time after knowledge" of his grandmother's transfer to him of an interest in the trust estate. Petitioner then filed this action in the Tax Court seeking a redetermination of the deficiency.

In the Tax Court and in the Court of Appeals, petitioner argued that at the time the disclaimers were made he had nothing more than a contingent interest in the trust, and that the "reasonable time" in which a tax-free disclaimer could be made did not begin to run until the interest became vested and possessory upon the death of the last surviving life tenant.[5] Although a comparable argument had been accepted

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unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D." Treas. Reg. § 25.2511-1(c), 26 CFR § 25.2511-1(c) (1981).

[5] As did the Tax Court, we assume that petitioner's interest in the trust is properly characterized as a contingent remainder. Although that interest is arguably a vested remainder subject to divestiture, the distinction is

by the Court of Appeals for the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F. 2d 57 (1973),[6] it was rejected by the Tax Court[7] and by the Ninth Circuit[8] in this case. We granted certiorari to resolve the conflict. 452 U. S. 904.

Petitioner relies heavily on the plain language of the Treasury Regulation and on early decisions that influenced its draftsmen. Before analyzing that language and its history, it is appropriate to review the statutory provisions that the Regulation interprets.

I

Section 2501(a)(1) of the Internal Revenue Code imposes a tax "on the transfer of property by gift." Section 2511(a) provides that the tax shall apply "whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." As the Senate[9] and House[10] Reports explain:

> "The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value."

In *Smith* v. *Shaughnessy*, 318 U. S. 176, 180, the Court noted that "[t]he language of the gift tax statute, 'property

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not one of substance for our purposes here. Cf. *Helvering* v. *Hallock*, 309 U. S. 106.

[6] In *Keinath*, the court applied "the prevailing common law rule" and held that the holder of a vested remainder interest subject to divestiture has a reasonable time after the death of the life beneficiary within which to renounce or disclaim the remainder without tax consequences. 480 F. 2d, at 64. The court emphasized that the holder of the remainder interest did not obtain a right to beneficial ownership and control of the property until the death of the life beneficiary. *Ibid.*

[7] 70 T.C. 430 (1978).

[8] 638 F. 2d 93 (1980).

[9] S. Rep. No. 665, 72d Cong., 1st Sess., 39 (1932).

[10] H. R. Rep. No. 708, 72d Cong., 1st Sess., 27 (1932).

. . . real or personal, tangible or intangible,' is broad enough to include property, however conceptual or contingent."

Our expansive reading of the statutory language in *Smith* unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust.[11] Congress enacted the gift tax as a "corollary" or "supplement" to the estate tax.[12] In *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 44, the Court explained that "[a]n important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." Since the practical effect of petitioner's disclaimers was to reduce the expected size of his taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty, the treatment of the disclaimers as taxable gifts is fully consistent with the basic purpose of the statutory scheme.

II

The controlling Treasury Regulation provides that a refusal to accept ownership of property transferred from a decedent does not constitute a gift if two conditions are met. First, the refusal must be effective under the law governing the administration of the decedent's estate. Second, the re-

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[11] The actual value of the interest will be affected by the fact that it is not indefeasibly vested. As the Tax Court noted in this case:

"The value of petitioner's remainder interest was not, of course, equal to 50 percent of the value of the trust corpus. Rather, it depended upon actuarial factors reflecting the various contingencies." 70 T. C., at 435, n. 3.

[12] The Committee Reports state that the gift tax was designed "to impose a tax which measurably approaches the estate tax which would have been payable on the donor's death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax." H. R. Rep. No. 708, *supra*, at 28; S. Rep. No. 665, *supra*, at 40.

fusal must be made "within a reasonable time after knowledge of the existence of the transfer."

There is no dispute in this case that the first requirement has been satisfied; the disclaimers were effective under Massachusetts law. The controversy arises from the second requirement; specifically, it is over the meaning of the word "transfer," which may be read to refer to the creation of petitioner's remainder interest by his grandmother's will, or to either the vesting of that interest or the distribution of tangible assets upon the death of the life tenant. Both positions find support in the language of the Regulation.

To a layman the word "transfer" would normally describe a change in ownership of an existing interest rather than the creation of a new interest. Moreover, the reference to a transfer of "ownership of a decedent's property" suggests that the transferee must acquire property that once had been owned by the decedent; petitioner's grandmother never owned the future interests that her will created, but she once did own the assets (or their equivalent) that the remaindermen will acquire when their interests become possessory in character. Thus, language in the Regulation implies that the relevant "transfer" had not yet occurred when petitioner renounced his interest in the trust.

Other language, however, indicates that the relevant "transfer" occurs at the time of the testator's death. The word "transfer" is the basic term used in the gift tax provisions to describe *any* passage of property without consideration that may have tax consequences. See 26 U. S. C. §§2501, 2511, quoted in nn. 2, 3, *supra*.[13] The Regulation

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[13] Petitioner does not contend that the creation of an irrevocable trust for the benefit of alternative contingent remaindermen is not a "transfer" when made; if the creation of such a trust is a "transfer" of property within the meaning of the statute, a "transfer" occurred in this case at Margaret Weyerhaeuser Jewett's death. In short, the use of the word "transfer" in Treas. Reg. §25.2511-1(c) is not indicative of special meaning. To the

describes a transfer that "is effected by the decedent's will" (or by the law of descent and distribution of intestate property), not by a subsequent vesting event or distribution of property. The property must be transferred "from a decedent," not from an estate executor or trust administrator. The lack of any reference in the Regulation to future interests or contingent remainders, and the consistent focus on transfers effected by the decedent by will or through the laws of intestate distribution, undermine the suggestion that the relevant transfer occurs other than at the time of the testator's death. The Regulation also requires "knowledge of the existence of the transfer"; since a person to whom assets have actually been distributed would seldom, if ever, lack knowledge of the existence of such a transfer, it seems more likely that this provision was drafted to protect persons who had no knowledge of the creation of an interest.

On balance, we believe that the text of the Regulation supports the Commissioner's interpretation. Because that text is not entirely clear, however, it is appropriate to examine briefly the Regulation's history.

III

Treasury Regulation § 25.2511-1(c) has not been changed since it was promulgated on November 15, 1958. The form of the Regulation, however, is somewhat different from a draft that was first proposed on January 3, 1957. That draft required a renunciation to be made "within a reasonable time after knowledge of the existence of the interest," rather than

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contrary, Congress has specifically indicated that the term "transfer," at least as used in the statutory provisions defining the gift tax, is used "in the broadest and most comprehensive sense." See *supra*, at 399, and nn. 9, 10. It is not surprising that the draftsmen of the Regulation would choose the general term utilized by Congress to describe any passage of property with possible tax consequences.

after knowledge of the existence of the "transfer."[14] The word "interest" unquestionably would encompass a contingent remainder even if the word "transfer" arguably would not. Thus, if the initial draft had been adopted without change, petitioner's disclaimers certainly would be subject to tax. Petitioner contends that the drafting change must have been intended to avoid this consequence.

An assessment of petitioner's argument requires an examination of the reason for the change in the Regulation's language. The explanation of the change rendered by the Commissioner in 1958 indicates that it was intended to accomplish a purpose quite different from that suggested by petitioner.

A Memorandum from the Commissioner to the Secretary of the Treasury submitted on October 1, 1958, explained that the change in language was intended to capture "the proper distinction" between two early court decisions that the Regulation had attempted to codify.[15] In both of these cases the

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[14] The January 3, 1957, draft of the Regulation provided, in part:

"The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest." 22 Fed. Reg. 58 (1957).

[15] The Memorandum is published in Tax Notes, July 27, 1981, p. 204. In pertinent part, the Memorandum explains:

"In what was intended to be the application of the rules in *Brown* v. *Routzahn* (1933) 63 F. 2d 914, cert. denied 290 U. S. 641, and *Hardenbergh* v. *Commissioner* (1952) 198 F. 2d 63, cert. denied 344 U. S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. . . . Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now

transferee had renounced a fee interest before the administration of the decedent's estate had been completed. In the earlier case, *Brown* v. *Routzahn*, 63 F. 2d 914 (CA6 1933), cert. denied, 290 U. S. 641, a husband refused to accept a bequest under his wife's will. Under Ohio law the disclaimer was effective because it preceded the distribution of his wife's estate. Since the husband had never acquired ownership of the property, his disclaimer was held not to constitute the transfer of an interest; rather, it was deemed an exercise of a right to refuse a gift of property. Accordingly, the renunciation was held not be a gift in contemplation of death for purposes of determining the husband's estate tax. In the second case, *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (CA8 1952), cert. denied, 344 U. S. 836, the decedent died intestate leaving a wife, a daughter, and a son by a prior marriage. To effectuate the decedent's intent to equalize the wealth of the three, the wife and daughter relinquished their rights to their intestate shares. Under Minnesota law, however, "title to an interest in decedent's estate vested in the taxpayers by operation of law which neither had the power to prevent." 198 F. 2d, at 66. Since local law denied them the power to renounce the interest, the taxpayers' disclaimers were not effective and constituted gifts subject to the federal gift tax.

As indicated in the Commissioner's Memorandum, Treas. Reg. § 25.2511-1(c) sought to preserve the distinction between these two cases. Originally, the Regulation tracked language in the *Hardenbergh* opinion and provided that a disclaimer was taxable only if title to the property had "vested" under state law. On consideration, however, the Commissioner recognized that this language did not capture "the

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believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of section 25.2511-1 to reflect this change of position."

proper distinction between these two court cases"; indeed, in *Brown* v. *Routzahn*, the property interest had fully "vested" at the time of the taxpayer's renunciation.[16] Thus, to incorporate the proper distinction, the Commissioner changed the "vesting" requirement to a requirement that "the law governing the administration of the decedent's estate" must give a right to "refuse to accept ownership of property transferred from a decedent." Having eliminated the "vested property interest" language from the first part of the Regulation, the Commissioner correspondingly changed the second part to read "within a reasonable time after knowledge of the existence of the transfer," rather than "within a reasonable time after knowledge of the existence of the interest."

Thus, the purpose of the change in the Regulation was not to exclude contingent remainders. Neither *Brown* nor *Hardenbergh* concerned contingent interests. Since the original draft of the Regulation supports the Commissioner's position in this case, and since the change in its form was made for a reason that is unrelated to the issue presented, the Regulation's history buttresses the Commissioner's position.

Petitioner also contends that the history of the Regulation demonstrates that its draftsmen merely intended to codify the rules of *Brown* v. *Routzahn* and *Hardenbergh* v. *Commissioner*, and that under those cases state law controlled both the "right" to renounce and the "timeliness" of the renunciation. Although petitioner accurately interprets

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[16] As the court stated in that case:

"The [taxpayer] was in possession of the estate from 1912 until it was transferred to the trustees in 1920. It was not, however, in his possession as donee, but as a coexecutor. Nevertheless, at any time within that period he could have taken the one-third or made a renunciation that would have estopped him from claiming it. He did neither. It may be conceded, too, we think, that, had he died at any time between 1912 and the date of the distribution, this property would have passed under a general devise in his will, or, leaving no will, would have passed under the laws of descent and distribution as a part of his estate." 63 F. 2d, at 916.

these two cases, his interpretation of the Regulation would render half of it superfluous. The Regulation explicitly imposes two requirements: (1) the disclaimer must be effective as a matter of local law; and (2) the disclaimer must be made within a reasonable time. If timeliness were governed solely by local law, the second requirement would be redundant. While it is possible that local law may require a disclaimer to be timely to be effective, such a requirement would not absolve the taxpayer from the separate timeliness requirement imposed by the federal Regulation. Otherwise, the Regulation would be complete with a single requirement that the disclaimer be effective under local law.[17]

IV

Petitioner's remaining arguments may be answered quickly. In the Tax Reform Act of 1976, Congress established specific standards for determining whether a disclaimer constitutes a taxable gift; those new standards would support the Commissioner's position in this case if the original transfers had occurred after the effective date of the Act.[18] Petitioner argues that the legislative decision not to

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[17] It is possible that the federal timeliness requirement was added in response to the particular facts presented by *Brown* v. *Routzahn*, in which the taxpayer waited eight years to renounce the interest and did so when he was 72 years old. Although the renunciation was timely as a matter of Ohio law, the Treasury Department may well have thought that such delay was unacceptable for federal tax purposes. In practical effect, the 8-year delay made it likely that the renunciation decision was part of the taxpayer's personal estate planning. As explained by the Tax Court in this case: "While a State court might be willing to accept a renunciation of a nonpossessory and not indefeasibly vested property interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the property, or whether he had better let it pass directly to the next generation." 70 T. C., at 437.

[18] See Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1893, § 2009(b), 26 U. S. C. § 2518(b).

apply those standards retroactively is evidence that a different rule was previously effective. It is clear, however, that Congress expressed no opinion on the proper interpretation of the Regulation at issue in this case; it merely established an unambiguous rule that should apply in the future.[19]

Petitioner also argues that it is unfair to apply the 1958 Regulation "retroactively" to an interest that had been created previously; petitioner asserts that, by the time the Regulation was adopted, it was already too late—according to the Commissioner's view—to disclaim the interest.[20] The argument lacks merit. It is based on an assumption that petitioner had a "right" to renounce the interest without tax consequences that was "taken away" by the 1958 Regulation. Petitioner never had such a right. Indeed, petitioner does not argue that taxation of the disclaimers is inconsistent with the statutory provisions imposing a gift tax, which were enacted long before petitioner's interest in the trust was created. The 1958 Regulation was adopted well in advance of the disclaimers in this case; we see no "retroactivity" problem.

Finally, petitioner argues that the disclaimer of a contingent remainder is not a taxable event by analogizing it to an

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[19] After noting the decision in *Keinath* v. *Commissioner*, 480 F. 2d 57 (CA8 1973), and the "reasonable" time requirement of the Regulation, the House Report states that Congress

"believe[d] that definitive rules concerning disclaimers should be provided for estate and gift tax purposes to achieve uniform treatment. In addition, [Congress] believe[d] that a uniform standard should be provided for determining the time within which a disclaimer must be made." H. R. Rep. No. 94-1380, pp. 66-67 (1976).

Nothing in the legislative history expresses an opinion on the proper interpretation of the previously controlling Regulation. Nor is such an opinion indicated by the mere enactment of the law; Congress may seek to clarify the future without affecting the past. Cf. *Knetsch* v. *United States*, 364 U. S. 361, 367-370.

[20] Petitioner's argument would have more appeal had he attempted to renounce the interest immediately after the adoption of the 1958 Regulation, rather than some 14 years later.

exercise of a special power of appointment, which generally is not considered a taxable transfer. 26 U. S. C. § 2514. As the Commissioner notes in response, however, a disclaimant's control over property more closely resembles a *general* power of appointment, the exercise of which is a taxable transfer. *Ibid.* Unlike the holder of a special power—but like the holder of a general power—a disclaimant may decide to retain the interest himself. It is this characteristic of the control exercised by a disclaimant that makes a disclaimer a "transfer" within the scope of the gift tax provisions.

V

The Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect. This canon of construction, which generally applies to the Commissioner's interpretation of the Internal Revenue Code, see *Commissioner* v. *Portland Cement Co. of Utah*, 450 U. S. 156, 169, is even more forceful when applied to the Commissioner's interpretation of his own Regulation.

Since the relevant "transfer" in this case occurred when petitioner's grandmother irrevocably transferred her assets to a testamentary trust, petitioner's disclaimers of the rights created by that trust were not made within a reasonable time. Even accepting petitioner's argument that the clock did not begin to run until he reached the age of majority, the disclaimers were made after the passage of 24 years. As the Tax Court explained:

> "The petitioner possessed, for 24 years, the effective right to determine who should ultimately receive the benefits of a 50-percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of

substantial means. In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will—to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax imposed by section 2501." 70 T. C. 430, 438 (1978) (footnote omitted).

We agree. The Commissioner's assessment of a tax was proper, both under the statute and the Regulation.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

I do not find this case as easy or as clear on behalf of the Government as a reading of the Court's opinion would lead one to believe. While the issue could be described as somewhat close, I conclude that the petitioners have much the better of the argument, and I would reverse the judgment of the Court of Appeals.

I

Margaret Weyerhaeuser Jewett, grandmother of petitioner George F. Jewett, Jr., died testate on January 14, 1939. At her death she was a resident of Massachusetts. She left a will which was duly admitted to probate in that Commonwealth.

By her will the decedent created a trust for the benefit of her husband, James R. Jewett, during his lifetime, and thereafter for the benefit of her son, George F. Jewett, and his wife, Mary, for their respective lives. On the death of the survivor of the three life beneficiaries, the trust estate is to be distributed to the then living children of George F. Jewett and to the then living issue of any deceased child of George F. Jewett, in equal shares by right of representation.

Petitioner George F. Jewett, Jr., was born April 10, 1927; he thus was not yet 12 years old when his grandmother died. The testatrix' husband, James, and her son, George, died prior to 1972. Mary is still living; she was born March 7, 1901.

On August 30, 1972, petitioner[1] executed an instrument disclaiming and renouncing the major portion of any right to receive any remainder of the trust estate upon the death of his mother. On December 14 of that year, petitioner executed a second instrument disclaiming and renouncing the remaining portion of any such right. It is undisputed that these 1972 disclaimers were valid, timely, and effective under the applicable Massachusetts law.

Petitioner George F. Jewett, Jr., and his wife, petitioner Lucille M. Jewett, filed federal gift tax returns for the calendar quarters ended September 30 and December 31, 1972, respectively. Those returns notified respondent Commissioner of the disclaimers but did not acknowledge them as taxable transfers for federal gift tax purposes.[2]

On audit, the Commissioner determined that the disclaimers were *not* "made within a reasonable time after knowledge of the existence of the transfer," within the meaning of Treas. Reg. § 25.2511–1(c), 26 CFR § 25.2511–1(c) (1981), and thus were transfers subject to federal gift tax under §§ 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 2501(a)(1) and 2511(a). Deficiencies of approximately $750,000 were determined.

Petitioners sought redetermination of the deficiencies in the United States Tax Court. That court, in a reviewed decision, ruled in favor of the Commissioner. 70 T. C. 430 (1978). In so doing, the court followed its earlier ruling in

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[1] For convenience, any reference made herein to "petitioner" in the singular, refers to George F. Jewett, Jr., alone.

[2] Petitioners, as they were entitled to do under § 2513 of the Internal Revenue Code of 1954, 26 U. S. C. § 2513, elected to treat any gift made by either as made equally by both.

Keinath v. *Commissioner*, 58 T. C. 352 (1972), an unreviewed decision that had been *reversed*, 480 F. 2d 57 (1973), by a unanimous panel of the United States Court of Appeals for the Eighth Circuit five years before. In the present case, a panel of the Ninth Circuit, by a divided vote, *affirmed* the Tax Court. 638 F. 2d 93 (1980). Because of the conflict, so created, between judgments of two Courts of Appeals, the case is here.

II

As the Court observes, *ante*, at 311, the language of the Regulation provides support for the petitioners as well as for the Commissioner. The Court also acknowledges that the Regulation has language that "implies that the relevant 'transfer' had not yet occurred when petitioner renounced his interest in the trust." *Ibid.* The Court, however, opts for the Commissioner's opposing interpretation. I am persuaded otherwise.

To be sure, certain factors lend colorable support to the Commissioner's position: (a) Although petitioner was not yet 12 years old when the testatrix died, he attained the age of 21 in 1948, 24 years before he executed the disclaimers in 1972. (b) Sections 2501(a)(1) and 2511(a) of the Code are broad and sweeping and were intended to reach every "transfer of property by gift," whether in trust or otherwise, and whether direct or indirect. (c) And to accept petitioners' position could mean, as a practical matter, that one who is a beneficiary of a trust, such as this testatrix created, may stand aside for a long period before disclaiming and thus, in a sense, may make that disclaimer a part of his own estate planning when actual possessory enjoyment of the property is nearer at hand and its desirability or a need for it is better evaluated than many years before.

The other side of the controversy, however, is not without substantial support. The federal gift tax does not deal with abstractions. It is concerned with "the transfer of property by gift." 26 U. S. C. § 2501(a)(1). With the development of

testamentary trusts—or, for that matter, of *inter vivos* trusts—legally recognized "interests" of various kinds, possessory and anticipatory, can be created by the trustor. The beneficiary of a contingent remainder or, as the Court seems to suggest here, *ante*, at 308, n. 5, of "a vested remainder subject to divestiture," however, may never realize anything by way of actual enjoyment of income or corpus. The contingencies upon which enjoyment depends may never ripen. In particular, the contingent beneficiary may die while the life beneficiary still lives.

These possibilities, accompanied by the monetary impact of gift and death taxes led courts and legislative bodies to recognize or develop common-law disclaimer and to enact preventive statutory provisions. Indeed, the Commissioner here, in the Regulation at issue, § 25.2511-1(c), recognizes a right to refuse, free of gift tax, acceptance of "ownership of property transferred from a decedent," provided that the right to refuse is effective under local law and the refusal is "made within a reasonable time after knowledge of the existence of the transfer." It is accepted that the disclaimers in the present case were effective under Massachusetts law. I search the statute in vain, however, for any statutory mention of, or provision for, the reasonable-time requirement. One might say, therefore, that the Commissioner in his wisdom acted as a matter of grace to relieve, upon the conditions specified, what could be difficult and potentially unfair and financially disastrous tax situations.

Be that as it may, I regard any "transfer" here, not as one from George F. Jewett, Jr. (the necessary predicate of the Commissioner's determination), but as a transfer from the testatrix. She is the one from whom the largess flows. Petitioner, of course, was in the line of designated beneficiaries, but he stepped from that line through the acts of disclaimer, and the transfer will pass him by.

There are other practical considerations that have appeal for me:

1. Accepting the Commissioner's Regulation and its "reasonable time" requirement, it seems to me that that time is to be measured, not from the death of the testatrix in 1939, but from the death of the preceding life beneficiary. That life beneficiary, petitioner's mother, is still alive. Petitioner has realized no benefit from the trust and never will have any benefit if he predeceases his mother. It is the contingency event that is important and makes sense in the consideration of any disclaimer.

2. A disclaimer is fundamentally different from a voluntary transfer of property. A disclaimer is a refusal to accept property *ab initio*. *Bel* v. *United States*, 452 F. 2d 683, 693 (CA5 1971), cert. denied, 406 U. S. 919 (1972); see Black's Law Dictionary 417 (5th ed. 1979). The law of disclaimer is founded on the basic property-law concepts that a transfer is not complete until its acceptance by the recipient, and that no person can be forced to accept property against his will. A transferor chooses the recipients of the transferred property; a disclaimant makes no such selection, for that selection has been made by the trustor. Petitioner's disclaimers merely renounced any future right to receive corpus of the trust; they did not direct or even purport to direct the future distribution of that corpus.

3. Until the Ninth Circuit, by its divided vote, decided the present case, the only Court of Appeals authority on the issue was *Keinath* v. *Commissioner*, *supra*. For reasons best known to him, the Commissioner did not seek certiorari in that case and the decision stood unmolested by any opposing appellate court authority for over seven years. Indeed, it was expressly reaffirmed by the Eighth Circuit sitting en banc in *Cottrell* v. *Commissioner*, 628 F. 2d 1127 (1980), a case decided just a few weeks before the Ninth Circuit decision.[3] In the interim, a substantial period as the tax law

[3] In *Cottrell*, three judges dissented because they felt that, in contrast with the factual situation in *Keinath*, the *Cottrell* taxpayer had "extensive" and "ultimate" control through a general testamentary power of appoint-

goes, taxpayers and their advisers have properly assumed that a disclaimer, valid under state law, was valid for federal tax purposes as well if it were timely made. Judge Harris, dissenting below, observed that "it is particularly important in matters of taxation that established precedent be followed." 638 F. 2d, at 96. He went on to say that if the case were one of first impression, he "might well join with the majority" but "[n]umerous tax practitioners have undoubtedly relied on this [the *Keinath*] opinion in advising as to the tax consequences of such acts as are involved in the instant case, and justifiably so." *Ibid.* I agree that stability in tax law is desirable. Except for the Tax Court, the pronounced law appeared to have achieved a level of stability after *Keinath*.

4. The Eighth Circuit's analysis of the legal issue, it seems to me, is sound. In *Keinath* the court stressed that the remainder beneficiary "at no time accepted any income or principal from the trust," 480 F. 2d, at 59, and that within eight weeks of the death of the testator's widow-life beneficiary, the remainderman executed his disclaimer. It was established that the disclaimer was valid and timely under applicable state law and that as a result thereof the trust estate passed to the disclaimant's children. The court noted that "reasonable time," as that term is used in the Regulation, is not defined either in the Code or the Regulation. The basic common-law requirements that the disclaimer must be made within a reasonable time and that it be effective under local law "are but a codification of common law principles applicable to the doctrine of disclaimers." *Id.*, at 61. A central

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ment. They would modify the *Keinath* approach "where the remainderman essentially controls the events which would cause divestiture of the interest." They agreed, however, with the "general rule as applied to the facts of *Keinath*," where an interest is "less than an indefeasibly vested remainder." 628 F. 2d, at 1132–1133.

It is of interest to note that the court in *Cottrell* observed: "The Commissioner has not asked us to overrule *Keinath*, and we are not inclined to do so on our own motion." *Id.*, at 1131.

factor is the interpretation of the word "transfer" in the Regulation. The remainderman "had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary." *Id.*, at 64. The court then held that, under the prevailing common law, the holder of a vested remainder interest subjected to divestiture has a reasonable time within which to disclaim after the death of the life beneficiary. *Ibid.* It distinguished *Fuller* v. *Commissioner*, 37 T. C. 147 (1961), upon which the Tax Court had relied, and did so on the factual grounds mentioned below.

In *Cottrell*, the Eighth Circuit, sitting en banc, adhered to its *Keinath* analysis. It felt the case was "indistinguishable in any material respect from *Keinath*." 628 F. 2d, at 1128. It was undisputed that the disclaimer in question was valid under state law, that it was unequivocal, and that the taxpayer accepted no property before she disclaimed. As in *Keinath*, if the "reasonable time" period began with the death of the testator, the disclaimer was untimely, but if the critical event was the death of the life beneficiary, the disclaimer "was unquestionably timely, having been executed 16 days, and filed two months, thereafter." 628 F. 2d, at 1129. There is nothing unfair or improper in allowing the remainderman to wait until the life beneficiary's death and then decide whether to accept the bequest.

What the Eighth Circuit said by way of analysis, and held, in *Keinath* and *Cottrell*, when applied to the facts before us, is persuasive and should control here. The Ninth Circuit majority, without any particular analysis, merely disagreed with the *Keinath* and *Cottrell* reasoning and held, in a conclusionary statement, that the "'transfer' as used in the regulation means the transfer to the disclaimant of the property interest disclaimed by him," and that the transfer in question took place in 1939 when Mrs. Jewett died and petitioner received a contingent remainder from her estate. 638 F. 2d, at 96.

5. The Court notes, *ante*, at 316, that by the Tax Reform Act of 1976, Pub. L. 94–455, § 2009(b)(1), 26 U. S. C. § 2518, Congress now has imposed a uniform tax treatment of disclaimers, independent of state law. Section 2518, as so added to the Code, however, was specifically made prospective only, that is, it was made applicable only to transfers creating an interest after 1976. Pub. L. 94–455, § 2009(e)(2), 90 Stat. 1896. It thus has no application to the present case.

The Court declares, *ante*, at 317: "Congress expressed no opinion on the proper interpretation of the Regulation at issue in this case," but merely established an unambiguous rule for the future. That conclusion is not at all clear to me. Congress was aware of the *Keinath* decision. See H. R. Rep. No. 94–1380, p. 66, and n. 4 (1976). The House Committee on Ways and Means observed:

> "The amendments apply with respect to transfers creating an interest in the person disclaiming made after December 31, 1976. In the case of transfers made before January 1, 1977, the rules relating to transfers under present law, including the period within which a disclaimer must be made, are to continue to apply to disclaimers made after December 31, 1976." *Id.*, at 67–68.

For me, this is an acknowledgment that the *Keinath* ruling represented what the law was prior to 1977, and what it still is for trust instruments effective before that calendar year. I cannot join the Court's flat statement that "Congress expressed no opinion" on the existing law.

6. To be sure, the Tax Court has persisted in its contrary rulings. Those rulings, I feel, rest on an insecure base. The original case, from which all the other Tax Court decisions have flowed, was *Fuller* v. *Commissioner*, 37 T. C. 147 (1961), a reviewed case. In *Fuller*, the life beneficiary of five-eighths of the income of her husband's testamentary trust received that income for many years before she renounced a portion of her five-eighths share. Thus, she real-

ized actual enjoyment for a long period before she disclaimed. This, for me, is a vital fact that distinguishes the case from *Keinath*, *Cottrell*, and *Jewett*, where each disclaimant enjoyed no benefit whatsoever. Mrs. Fuller had accepted her gift before renouncing it.

The next Tax Court case was *Keinath* v. *Commissioner*, 58 T. C. 352 (1972). The judge who decided *Keinath* relied on *Fuller* as controlling precedent. He acknowledged Mrs. Fuller's receipt of income from the trust "for over 25 years," conceded that the Fuller facts "are admittedly different," but nevertheless ruled that "this distinction is immaterial." 58 T. C., at 358. He did not read *Fuller* "as resting upon Mrs. Fuller's acceptance of income from the trust but upon her acceptance of her interest in the trust." 58 T. C., at 358.

The next pertinent Tax Court decision was that in the present case.[4] 70 T. C. 430 (1978). There the court, in a reviewed decision, referred to, and relied upon, its own decision in *Keinath* which had been reversed by the Eighth Circuit. "We think that our decision in *Keinath* was correct and that it controls the decision in this case." 70 T. C., at 435.

The last Tax Court cases are *Estate of Halbach* v. *Commissioner*, 71 T. C. 141 (1978), and *Cottrell* v. *Commissioner*, 72 T. C. 489 (1979). The former was a federal estate tax case centering on 26 U. S. C. § 2035 (disclaimer within three years of death). The latter, concerning a sister of the *Halbach* decedent, related to federal gift tax. Neither was a reviewed decision. The judge in *Cottrell*, recognizing that that case was appealable only to the Eighth Circuit, avoided the Court of Appeals decision in *Keinath* by distinguishing it on grounds later found unacceptable by the Eighth Circuit majority when the Tax Court decision was reversed.

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[4] See, however, *Estate of Rolin* v. *Commissioner*, 68 T. C. 919, 927 (1977), aff'd, 588 F. 2d 368 (CA2 1978).

Such is the saga of the issue in the United States Tax Court. The cases build on one another, but the origin and base is *Fuller*. That original case, in my view, is clearly distinguishable on its facts and thus, indeed, is "a frail reed on which to lean."

7. The Court's and the Commissioner's position also seems to me to embrace a distinct element of unfairness. The Commissioner stresses repeatedly the number of years that elapsed between the death of the testatrix and the execution of the disclaimers. This same element has been stressed in others of these cases. But to require the disclaimer long before the interest could ripen into enjoyment means that the decision must be made at a time when the disclaimant does not know what he is disclaiming or whether he ever would receive and enjoy any interest. This concern is compatible with the wording of the applicable Regulation which speaks of "knowledge of the existence of the transfer." The Eighth Circuit recognized this element of unfairness in *Cottrell*. 628 F. 2d, at 1131.

For all these reasons, I would reverse the judgment of the Court of Appeals. I therefore respectfully dissent.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE v. KASSEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-1618. Argued November 9, 1981—Decided February 23, 1982

Certiorari dismissed.

John H. Lederer argued the cause for petitioner. With him on the briefs were *John Duncan Varda*, *Anthony R. Varda*, and *William C. Lewis, Jr.*

Mark E. Schantz, Solicitor General of Iowa, argued the cause for respondents. With him on the brief were *Thomas J. Miller*, Attorney General, *Robert W. Goodwin*, Special Assistant Attorney General, and *Lester A. Paff*, Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE WHITE, dissenting.

We granted certiorari in this case to decide one very narrow question: "May a court, without articulating its rationale, summarily deny an application for attorneys' fees under 42 U. S. C. § 1988?" Petitioner concedes that "not . . . all cases require opinions," Brief for Petitioner 6, n. 6, but argues that with respect to an application for fees under § 1988 "[t]he combination of discretion and a standard for the exercise of that discretion necessitates a statement of reasons to determine whether the decision is proper." *Id*, at 12. In my view, such an application is not sufficiently distinguishable

from numerous other motions and applications that a court may concedely decide without opinion. Whether this is a good or bad method of exercising discretion in a particular case, or even in general, is not at issue in this case. Because I do not believe that there is any *per se* rule that a court may never summarily deny an application for fees, I would affirm the decision below.

Accordingly, I dissent from the majority's disposition of this case.

NEW ENGLAND POWER CO. v. NEW HAMPSHIRE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

No. 80-1208. Argued December 7, 1981—Decided February 24, 1982*

Appellant New England Power Co., a public utility generating and transmitting electricity at wholesale, sells most of its power in Massachusetts and Rhode Island; its wholesale customers service less than 6% of New Hampshire's population. New England Power owns and operates hydroelectric units, some of which are located in New Hampshire. The units are licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act. A New Hampshire statute, enacted in 1913, prohibits a corporation engaged in the generation of electrical energy by water power from transmitting such energy out of the State unless approval is first obtained from the New Hampshire Public Utilities Commission. The statute empowers that Commission to prohibit the exportation of such energy when it determines that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." Since 1926, New England Power or its predecessor periodically obtained the Commission's approval to transmit electricity produced in New Hampshire to points outside the State. However, in 1980, after an investigation and hearings, the Commission withdrew such approval and ordered New England Power to arrange to sell the previously exported hydroelectric energy within New Hampshire. New England Power, the Commonwealth of Massachusetts, and the Attorney General of Rhode Island appealed the Commission's order to the New Hampshire Supreme Court, contending that the order was pre-empted by the Federal Power Act and imposed impermissible burdens on interstate commerce. The court rejected those arguments, holding, *inter alia*, that the "saving clause" of § 201(b) of the Federal Power Act granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State. Section 201(b), which was enacted in 1935, provides that the Act's provisions delegating exclusive authority to the FERC to regulate the transmission and sale at wholesale of electric energy in interstate

*Together with No. 80-1471, *Massachusetts et al.* v. *New Hampshire et al.*; and No. 80-1610, *Roberts, Attorney General of Rhode Island, et al.* v. *New Hampshire et al.*, also on appeal from the same court.

commerce "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."

Held: New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce in a manner inconsistent with the Commerce Clause. Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority to the State to do so. Pp. 338–344.

(a) Absent authorizing federal legislation, the Commerce Clause precludes a state from mandating that its residents be given a preferred right of access over out-of-state consumers to natural resources located within its borders or to the products derived therefrom. The New Hampshire Commission's order is precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states. Moreover, the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce that cannot be squared with the Commerce Clause when they serve only to advance simple economic protectionism. Pp. 338–340.

(b) In § 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy. Nothing in the legislative history or language of the statute evinces a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause, or to modify this Court's earlier holdings concerning the limits of state authority to restrain interstate trade. When Congress has not expressly stated its intent to sustain state legislation from attack under the Commerce Clause, this Court has no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind. Pp.340–343.

120 N. H. 866, 424 A. 2d 807, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Samuel Huntington argued the cause for appellant in No. 80–1208. With him on the briefs were *John F. Sherman III*, *Edward Berlin*, *Carmen D. Legato*, and *J. Phillip Jordan*. *Donald K. Stern*, Assistant Attorney General of Massachusetts, argued the cause for appellants in Nos. 80–1471 and 80–1610. With him on the brief for appellants in No. 80–1471 were *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, and *Joan C. Stod-*

dard, *E. Michael Sloman*, and *Alan Sherr*, Assistant Attorneys General. *Dennis J. Roberts II*, Attorney General of Rhode Island, and *John R. McDermott* filed a brief for appellants in No. 80–1610.

Gregory H. Smith, Attorney General of New Hampshire, argued the cause for appellees. With him on the brief was *Peter C. Scott*, Assistant Attorney General.†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These three consolidated appeals present the question whether a state can constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally licensed facility, or otherwise reserve for its own citizens the "economic benefit" of such hydroelectric power.

I

Appellant New England Power Co. is a public utility which generates and transmits electricity at wholesale. It sells 75% of its power in Massachusetts and much of the remainder in Rhode Island; less than 6% of New Hampshire's population is serviced by New England Power's wholesale customers. New England Power owns and operates six hydroelectric generating stations on the Connecticut River, consisting of 27 generating units. Twenty-one of these units—with a capacity of 419.8 megawatts, or about 10% of New England Power's total generating capacity—are located within the State of New Hampshire. The units are licensed by the Federal En-

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†Briefs of *amici curiae* urging reversal were filed by *Acting Solicitor General Wallace*, *Stuart A. Smith*, and *Jerome M. Feit* for the United States et al.; by *Robert L. Baum* and *Ronald D. Jones* for the Edison Electric Institute; by *Joseph D. Alvaini* for the New England Legal Foundation et al.; by *James R. McIntosh* and *Allan B. Taylor* for the New England Power Pool Executive Committee; and by *Robert C. McDiarmid* for the Unaffiliated Massachusetts Municipal Wholesale Customers of New England Power Co.

ergy Regulatory Commission pursuant to Part I of the Federal Power Act, 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a–823 (1976 ed. and Supp. IV). Since hydroelectric facilities operate without significant fuel consumption, these units can produce electricity at substantially lower cost than most other generating sources.

New England Power is a member of the New England Power Pool, whose utility-members own over 98% of the total generation capacity, and virtually all of the transmission facilities, in the six-state region. The objectives of the Power Pool, as described in the agreement among its members, are to assure the reliabilty of the region's bulk power supply and to attain "maximum practicable economy" through, *inter alia*, "joint planning, central dispatching . . . and coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants . . . ." New England Power Pool Agreement § 4.1, App. 31a. All member-owned generating facilities are placed under the control of the Power Pool's Dispatch Center. A computer calculates the cost of generation for each generating unit and assigns each unit an operating schedule that will minimize the cost of the region's total power supply. Power generated at the various units, including New England Power's Connecticut River hydroelectric stations, flows freely through the Pool's regional transmission network, or "grid." The energy is dispatched to members' customers as their power needs arise, without regard to generating source. The Pool bills each member the amount it would have cost the utility to meet its customers' load using only its own generating sources, minus that member's share of the savings resulting from the centralized dispatch system.[1]

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[1] Testimony before the New Hampshire Public Utilities Commission in these cases indicated that the savings have been substantial. For example, in 1979, the savings attributable to the Power Pool's centralized dis-

A New Hampshire statute, enacted in 1913, provides:

> "No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business." N. H. Rev. Stat. Ann. § 374:35 (1966).

The statute empowers the New Hampshire Commission to prohibit the exportation of such electrical energy when it determines that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." *Ibid.*

Since 1926, New England Power or a predecessor company periodically applied for and obtained approval from the New Hampshire Commission to transmit electricity produced at the Connecticut River plants to points outside New Hampshire. However, on September 19, 1980, after an investigation and hearings, the Commission withdrew the authority formerly granted New England Power to export its hydroelectric energy, and ordered the company to "make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire . . . ."[2] In its report accompanying the order,

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patch system were reported at over $44 million. App. 35a, 56a. See generally Federal Energy Regulatory Commission, Office of Electric Power Regulation, Power Pooling in the United States 15–23, 39–41, 69–79 (1981), for a description of efficiencies attributable to pooling arrangements.

[2] The order reads:

"ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

"FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and munici-

the Commission found that New Hampshire's population and energy needs were increasing rapidly; that, primarily because of its low "generating mix" of hydroelectric energy, the Public Service Company of New Hampshire, the State's largest electric utility, had generating costs about 25% higher than those of New England Power; and that if New England Power's hydroelectric energy were sold exclusively in New Hampshire, New Hampshire customers could save approximately $25 million a year. The Commission therefore concluded that New England Power's hydroelectric energy was "required for use within the State" of New Hampshire, and that discontinuation of its exportation would serve the "public good." App. to Juris. Statement in No. 80–1208, pp. 25–39.

The Commission did not, however, order New England Power to sever its connections with the Power Pool. So long as the electricity produced at New England Power's hydroelectric plants continues to flow through the Pool's regional transmission network, it will be impossible to contain that electricity within the State of New Hampshire in any physical sense. Although the precise contours of the Commission's order are unclear, it appears to require that New England Power sell electricity to New Hampshire utilities in an amount equal to the output of its in-state hydroelectric facilities, at special rates adjusted to reflect the entire savings attributable to the low-cost hydroelectric generation.[3]

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palities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

"FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation."

[3] For example, the Commission's staff economist testified at the hearings that New England Power could "allocate the benefits of low-cost hydroelectric power to New Hampshire through billing mechanisms" pursuant to which the power would be sold in New Hampshire at "economic cost"—*i. e.*, the cost of producing the power, including depreciation, plus a return on invested capital. App. 38a–39a. The economist's analysis of the

New England Power, the Commonwealth of Massachusetts, and Dennis J. Roberts II, Attorney General of Rhode Island, appealed the Commission's order to the Supreme Court of New Hampshire. They contended that the order was pre-empted by Parts I and II of the Federal Power Act, 16 U. S. C. §§ 791a–824k (1976 ed. and Supp. IV), and imposed impermissible burdens on interstate commerce. The court rejected these arguments, concluding that the "saving clause" of § 201(b) of the Federal Power Act, 16 U. S. C. § 824(b) (1976 ed., Supp. IV), granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State. *Appeal of New England Power Co.*, 120 N. H. 866, 876–877, 424 A. 2d 807, 814 (1980).[4] The court further held that the New Hampshire Commission's order did not interfere with the Federal Energy Regulatory Commission's exclusive regulatory authority over rates charged for interstate sales of electricity at wholesale. It thus remanded the case to permit the parties to "develop the mechanics of implemention" of the New

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benefits which would ensue from restricting the "exportation" of hydroelectric energy in this manner—upon which the New Hampshire Commission relied heavily in its report—was based on the assumption that New England Power would simply enter into new unit power contracts with New Hampshire utilities for an amount of kilowatt hours equal to New England Power's average hydroelectric generation over the course of a number of years. 3 Tr. of Hearings before the N. H. Public Utilities Comm'n in DE 79–223, pp. 23–24, 1–35. Although the record is not entirely clear on this point, it appears that the "economic benefit," or "savings," attributable to New England Power's hydroelectric facilities is currently reflected in the company's general wholesale rates, and thus shared pro rata by its customers in Massachusetts, Rhode Island, and New Hampshire. App. 15a–18a. See also Brief for Appellant in No. 80–1208, p. 7.

[4] The court also dismissed several arguments advanced only by appellants Massachusetts and Roberts—that § 201(b), as so interpreted, exceeded Congress' power under the Commerce Clause, Art. I, § 8, cl. 3, and violated both the Privileges and Immunities Clause, Art. IV, § 2, cl. 1, and the Tenth Amendment of the Constitution.

Hampshire Commission's order, and mandated that New England Power "make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power." *Id.*, at 878–879, 424 A. 2d, at 815.[5]

We noted probable jurisdiction, 451 U. S. 981 (1981), and we reverse.

II

The Supreme Court of New Hampshire recognized that, absent authorizing federal legislation, it would be "questionable" whether a state could constitutionally restrict interstate trade in hydroelectric power. 120 N. H., at 876, 424 A. 2d, at 814. Our cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. *E. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). Only recently, in *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627 (1978), we reiterated that "[t]hese cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State'" (quoting *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10 (1928)).[6]

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[5] The parties inform us that the New Hampshire Commission has refrained from acting on remand pending this Court's disposition of the appeals.

[6] We find no merit in New Hampshire's attempt to distinguish these cases on the ground that it "owns" the Connecticut River, the source of New England Power's hydroelectricity. Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regu-

The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. Moreover, it cannot be disputed that the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce. See *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance "simple economic protectionism." *Philadelphia* v. *New Jersey*, *supra*, at 624.

The Supreme Court of New Hampshire nevertheless upheld the order of the New Hampshire Commission on the ground that § 201(b) of the Federal Power Act expressly permits the State to prohibit the exportation of hydroelectric power produced within its borders. It is indeed well settled

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late the flow of navigable waters resides with the Federal Government, *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), which has licensed New England Power to operate its Connecticut River hydroelectric plants pursuant to a determination that those facilities are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce," 16 U. S. C. § 803(a). New Hampshire's purported "ownership" of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. See *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152 (1946). Moreover, New Hampshire has done more than regulate use of the resource it assertedly owns; it has restricted the sale of electric energy, a product entirely distinct from the river waters used to produce it. See *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 179–181 (1932). This product is manufactured by a private corporation using privately owned facilities. Thus, New Hampshire's reliance on *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980)—holding that a state may confine to its residents the sale of products it *produces*—is misplaced.

that Congress may use its powers under the Commerce Clause to "[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 44 (1980). See *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). The dispositive question, however, is whether Congress in fact has authorized the states to impose restrictions of the sort at issue here.

III

The national concern for planning, development, and comprehensive utilization of the country's water resources was very early expressed by Congress under its Commerce Clause powers. The Federal Water Power Act, now Part I of the Federal Power Act, 16 U. S. C. §§ 791a–823 (1976 ed. and Supp. IV), was enacted in 1920. The potential of water power as a source of electric energy led Congress to exercise its constitutional authority over navigable streams to regulate and encourage development of hydroelectric power generation "to meet the needs of an expanding economy." *FPC* v. *Union Electric Co.*, 381 U. S. 90, 99 (1965).

In 1935, Congress enacted Part II of the Federal Power Act, 16 U. S. C. §§ 824–824k (1976 ed. and Supp. IV), which delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production. *United States* v. *Public Utilities Comm'n of California*, 345 U. S. 295 (1953). The 1935 enactment was a "direct result" of this Court's holding in *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, *supra*, that the states lacked power to regulate the rates governing interstate sales of electricity for resale. *United States* v. *Public Utilities Comm'n of California*, *supra*, at 311. Part II of the Act was intended to "fill the gap" created by *Attleboro* by establishing exclusive federal jurisdiction over such sales. 345 U. S., at 307–311.

Section 201(b) of the Act provides, *inter alia*, that the provisions of Part II "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." However, this provision is in no sense an affirmative grant of power to the states to burden interstate commerce "in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan, supra*, at 769. In § 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy; by its plain terms, § 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise "lawful." The legislative history of the Act likewise indicates that Congress intended only that its legislation "*tak[e] no authority from* State commissions." H.R. Rep. No. 1318, 74th Cong., 1st Sess., 8 (1935) (emphasis added). Nothing in the legislative history or language of the statute evinces a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause," *United States* v. *Public Utilities Comm'n of California, supra*, at 304, or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade. *E. g., Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). Rather, Congress' concern was simply "to define the extent of the federal legislation's pre-emptive effect on state law." *Lewis* v. *BT Investment Managers, Inc., supra*, at 49.[7]

To support its argument to the contrary, New Hampshire relies on a single statement made on the floor of the House of

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[7] Indeed, had Congress intended § 201(b) to confer upon the states powers which they would have lacked in the absence of the federal legislation, it would have been anomalous to speak in terms of "authority *now exercised*." This language plainly assumes the prior existence of valid state authority; in addition, it appears to limit the saving effect of the provision to those few States in which the authority was in fact "exercised" in 1935.

Representatives during the debates preceding enactment of Part II. Congressman Rogers of New Hampshire stated:

> "[T]he Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire." 79 Cong. Rec. 10527 (1935).

From this expression of "hope," New Hampshire concludes that Congress specifically intended to preserve the very statute at issue here.

Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and "a step to be taken cautiously." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 26 (1977); *United States* v. *Public Utilities Comm'n of California, supra*, at 319–321 (Jackson, J., concurring). However, even were we to accord significant weight to Congressman Rogers' statement, it would not support New Hampshire's contention that § 201(b) was intended to permit states to regulate free from Commerce Clause restraint. Congressman Rogers simply urged his colleagues not to "deprive" the State of New Hampshire of "rights" it already possessed—*i. e.*, to ensure that the Act itself would not be read as pre-empting otherwise valid state legislation.

To be sure, some Members of Congress may have thought that no further protection of state authority was needed.[8]

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[8] On the other hand, it would not have been at all unusual had Congress taken care that the 1935 enactment not displace state authority in the area,

Indeed, given that the Commerce Clause—independently of the Federal Power Act—restricts the ability of the states to regulate matters affecting interstate trade in hydroelectric energy, § 201(b) may in fact save little in the way of "lawful" state authority.[9] But when Congress has not "expressly stated its intent and policy" to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See *United States* v. *Public Utilities Comm'n of California*, 345 U. S., at 319 (Jackson, J., concurring); see also *id.*, at 311. We must construe § 201(b) as it is written, and as its legislative history indicates it was intended—as a standard "nonpre-emption" clause.[10]

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without consideration of the scope of that authority or the extent to which it might be constrained by other provisions of federal law. See *Milwaukee* v. *Illinois*, 451 U. S. 304, 329, n. 22 (1981).

[9] We need not speculate here as to the precise contours of § 201(b)'s saving effect.

[10] Even were we to conclude that Congress intended § 201(b) to override restraints placed on state regulatory power by the Commerce Clause, there would remain a substantial question whether the order of the New Hampshire Commission was entitled to protection under that provision. Section 201(b) seeks to protect only state regulation relating to the "exportation" of hydroelectric power. However, New England Power cannot terminate its out-of-state transmission of hydroelectricity without substantial alterations in the regional transmission system to which its hydroelectric facilities are connected—alterations which the New Hampshire Commission did not appear to contemplate would be made. *Appeal of New England Power Co.*, 120 N. H. 866, 876–877, 424 A. 2d 807, 814 (1980). The operative effect of the Commission's order would be to compel New England Power to enter into new wholesale contracts with New Hampshire utilities, at rates fixed by the New Hampshire Commission to reflect the "economic cost" of the company's hydroelectric production. See *supra*, at 336, and n. 3. Appellants argue that such state regulation is incompatible with Part II of the Federal Power Act—which vests in the Federal Energy Regulatory Commission exclusive ratemaking jurisdiction

IV

We conclude, therefore, that New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce, in a manner inconsistent with the Commerce Clause. Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority to the State to do so. For these reasons, the judgment of the Supreme Court of New Hampshire is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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over "the sale of electric energy at wholesale in interstate commerce," 16 U. S. C. §§ 824(b), 824d–824f (1976 ed. and Supp. IV)—and conflicts directly with § 205(b) of the Federal Power Act, 16 U. S. C. § 824d(b), which prohibits utilities from maintaining "any unreasonable difference in rates . . . as between localities" with respect to sales subject to federal jurisdiction. Given our holding that the New Hampshire Commission's order violates the Commerce Clause, we need not decide this issue.

BALDRIGE, SECRETARY OF COMMERCE, ET AL. v. SHAPIRO, ESSEX COUNTY EXECUTIVE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1436. Argued December 2, 1981—Decided February 24, 1982*

These cases present the question whether lists of addresses collected and utilized by the Bureau of the Census are exempt from disclosure, either by way of civil discovery or the Freedom of Information Act (FOIA), under the confidentiality provisions of the Census Act, 13 U. S. C. §§ 8 and 9. Section 8(b) allows the Secretary of Commerce to reveal statistical materials "which do not disclose the information reported by, or on behalf of, any particular respondent." Section 9(a) prohibits the Secretary from using the information furnished except for statistical purposes and from making any publication "whereby the data furnished by any particular establishment or individual . . . can be identified"; it also prohibits examination of individual reports by "anyone other than the sworn officers and employees of the Department or bureau or agency thereof." The 1980 census indicated that the areas of Essex County, N. J., and Denver, Colo., among others, had lost population during the 1970's. Both localities challenged the census count under the Census Bureau's local review procedures, asserting that the Bureau had erroneously classified occupied dwellings as vacant and seeking unsuccessfully to obtain access to a portion of the address lists used by the Bureau in conducting its count in their respective jurisdictions. In No. 80-1436, the Essex County Executive filed suit in Federal District Court to compel disclosure under the FOIA of the Bureau's master address list, compiled initially from commercial mailing address lists and census postal checks, and updated through direct responses to census questionnaires, canvassing by Bureau personnel, and in some instances a cross-check with the 1970 census data. The District Court held that the FOIA required disclosure of the requested information. The court rejected the contention that the confidentiality provisions of the Census Act constitute a statutory exception to disclosure within the meaning of Exemption 3 of the FOIA, which provides that disclosure need not be made as to information "specifically exempted from disclosure by statute" if the statute affords the agency no discretion on disclosure, or establishes particular cri-

*Together with No. 80-1781, *McNichols, Mayor of Denver, et al.* v. *Baldrige, Secretary of Commerce, et al.*, on certiorari to the United States Court of Appeals for the Tenth Circuit.

teria for withholding the data, or refers to the particular types of material to be withheld. The Court of Appeals affirmed. In No. 80-1781, Denver officials filed suit in Federal District Court, seeking a preliminary injunction to require the Bureau's cooperation with the city in verifying its vacancy data. The District Court granted the city's discovery request for vacancy information contained in the Bureau's updated master address registers. However, the Court of Appeals reversed, relying on the language of the Census Act and Congress' intent to protect census information.

Held:

1. The requested information in No. 80-1436 is not subject to disclosure under the FOIA. Pp. 352-359.

(a) To stimulate public cooperation necessary for an accurate census—providing a basis for apportioning Representatives among the states in Congress, serving an important function in the allocation of federal grants to states based on population, and also providing important data for Congress and ultimately for the private sector—Congress has provided assurances that information furnished by individuals is to be treated as confidential. Title 13 U. S. C. §§ 8(b) and 9(a) explicitly provide for nondisclosure of certain census data, and no discretion is provided to the Census Bureau on whether or not to disclose such data. Thus, §§ 8(b) and 9(a) qualify as withholding statutes under Exemption 3 of the FOIA. Pp. 353-355.

(b) The unambiguous language of the confidentiality provisions of the Census Act—focusing on the "information" or "data" that constitutes the statistical compulation—as well as the Act's legislative history, indicates that Congress contemplated that raw data reported by or on behalf of individuals, not just the identity of the individuals, was to be held confidential and not available for disclosure. The master address list sought by Essex County is part of the raw census data intended by Congress to be protected under the Act. And under the Act's clear language, it is not relevant that municipalities seeking data will use it only for statistical purposes. Pp. 355-359.

2. Nor is the requested information in No. 80-1781 subject to disclosure under the discovery provisions of the Federal Rules of Civil Procedure. Under Rule 26(b)(1), if requested information is privileged, it may be withheld even if relevant to the lawsuit and essential to the establishment of plaintiff's claim. A privilege may be created by statute, and the strong policy of nondisclosure under the confidentiality provisions of the Census Act indicates that Congress intended such provisions to constitute a "privilege" within the meaning of the Federal Rules. Pp. 360-362.

No. 80-1436, 636 F. 2d 1210, reversed; No. 80-1781, 644 F. 2d 844, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Elliott Schulder argued the cause for petitioners in No. 80-1436 and respondents in No. 80-1781. With him on the briefs were *Solicitor General Lee, Acting Solicitor General Wallace, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Geller, Leonard Schaitman, Michael Kimmel*, and *John Cordes*.

George J. Cerrone, Jr., argued the cause for petitioners in No. 80-1781. With him on the briefs was *Max P. Zall*.

David H. Ben-Asher argued the cause and filed a brief for respondent in No. 80-1436.†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether lists of addresses collected and utilized by the Bureau of the Census are exempt from disclosure, either by way of civil discovery or the Freedom of Information Act, under the confidentiality provisions of the Census Act, 13 U. S. C. §§ 8 and 9.

I

Under Art. I, § 2, cl. 3, of the United States Constitution, responsibility for conducting the decennial census rests with

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†*Vilma S. Martinez* and *Morris J. Baller* filed briefs for the Mexican American Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance in No. 80-1436 and reversal in No. 80-1781.

John E. Flaherty, Jr., and *Malcolm J. Hall* filed a brief for Plantiffs in MDL-444, *In re 1980 Decennial Census Adjustment Litigation*, as *amici curiae* urging reversal in No. 80-1781.

Robert Abrams, Attorney General, *Frederick A. O. Schwarz, Jr., Robert S. Rifkind, Peter Bienstock*, and *Allen G. Schwartz* filed a brief for the State of New York et al. as *amici curiae*.

Congress.[1] Congress has delegated to the Secretary of Commerce the duty to conduct the decennial census, 13 U. S. C. § 141; the Secretary in turn has delegated this function to the Bureau of the Census. 13 U. S. C. § 21.

The 1980 enumeration conducted by the Bureau of the Census indicated that Essex County, N. J., which includes the city of Newark, and Denver, Colo., among other areas, had lost population during the 1970's. This information was conveyed to the appropriate officials in both Essex County and Denver. Under Bureau procedures a city has 10 working days from receipt of the preliminary counts to challenge the accuracy of the census data.[2] Both Essex County and Denver challenged the census count under the local review procedures. Both proceeded on the theory that the Bureau had erroneously classified occupied dwellings as vacant, and both sought to compel disclosure of a portion of the address lists used by the Bureau in conducting its count in their respective jurisdictions.

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[1] Article I, § 2, cl. 3, provides:

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . ."

Article I, § 2, cl. 3, was amended by § 2 of the Fourteenth Amendment to provide:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

The Sixteenth Amendment also altered cl. 3 to provide for direct taxation without apportionment among the states and without regard to any census or enumeration.

[2] See Revised Local Review Program Information Booklet (Apr. 1980), App. in No. 80–1436, pp. 22–48.

A

BALDRIGE v. *SHAPIRO (No. 80-1436)*

The Essex County Executive filed suit in the United States District Court for the District of New Jersey to compel the Bureau to release the "master address" register under the Freedom of Information Act (FOIA), 5 U. S. C. § 552.[3] The master address register is a listing of such information as addresses, householders' names, number of housing units, type of census inquiry, and, where applicable, the vacancy status of the unit. The list was compiled initially from commercial mailing address lists and census postal checks, and was updated further through direct responses to census questionnaires, pre- and post-enumeration canvassing by census personnel, and in some instances by a cross-check with the 1970 census data. The Bureau resisted disclosure of the master address list, arguing that 13 U. S. C. §§ 8(b) and 9(a) prohibit disclosure of all raw census data pertaining to particular individuals, including addresses. The Bureau argued that it therefore could lawfully withhold the information under the FOIA pursuant to Exemption 3, which provides that the FOIA does not apply where information is specifically exempt from disclosure by statute. 5 U. S. C. § 552(b)(3).

The District Court concluded that the FOIA required disclosure of the requested information. The court began its analysis by noting that public policy favors disclosure under the FOIA unless the information falls within the statutory exemptions. The District Court concluded that the Census Act did not provide a "blanket of confidentiality" for all census materials. Rather, the confidentiality limitation is

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[3] Under 5 U. S. C. § 552(a)(4)(B), "the district court of the United States in the district in which the complainant resides . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."

"solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response." App. to Pet. for Cert. 10a. The court noted that Essex County did not seek access to individual census reports or information relative to particular individuals, but sought access to the address list exclusively for statistical purposes in conjunction with the Bureau's own program of local review. In addition, the Secretary is authorized by the Census Act to utilize county employees if they are sworn to observe the limitations of the statute. The District Court concluded that the Bureau's claim of confidentiality impeded the goal of accurate and complete enumeration. Finally, the District Court found that the information sought was not derived from the questionnaires received, but rather from data available prior to the census. The District Court ordered the Bureau to make available the address register of all property in the county, with the proviso that all persons using the records be sworn to secrecy.[4] The United States Court of Appeals for the Third Circuit affirmed for the reasons stated by the District Court. App. to Pet. for Cert. 1a. Judgment order reported at 636 F. 2d 1210 (1980).

B

McNICHOLS v. *BALDRIGE (No. 80–1781)*

The city of Denver, through its officials, filed suit in the United States District Court for the District of Colorado seeking a preliminary injunction to require the Bureau to cooperate with the city in verifying its vacancy data.[5] The

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[4] We note in passing that there is no provision in the FOIA for this procedure.

[5] Jurisdiction in the District Court for the District of Colorado was invoked under 28 U. S. C. §§ 1331, 1337, 1361, 2201, and 2202, under the Freedom of Information Act, 5 U. S. C. § 552, under 5 U. S. C. §§ 702, 704, and 706, and under U. S. Const., Art. I, § 2, cl. 3. The city argued

District Court did not rule on the preliminary injunction, but instead focused on whether the city of Denver was entitled to the vacancy information contained in the updated master address registers maintained by the Bureau. The District Court granted the city of Denver's discovery request for this information. The court concluded that the city should have access to the information because without the address list the city was denied any meaningful ability to challenge the Bureau's data. In light of what it deemed the important constitutional and statutory rights involved, the District Court concluded that the purposes of § 9 of the Census Act could be maintained without denying the city the right of discovery. The District Court entered a detailed order to protect the confidentiality of the information.[6]

The United States Court of Appeals for the Tenth Circuit reversed. 644 F. 2d 844 (1981). The Court of Appeals relied on the "express language" of the statute and on the "'emphatically expressed intent of Congress to protect census information.'" *Id.*, at 845, quoting *Seymour* v. *Barabba*,

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that as a result of the erroneous undercount, Denver would be underrepresented in Congress and would be deprived of certain federal funds to which it otherwise would be entitled under the federal grant-in-aid programs that distribute funds on the basis of population. The city also argued that it would be underrepresented in the state legislature because under the Colorado Constitution apportionment of state legislative districts is based on the federal census. Colo. Const., Art. V, § 48.

The city of Denver originally sought a temporary restraining order to require the Bureau to keep open its Denver offices. The parties agreed that the offices could close so long as the Bureau kept its updated master address lists ("Follow-up Address Registers" or "FAR's") in Denver.

[6] The District Court ordered that (1) the Government must produce the updated master address registers, described as "Follow-up Address Registers" (FAR's), or a list of vacant addresses culled from the FAR's; (2) all names and other identifying references must be eliminated; (3) all city employees with access to the information must take an oath of secrecy; (4) the information must be used only for adjustment of the census; and (5) Bureau officials may at their option accompany city employees as they verify the information.

182 U. S. App. D. C. 185, 188, 559 F. 2d 806, 809 (1977). The court reasoned that Congress has the power to make census information immune from direct discovery or disclosure. The court concluded that Congress has neither made nor implied an exception covering this case. The Court of Appeals also found no indication that Congress is constitutionally required to provide the city with information to challenge the census data. The court concluded that the city of Denver's remedy must lie with Congress.

Thus, the United States Court of Appeals for the Third Circuit ordered disclosure of the master address list under the FOIA. App. to Pet. for Cert. 1a. The United States Court of Appeals for the Tenth Circuit denied discovery of similar information, concluding that the data was privileged from disclosure. 644 F. 2d 844 (1981). We granted certiorari in these cases to determine whether such information is to be disclosed under either of the requested procedures. 451 U. S. 936 (1981); 452 U. S. 937 (1981).

II

A

The broad mandate of the FOIA is to provide for open disclosure of public information.[7] The Act expressly recognizes, however, that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U. S. C. § 552(b). Under Exemption 3 disclosure need not be made as to information "specifically exempted from disclosure by statute" if the statute affords the agency no discretion on disclosure, or establishes particular criteria for withholding the data, or refers to the

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[7] This principle has been reiterated frequently by this Court. See, *e.g.*, *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U. S. 139 (1981); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 220 (1978); *EPA* v. *Mink*, 410 U. S. 73, 80 (1973).

particular types of material to be withheld. The question in *Baldrige* v. *Shapiro*, No. 80–1436, is twofold: first, do §§ 8(b) and 9(a) of the Census Act constitute a statutory exception to disclosure within the meaning of Exemption 3; and second, is the requested data included within the protection of §§ 8(b) and 9(a).

B

Although the national census mandated by Art. I, § 2, of the Constitution fulfills many important and valuable functions for the benefit of the country as a whole, its initial constitutional purpose was to provide a basis for apportioning representatives among the states in the Congress.[8] The census today serves an important function in the allocation of federal grants to states based on population. In addition, the census also provides important data for Congress and ultimately for the private sector.[9]

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[8] As originally enacted the decennial census was to serve both for apportioning representatives and apportioning direct taxes among the states. The ratification of the Sixteenth Amendment in 1913 amended Art. I, § 2, to provide for direct taxation without apportionment.

Even the first census takers, who had a relatively small population to deal with, encountered difficulty in taking a national census. 31 The Writings of George Washington 329 (J. Fitzpatrick ed. 1939) ("Returns of the Census have already been made from several of the States and a tolerably just estimate has been formed now in others, by which it appears that we shall hardly reach four millions; but one thing is certain our *real* numbers will exceed, greatly, the official returns of them; because the religious scruples of some, would not allow them to give in their lists; the fears of others that it was intended as the foundation of a tax induced them to conceal or diminished theirs, and thro' the indolence of the people, and the negligence of many of the Officers numbers are omitted"); 8 The Writings of Thomas Jefferson 229 (A. Lipscomb ed. 1903) (Aug. 24, 1791, letter to Wm. Carmichael) ("I enclose you a copy of our census . . . . Making very small allowance for omissions, which we know to have been very great, we may safely say we are above four millions").

[9] The information obtained from the national census is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and so-

Although Congress has broad power to require individuals to submit responses, an accurate census depends in large part on public cooperation. To stimulate that cooperation Congress has provided assurances that information furnished to the Secretary by individuals is to be treated as confidential. 13 U. S. C. §§ 8(b), 9(a). Section 8(b) of the Census Act provides that subject to specified limitations, "the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent . . . ." Section 9(a) provides further assurances of confidentiality:

> "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> "(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

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cial studies. See Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, The Use of Population Data in Federal Assistance Programs, Ser. No. 95–16 (Committee Print compiled by the Library of Congress 1978); S. Rep. No. 94–1256, p. 1 (1976).

During congressional debates James Madison emphasized the importance of census information beyond the constitutionally designated purposes and encouraged the new Congress to "embrace some other subjects besides the bare enumeration of the inhabitants."

"This kind of information, [Madison] observed, all legislatures had wished for; but this kind of information had never been obtained in any country. . . . If the plan was pursued in taking every future census, it would give them an opportunity of marking the progress of the society, and distinguishing the growth of every interest." 13 The Papers of James Madison 8–9 (C. Hobson & R. Rutland eds. 1981) (Debate of Jan. 25, 1790). A bill for obtaining information as described by Mr. Madison passed the House of Representatives but "was thrown out by the Senate as a waste of trouble and supplying materials for idle people to make a book." Letter to Thomas Jefferson, *id.*, at 41.

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

Sections 8(b) and 9(a) explicitly provide for the nondisclosure of certain census data. No discretion is provided to the Census Bureau on whether or not to disclose the information referred to in §§ 8(b) and 9(a). Sections 8(b) and 9(a) of the Census Act therefore qualify as withholding statutes under Exemption 3.[10] Raw census data is protected under the §§ 8(b) and 9(a) exemptions, however, only to the extent that the data is within the confidentiality provisions of the Act.

C

Essex County and various *amici* vigorously argue that §§ 8(b) and 9(a) of the Census Act are designed to prohibit disclosure of the identities of individuals who provide raw census data; for this reason, they argue, the confidentiality provisions protect raw data only if the individual respondent can be identified. The unambiguous language of the confidentiality provisions, as well as the legislative history of the Act, however, indicates that Congress plainly contemplated that raw data reported by or on behalf of individuals was to be held confidential and not available for disclosure.

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[10] Respondent Shapiro does not dispute this conclusion. See Brief for Respondent in No. 80-1436, p. 8. The legislative history of the FOIA clearly indicates that Congress recognized that the Census Act constituted a specific exemption under Exemption 3. See, *e.g.*, S. Rep. No. 1621, 85th Cong., 2d Sess., 9 (1958); 104 Cong. Rec. 6549–6550 (1958) (remarks of Rep. Moss); 112 Cong. Rec. 13646 (1966) (remarks of Rep. Olsen) ("information . . . or sources of information" given to the Bureau of the Census will be held confidential under Exemption 3); H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966); 122 Cong. Rec. 24211 (1976) (remarks of Reps. Abzug and McCloskey).

We begin first with the language of §§ 8(b) and 9(a). *Watt* v. *Energy Action Educational Foundation*, 454 U. S. 151 (1981). Section 8(b) allows the Secretary to provide statistical materials "which do not disclose *the information* reported by, or on behalf of, any particular respondent . . . ." (Emphasis added.) The focus of § 9(a) is also on the information that constitutes the statistical compilation. The Secretary is prohibited from using the "information" except for statistical purposes and is prohibited from publication "whereby the *data* furnished by any particular establishment or individual under this title can be identified . . . ." (Emphasis added.)

The language of each section refers to protection of the "information" or "data" compiled. In addition, the provisions of § 8(b) prohibit disclosure of data provided "by, or on behalf of," any respondent. By protecting data revealed "on behalf of" a respondent, Congress further emphasized that the data itself was to be protected from disclosure.

The legislative history also makes clear that Congress was concerned not solely with protecting the identity of individuals. Since 1879 Congress has expressed its concern that confidentiality of data reported by individuals also be preserved. At that time each census taker was required by law to take an oath "not [to] disclose any information contained in the schedules, lists, or statements." Act of Mar. 3, 1879, ch. 195, § 7, 20 Stat. 475, and Act of Apr. 20, 1880, ch. 57, 21 Stat. 75.[11] As a result of the detailed questions asked in the 1880 and 1890 censuses, Congress amended the Census Act

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[11] Concern for confidentiality in census-taking was expressed as early as the 1840 census in which each census enumerator was instructed to "consider all communications made to him in the performance of [his] duty, relative to the business of the people, as strictly confidential." Subcommittee on Energy Nuclear Proliferation and Federal Services of the Senate Committee on Governmental Affairs, The Decennial Census: An Analysis and Review, 96th Cong., 2d Sess., 113 (Committee Print compiled by the Library of Congress 1980) (hereinafter Decennial Census). See also A. Scott, Census, U. S. A. 29 (1968). The 1870 census instructions emphatically stated that "[a]ll disclosures should be treated as strictly

to broaden the confidentiality protections. Act of Mar. 3, 1899, ch. 419, § 21, 30 Stat. 1020. The law restricted disclosure unless the Director of the Census authorized that the information be revealed. The governor of any state or the chief officer of any municipal government upon request, however, could receive a list of individuals counted within the territory of the jurisdiction. § 30, 30 Stat. 1021. The Director of the Census frequently was asked to disclose information to cities complaining of undercounts. For example, data was revealed to New York City after the 1890 census in order to allow the city to challenge the accuracy of the federal count. House Committee on the Eleventh Census, Reenumeration of New York City, 51st Cong., 2d Sess. (1890). See also Decennial Census, at 113–138.

In 1929 Congress again amended the Census Act and provided the confidentiality provisions of § 9. Act of June 18,

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confidential, with the exception hereafter to be noted in the case of the mortality schedule. . . ." Decennial Census, at 114. The 1909 revisions of the Census Act stated that "[n]o publication shall be made by the Census Office whereby the *data* furnished by any particular establishment can be identified . . . ." Act of July 2, 1909, ch. 2, § 25, 36 Stat. 9 (emphasis added). See also Act of Apr. 2, 1924, ch. 80, § 3, 43 Stat. 31; Act of June 18, 1929, ch. 28, § 8, 46 Stat. 23; Act of July 25, 1947, ch. 331, 61 Stat. 458; Act of Aug. 31, 1954, Pub. L. 740, 68 Stat. 1013–1014; Act of Oct. 15, 1962, Pub. L. 87–813, 76 Stat. 922 (overriding decision in *St. Regis Paper Co.* v. *United States*, 368 U. S. 208 (1961), by prohibiting disclosure of copy of census report retained by business establishment).

For a more detailed history of the provisions of confidentiality see C. Kaplan & T. Van Valey, Census '80: Continuing the Factfinder Tradition 68–71 (U. S. Dept. of Commerce, 1980).

Recognition of the need for some degree of confidentiality of census materials is indicated in the confidentiality provisions of several foreign nations. Canada, France, Germany, Great Britain, Italy, Japan, The Netherlands, and Sweden make some provision for the confidentiality of census materials. See Senate Committee on Post Office and Civil Service, Laws on the Confidentiality of Census Records in Western Europe, Canada, and Japan, 94th Cong., 2d Sess. (Committee Print compiled by the Library of Congress 1976).

1929, ch. 28, § 11, 46 Stat. 25. The amendment gave the Director of the Bureau no discretion to release data, regardless of the claimed beneficial effect of disclosure. The confidentiality provisions extended to all information collected by the Bureau of the Census. Decennial Census, at 116. No special access was granted to states or municipalities. In 1976 the confidentiality provision of § 8 was strengthened "to add further protection of privacy" by prohibiting disclosure of information "reported by, or on behalf of, any respondent." S. Rep. No. 94–1256, pp. 3–4 (1976). See also H. R. Conf. Rep. No. 94–1719, p. 10 (1976). The prohibitions of disclosure of "material which might disclose information reported by, or on behalf of, any respondent" extend both to "public and private entities," S. Rep. No. 94–1256, *supra*, at 4, further indicating that the municipalities requesting disclosure of raw census data have no special claim to the information.

The foregoing history of the Census Act reveals a congressional intent to protect the confidentiality of census information by prohibiting disclosure of raw census data reported by or on behalf of individuals. Subsequent congressional action is consistent with this interpretation. In response to claimed undercounts in the census of 1960 and of 1970, Congress considered, but ultimately rejected, proposals to allow local officials limited access to census data in order to challenge the census count. See H. R. 8871, 95 Cong., 1st Sess. (1977); Hearings on H. R. 8871 before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977).

A list of vacant addresses is part of the raw census data—the information—intended by Congress to be protected. The list of addresses requested by the County of Essex constitutes "information reported by, or on behalf of," individuals responding to the census. The initial list of addresses is taken from prior censuses and mailing lists. This information then is verified both by direct mailings and census enumerators who go to areas not responding. See, *e. g.*, 1980

Census Questionnaire, Question No. H4 ("How many living quarters, occupied and vacant, are at this address?"). As with all the census material, the information on vacancies was updated from data obtained from neighbors and others who spoke with the followup census enumerators. The final master address list therefore includes data reported by or on behalf of individuals.

Under the clear language of the Census Act it is not relevant that the municipalities seeking the data will use it only for statistical purposes. Section 9(a)(1) permits use of the data only for "the statistical purposes for which it is supplied." There is no indication in the Census Act that the hundreds of municipal governments in the 50 states were intended by Congress to be the "monitors" of the Census Bureau.[12] In addition, limiting use of data only for "statistical" purposes in no way indicates that raw data may be revealed outside the strict requirements of the Census Act that data be handled by census employees sworn to secrecy.[13]

Because §§ 8(b) and 9(a) of the Census Act constitute withholding statutes under Exemption 3 of the FOIA and because the raw census data in this case was intended to be protected from disclosure within those provisions of the Census Act, the requested information is not subject to disclosure under the FOIA.

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[12] Congress may well have concluded that the controversy over the "vacant" or "occupied" status of property months after the census was taken could lead to interminable litigation and impair the constitutional and statutory purposes of the census.

Approximately 50 lawsuits have been brought by local governments claiming an undercount from the 1980 census. See, *e. g.*, *In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J.P.M.D.L. 1981); *Carey* v. *Klutznick*, 653 F. 2d 732 (CA2), cert. pending *sub nom. Carey* v. *Baldrige*, No. 81-752.

[13] Although § 9(a)(1) allows use of census data for "statistical" purposes, it remains subject to § 8(b), which prohibits public disclosure of information reported by or on behalf of individuals.

III

The discovery provisions of the Federal Rules of Civil Procedure, similar to the FOIA, are designed to encourage open exchange of information by litigants in federal courts. Unlike the FOIA, however, the discovery provisions under the Federal Rules focus upon the need for the information rather than a broad statutory grant of disclosure.[14] Federal Rule of Civil Procedure 26(b)(1) provides for access to all information "relevant to the subject matter involved in the pending action" unless the information is privileged. If a privilege exists, information may be withheld, even if relevant to the lawsuit and essential to the establishment of plaintiff's claim.

It is well recognized that a privilege may be created by statute.[15] A statute granting a privilege is to be strictly construed so as "to avoid a construction that would suppress otherwise competent evidence." *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961). In the case of the city of Denver, the central inquiry is whether §§ 8(b) and 9(a) create a privilege so as to protect against disclosure of the raw census data requested.[16]

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[14] The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 143, n. 10 (1975); *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 24 (1974).

[15] Most courts have concluded that an FOIA exemption does not automatically constitute a "privilege" within the meaning of the Federal Rules of Civil Procedure. See, *e. g.*, *Frankel* v. *SEC*, 460 F. 2d 813, 818 (CA2 1972) (information exempt under FOIA may be obtained through discovery if party's need for information exceeds Government's need for confidentiality). See Toran, Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules, 49 Geo. Wash. L. Rev. 843, 848–854 (1981).

[16] Federal Rule of Evidence 501 provides that "*[e]xcept as otherwise required by* the Constitution of the United States or provided by *Act of Congress* . . . the privilege of a witness . . . [or] government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (Emphasis added.)

As noted above, § 8(b) and § 9(a) of the Census Act embody explicit congressional intent to preclude *all* disclosure of raw census data reported by or on behalf of individuals. This strong policy of nondisclosure indicates that Congress intended the confidentiality provisions to constitute a "privilege" within the meaning of the Federal Rules. Disclosure by way of civil discovery would undermine the very purpose of confidentiality contemplated by Congress. One such purpose was to encourage public participation and maintain public confidence that information given to the Census Bureau would not be disclosed. The general public, whose cooperation is essential for an accurate census, would not be concerned with the underlying rationale for disclosure of data that had been accumulated under assurances of confidentiality. Congress concluded in §§ 8(b) and 9(a) that only a bar on disclosure of all raw data reported by or on behalf of individuals would serve the function of assuring public confidence. This was within congressional discretion, for Congress is vested by the Constitution with authority to conduct the census "as they shall by Law direct."[17] The wisdom of its classifications is not for us to decide in light of Congress' 180 years' experience with the census process.

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[17] It is not unlikely that while checking the Bureau vacancy figures the city of Denver would speak to individuals who had supplied vacancy data to the Bureau. Even though the city might not be able to identify the individuals who originally gave the information, there would nonetheless be the *appearance* that confidentiality had been breached.

Congress has several times rejected proposals designed to assure availability of census records to historians and other legitimate researchers. See, *e. g.*, S. 3279, H. R. 10686, 94th Cong., 2d Sess. (1976). "Concerns about the legislation raised by the Bureau of the Census and others soon made it apparent that benefits gained from the release of census records could be easily offset by a loss of credibility for the census, as well as damage to the reputations of individual citizens." Senate Committee on Post Office and Civil Service, Laws on the Confidentiality of Census Records in Western Europe, Canada, and Japan, 94th Cong., 2d Sess. (Committee Print compiled by the Library of Congress 1976) (Foreword by Sen. McGee, Chairperson).

This is not to say that the city of Denver does not also have important reasons for requesting the raw census data for purposes of its civil suit. A finding of "privilege," however, shields the requested information from disclosure despite the need demonstrated by the litigant.

IV

We hold that whether sought by way of requests under the FOIA or by way of discovery rules, raw data reported by or on behalf of individuals need not be disclosed. Congress, of course, can authorize disclosure in executing its constitutional obligation to conduct a decennial census. But until Congress alters its clear provisions under §§ 8(b) and 9(a) of the Census Act, its mandate is to be followed by the courts.

Accordingly the judgment of the United States Court of Appeals for the Third Circuit in No. 80–1436 is reversed, and the judgment of the United States Court of Appeals for the Tenth Circuit in No. 80–1781 is affirmed.

It is so ordered.

HAVENS REALTY CORP. ET AL. v. COLEMAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-988. Argued December 1, 1981—Decided February 24, 1982

Section 804 of the Fair Housing Act of 1968 (Act) makes unlawful various forms of discriminatory housing practices. Section 812(a) authorizes civil actions to enforce § 804 and requires that suit be brought within 180 days after the alleged occurrence of a discriminatory practice. A class action for declaratory, injunctive, and monetary relief was brought in Federal District Court against petitioners—Havens Realty Corp. (Havens), an apartment complex owner in a suburb of Richmond, Va., and one of its employees—on the basis of their alleged "racial steering" in violation of § 804. The suit was brought by a black person (Coles) who, attempting to rent an apartment from Havens, allegedly was falsely told less than 180 days before suit was instituted that no apartments were available, and by respondents—Housing Opportunities Made Equal (HOME), a nonprofit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area," and two individuals (one black and one white) who were employed by HOME as "testers" to determine whether Havens practiced racial steering. The complaint alleged that on specified dates more than 180 days before suit was instituted, the black tester was told by Havens that no apartments were available, but the white tester was told that there were vacancies. It was also alleged that Havens' practices had deprived the individual plaintiffs (who were residents of Richmond or the adjacent county) of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices"; that Havens' steering practices had frustrated HOME's activities as to housing counseling and referral services, with a consequent drain on resources; and that its members had been deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination. On petitioners' pretrial motion, the District Court dismissed respondents' claims, holding that they lacked standing and that their claims were barred by the Act's 180-day statute of limitations. The Court of Appeals reversed and remanded. It held that the allegations of injury to the respondents were sufficient to withstand a motion to dismiss, and that their claims were not time-barred because petitioners' conduct constituted a "continuing violation" lasting through the time of the alleged Coles incident, which was within the 180-day period of § 812(a).

Held:

1. Respondents' claims were not rendered moot by either (1) the District Court's entry of a consent order with respect to Coles' claims granting him and the class he represented monetary and injunctive relief, the order having been entered after a trial in which Havens was found to have engaged in unlawful racial steering, or (2) a letter agreement between petitioners and respondents—reached prior to this Court's grant of certiorari—whereby, upon approval by the District Court, respondents would each be entitled to $400 in damages and no further relief if this Court were either to deny certiorari or to grant it and affirm, but to no relief if this Court were to grant certiorari and reverse. Irrespective of the issue of injunctive relief, respondents continue to seek damages to redress alleged violations of the Act. The letter agreement would merely liquidate those damages. Pp. 370–371.

2. The determination of whether each of the respondents has standing to sue is guided by the decision in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, that Congress intended standing under § 812 of the Act to extend to the full limits of Art. III and that the courts accordingly lack authority to create prudential barriers to standing in suits brought under that section. Thus the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact—that the plaintiff allege that as a result of the defendant's actions he has suffered "a distinct and palpable injury." Pp. 372–379.

(a) The black individual respondent (Coleman) has standing to sue in her capacity as a "tester." Section 804(d) establishes an enforceable right of "any person" to truthful information concerning the availability of housing. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a damages claim under the Act. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the fact of injury within the meaning of § 804(d). If, as alleged, Coleman was told that apartments were not available while white testers were informed that apartments were available, she has suffered "specific injury" from petitioners' challenged acts, and the Art. III requirement of injury in fact is satisfied. However, since the white individual respondent (Willis) alleged that he was informed that apartments *were* available, rather than that petitioners misrepresented to him that apartments were unavailable, thus alleging no injury to his statutory right to accurate information, he has no standing to sue in his capacity as a tester and, more to the point, has not pleaded a cause of action under § 804(d). Pp. 373–375.

(b) Insofar as Coleman and Willis have alleged that the steering practices of petitioners have deprived the two respondents of the benefits of interracial association, the Court of Appeals properly held that dismissal was inappropriate at this juncture in the proceedings. It is implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area. But respondents have not identified the particular neighborhoods in which they lived, nor established the proximity of their homes to the site of petitioners' alleged steering practices. In the absence of further factual development, it cannot be said as a matter of law that no injury could be proved. Further pleading and proof might establish that the respondents lived in areas where petitioners' practices had an appreciable effect. Pp. 375–378.

(c) Although HOME apparently has abandoned its claim of standing to sue for injunctive relief as a representative of its members, it has standing to sue for damages in its own right under the Act. If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide housing counseling and referral services—with a consequent drain on the organization's resources—there can be no question that the organization has suffered the requisite injury in fact. Pp. 378–379.

3. The 180-day limitations period of § 812(a) of the Act is no bar to the "neighborhood" claims of the individual respondents or to HOME's claim for injury to its counseling and referral services, even though the alleged incidents of racial steering involving Coleman and Willis occurred more than 180 days before suit was filed. Where a plaintiff, pursuant to the Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice. Here, the individual respondents' "neighborhood" claims and HOME's claim are based not solely on isolated incidents involving the two individual respondents but on a continuing violation manifested in a number of incidents—including at least one (involving Coles) that is asserted to have occurred within the 180-day period. However, insofar as Coleman has standing to assert a claim as a "tester," she may not take advantage of the "continuing violation" theory, and such claim is time barred. It is not alleged, nor could it be, that the incident of steering involving Coles deprived Coleman of her § 804(d) right to truthful housing information. Pp. 380–381.

633 F. 2d 384, affirmed in part and reversed in part.

BRENNAN, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 382.

Everette G. Allen, Jr., argued the cause for petitioners. With him on the briefs was *James F. Pascal.*

Vanessa Ruiz argued the cause for respondents. With her on the brief were *Daniel M. Singer, James B. Blinkoff,* and *Josephine L. Ursini.**

JUSTICE BRENNAN delivered the opinion of the Court.

This case presents questions concerning the scope of standing to sue under the Fair Housing Act of 1968 and the proper construction of § 812(a) of the Act, which requires that a civil suit be brought within 180 days after the alleged occurrence of a discriminatory practice.

I

The case began as a class action against Havens Realty Corp. (Havens) and one of its employees, Rose Jones. Defendants were alleged to have engaged in "racial steering"[1] violative of § 804 of the Fair Housing Act of 1968, 42 U. S. C.

**William D. North* and *John R. Linton* filed a brief for the National Association of Realtors as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Reginald M. Barley* for the City of Richmond; by *F. Willis Caruso* for the Leadership Council for Metropolitan Open Communities; and by *Martin E. Sloane* for the National Committee Against Discrimination in Housing, Inc., et al.

Briefs of *amici curiae* were filed by *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Harriet S. Shapiro, Jessica Dunsay Silver, Mildred M. Matesich,* and *Gershon M. Ratner* for the United States; and by *Richard C. Dinkelspiel, Norman J. Chachkin, Roderic V. O. Boggs, Jack Greenberg, James M. Nabrit III, Lowell Johnston, Judith Reed,* and *William L. Taylor* for the Lawyers' Committee for Civil Rights Under Law et al.

[1] As defined in the complaint, "racial steering" is a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." App. 11–12, ¶ 1.

§ 3604 (Act or Fair Housing Act).[2] The complaint, seeking declaratory, injunctive, and monetary relief, was filed in the United States District Court for the Eastern District of Virginia in January 1979 by three individuals[3]—Paul Coles, Sylvia Coleman, and R. Kent Willis—and an organization—Housing Opportunities Made Equal (HOME).

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[2] Section 804 provides:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

"(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

"(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

"(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin." 82 Stat. 83, as amended, 88 Stat. 729.

The complaint also alleged violation of the Civil Rights Act of 1866, 42 U. S. C. § 1982. Since the judgment of the Court of Appeals did not rest on a violation of § 1982, we have no occasion to consider the applicability of that statute.

[3] The individual plaintiffs averred that they were "members of a class composed of all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who have been, or continue to be, adversely affected by the acts, policies and practices of" Havens. App. 12, ¶ 2.

At the time suit was brought, defendant Havens owned and operated two apartment complexes, Camelot Townhouses and Colonial Court Apartments, in Henrico County, Va., a suburb of Richmond. The complaint identified Paul Coles as a black "renter plaintiff" who, attempting to rent an apartment from Havens, inquired on July 13, 1978, about the availability of an apartment at the Camelot complex, and was falsely told that no apartments were available. App. 13, ¶7; *id.*, at 15, ¶12.[4] The other two individual plaintiffs, Coleman and Willis, were described in the complaint as "tester plaintiffs" who were employed by HOME to determine whether Havens practiced racial steering. *Id.*, at 13, ¶7. Coleman, who is black, and Willis, who is white, each assertedly made inquiries of Havens on March 14, March 21, and March 23, 1978, regarding the availability of apartments. On each occasion, Coleman was told that no apartments were available; Willis was told that there were vacancies. On July 6, 1978, Coleman made a further inquiry and was told that there were no vacancies in the Camelot Townhouses; a white tester for HOME, who was not a party to the complaint, was given contrary information that same day. *Id.*, at 16, ¶13.

The complaint identified HOME as "a nonprofit corporation organized under the laws of the State of Virginia" whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." *Id.*, at 13, ¶8. According to the complaint, HOME's membership was "multiracial and include[d] approximately 600 individuals." *Ibid.* Its activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination. *Id.*, at 14, ¶¶8a, 8b.

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[4] According to the complaint,

"Camelot Townhouses is an apartment complex predominantly occupied by whites. Coles was informed that no apartments were available in the Camelot complex. He was told that an apartment was available in the adjoining Colonial Court complex. The Colonial complex is integrated." *Id.*, at 15–16, ¶12.

The three individual plaintiffs, who at the time the complaint was filed were all residents of the city of Richmond or the adjacent Henrico County, *id.*, at 13, ¶7, averred that they had been injured by the discriminatory acts of petitioners. Coles, the black renter, claimed that he had been "denied the right to rent real property in Henrico County." *Id.*, at 17, ¶14. Further, he and the two tester plaintiffs alleged that Havens' practices deprived them of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." *Id.*, at 17, ¶¶14, 15. And Coleman, the black tester, alleged that the misinformation given her by Havens concerning the availability of apartments in the Colonial Court and Camelot Townhouse complexes had caused her "specific injury." *Id.*, at 16, ¶13.

HOME also alleged injury. It asserted that the steering practices of Havens had frustrated the organization's counseling and referral services, with a consequent drain on resources. *Id.*, at 17, ¶16. Additionally, HOME asserted that its members had been deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination. *Id.*, at 17–18, ¶16.

Before discovery was begun, and without any evidence being presented, the District Court, on motion of petitioners, dismissed the claims of Coleman, Willis, and HOME. The District Court held that these plaintiffs lacked standing and that their claims were barred by the Act's 180-day statute of limitations, 42 U. S. C. §3612(a). App. 33–35.[5] Each of the dismissed plaintiffs—respondents in this Court—appealed, and the Court of Appeals for the Fourth Circuit reversed and remanded for further proceedings. *Coles* v. *Ha-*

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[5] Coles' claims, however, were not dismissed. Rather, they went to trial following the court's certification of a class, represented by Coles, of individuals injured monetarily on or after January 9, 1977, by the steering practices of petitioners.

vens Realty Corp., 633 F. 2d 384 (1980). The Court of Appeals held that the allegations of injury by Willis and Coleman, both as testers and as individuals who were deprived of the benefits of residing in an integrated community, sufficed to withstand a motion to dismiss.[6] With respect to HOME, the Court of Appeals held that the organization's allegations of injury to itself and its members were sufficient, at the pleading stage, to afford the organization standing both in its own capacity and as a representative of its members. The Court of Appeals further held that none of the allegations of racial steering was time-barred, because petitioners' conduct constituted a "continuing violation" lasting through July 13, 1978—less than 180 days before the complaint was filed. We granted certiorari. 451 U. S. 905 (1981).

II

At the outset, we must consider whether the claims of Coleman, Willis, and HOME have become moot as a result of certain developments occurring after the District Court's dismissal. The first was the District Court's entry of a consent order with respect to Coles' claims. Following the dismissal of respondents' claims, Coles' undismissed claims went to trial, and Havens was found to have engaged in unlawful racial steering.[7] Shortly thereafter, at the request of the parties, the court entered a consent order granting Coles and the class he represented monetary and injunctive relief. App. to Brief for Respondents 10a. The second development con-

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[6] The court noted that the District Court could require respondents to amend their pleadings to make more specific their allegations, and that if their allegations were "not supported by proof at trial, the case [could] be terminated for lack of standing at an appropriate stage of the trial." 633 F. 2d, at 391.

[7] The court found that the practices violated both the Fair Housing Act and the Civil Rights Act of 1866, 42 U. S. C. § 1982. That determination is not before us, and we intimate no view as to its correctness. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 115, n. 32 (1979).

cerns an agreement reached between petitioners and respondents prior to this Court's grant of certiorari.[8] The letter agreement, which expressly provides that it is to become effective only after approval by the District Court, states that if the Court were to deny certiorari, or grant it and affirm, respondents would each be entitled to $400 in damages and no further relief. The agreement provides also that if the Court were to grant certiorari and reverse, respondents would be entitled to no relief whatsoever.

Despite these two developments, this case is not moot. Irrespective of the issue of injunctive relief, respondents continue to seek damages to redress alleged violations of the Fair Housing Act.[9] The letter agreement, if approved by the District Court, would merely liquidate those damages. If respondents have suffered an injury that is compensable in money damages of some undetermined amount, the fact that they have settled on a measure of damages does not make their claims moot. Given respondents' continued active pursuit of monetary relief, this case remains "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937) (citations omitted). See *Powell* v. *McCormack*, 395 U. S. 486, 495–500 (1969); *Bond* v. *Floyd*, 385 U. S. 116, 128, n. 4 (1966).[10]

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[8] The parties filed the agreement with the Court following oral argument.

[9] The consent order involving Coles' claims did establish a fund to provide damages for "claimants." The parties agree, however, that respondents, whose claims were dismissed as time-barred and on standing grounds, cannot claim against the fund.

[10] It is true that with respect to the claims of HOME in its representative capacity, the complaint only requested injunctive relief, although of a broader nature than that provided in Coles' consent order. Even as to HOME's representative claims, however, the "stringent" test for mootness, *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968), is not satisfied, since the letter agreement, under which HOME agreed not to seek any further injunctive relief and which involves settle-

III

Our inquiry with respect to the standing issues raised in this case is guided by our decision in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91 (1979). There we considered whether six individuals and the village of Bellwood had standing to sue under § 812 of the Fair Housing Act, 42 U. S. C. § 3612,[11] to redress injuries allegedly caused by the racial steering practices of two real estate brokerage firms. Based on the complaints, "as illuminated by subsequent discovery," 441 U. S., at 95, we concluded that the village and four of the individual plaintiffs did have standing to sue under the Fair Housing Act, *id.*, at 111, 115.[12] In reaching that conclusion, we held that "Congress intended standing under § 812 to extend to the full limits of Art. III" and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section. *Id.*, at 103, n. 9, 109. Thus the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered "a distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). With this understanding,

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ment of an uncertified class action, is still subject to the approval of the District Court. For reasons stated *infra*, at 378, we nevertheless do not reach the question whether HOME has standing in its representative capacity.

[11] Section 812 provides in relevant part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction." 82 Stat. 88.

[12] The Court did hold, however, that on the given record it was appropriate to grant summary judgment against the two remaining individual plaintiffs, neither of whom resided within the area alleged to have been adversely affected by the steering practices of the defendants. 441 U. S., at 112, n. 25. But the Court left the District Court free to permit these two individuals "to amend their complaints to include allegations of actual harm." *Id.*, at 113, n. 25.

we proceed to determine whether each of the respondents in the present case has the requisite standing.

A

The Court of Appeals held that Coleman and Willis have standing to sue in two capacities: as "testers" and as individuals deprived of the benefits of interracial association. We first address the question of "tester" standing.

In the present context, "testers" are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices. Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," 42 U. S. C. § 3604(d) (emphasis added), a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act, 42 U. S. C. § 3612(a). Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth* v. *Seldin*, *supra*, at 500, quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617, n. 3 (1973). Accord, *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 212 (1972) (WHITE, J., concurring). Section 804(d), which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and there-

fore has standing to maintain a claim for damages under the Act's provisions. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d). See *Pierson* v. *Ray*, 386 U. S. 547, 558 (1967); *Evers* v. *Dwyer*, 358 U. S. 202, 204 (1958) (*per curiam*). Whereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) of the Act, 42 U. S. C. § 3604(a),[13] required that there be a "bona fide offer" to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d).[14]

In the instant case, respondent Coleman—the black tester—alleged injury to her statutorily created right to truthful housing information. As part of the complaint, she averred that petitioners told her on four different occasions that apartments were not available in the Henrico County complexes while informing white testers that apartments were available. If the facts are as alleged, then respondent has suffered "specific injury" from the challenged acts of petitioners, see App. 16, ¶ 13, and the Art. III requirement of injury in fact is satisfied.

Respondent Willis' situation is different. He made no allegation that petitioners misrepresented to him that apart-

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[13] For the terms of § 804(a), see n. 2, *supra*.

[14] Congress' decision to confer a broad right of truthful information concerning housing availability was undoubtedly influenced by congressional awareness that the intentional provision of misinformation offered a means of maintaining segregated housing. Various witnesses testifying before Congress recounted incidents in which black persons who sought housing were falsely informed that housing was not available. See Hearings on S. 1358, S. 2114, and S. 2280 before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 99 (1967) (testimony of Roy Wilkins); *id.*, at 204, 206 (statement of Gerard A. Ferere); *id.*, at 497 (statement of Whitney M. Young, Jr.).

ments were unavailable in the two apartment complexes. To the contrary, Willis alleged that on each occasion that he inquired he was informed that apartments *were* available. As such, Willis has alleged no injury to his statutory right to accurate information concerning the availability of housing. We thus discern no support for the Court of Appeals' holding that Willis has standing to sue in his capacity as a tester.[15] More to the point, because Willis does not allege that he was a victim of a discriminatory misrepresentation, he has not pleaded a cause of action under § 804(d). We must therefore reverse the Court of Appeals' judgment insofar as it reversed the District Court's dismissal of Willis' "tester" claims.

B

Coleman and Willis argue in this Court, and the Court of Appeals held, that irrespective of their status as testers, they should have been allowed to proceed beyond the pleading stage inasmuch as they have alleged that petitioners' steering practices deprived them of the benefits that result from living in an integrated community. This concept of "neighborhood" standing differs from that of "tester" standing in that the injury asserted is an indirect one: an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff. By contrast, the injury underlying tester standing—the denial of the tester's own statutory right to truthful housing information caused by misrepresentations to the tester—is a direct one. See *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 80–81 (1978). The distinction is between "third-party" and "first-party" standing.

This distinction is, however, of little significance in deciding whether a plaintiff has standing to sue under § 812 of the Fair Housing Act. *Bellwood*, as we have already noted, held that the only requirement for standing to sue under

[15] Indeed, respondent Willis made no argument in this Court in defense of this holding and appears to concede its error.

§ 812 is the Art. III requirement of injury in fact. As long as respondents have alleged distinct and palpable injuries that are "fairly traceable" to petitioners' actions, the Art. III requirement of injury in fact is satisfied. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977). The question before us, then, is whether injury in fact has been sufficiently alleged.[16]

The two individual respondents, who according to the complaint were "residents of the City of Richmond or Henrico County," alleged that the racial steering practices of petitioners have deprived them of "the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." App. 13, ¶ 7; *id.*, at 17, ¶¶ 14, 15. The type of injury alleged thus clearly resembles that which we found palpable in *Bellwood*. In that case, plaintiffs alleged that the steering practices of the defendants, by transforming their neighborhood in Bellwood from an integrated into an almost entirely black environment, had deprived them of "the social and professional benefits of living in an integrated society" and had caused them "economic injury." 441 U. S., at 111, 115, and n. 30.[17]

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[16] "[A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm under § 812." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 103, n. 9.

[17] Similarly, in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972), on which *Bellwood* relied, we held that two tenants—one black and one white—of an apartment complex had standing to sue under § 810(a) of the Fair Housing Act, 42 U. S. C. § 3610(a), in challenging the alleged racial steering practices of their landlord. The plaintiffs' averments of injury, held sufficient for purposes of standing, were summarized by the Court in the following terms:

"(1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would

Petitioners do not dispute that the loss of social, professional, and economic benefits resulting from steering practices constitutes palpable injury. Instead, they contend that Coleman and Willis, by pleading simply that they were residents of the Richmond metropolitan area, have failed to demonstrate how the asserted steering practices of petitioners in Henrico County may have affected the *particular* neighborhoods in which the individual respondents resided.

It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area. At the time relevant to this action the city of Richmond contained a population of nearly 220,000 persons, dispersed over 37 square miles. Henrico County occupied more than 232 square miles, in which roughly 170,000 people made their homes.[18] Our cases have upheld standing based on the effects of discrimination only within a "relatively compact neighborhood," *Bellwood*, 441 U. S., at 114. We have not suggested that discrimination within a single housing complex might give rise to "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S., at 501, throughout a metropolitan area.

Nonetheless, in the absence of further factual development, we cannot say as a matter of law that no injury could be proved. Respondents have not identified the particular neighborhoods in which they lived, nor established the proximity of their homes to the site of petitioners' alleged steering practices. Further pleading and proof might establish that they lived in areas where petitioners' practices had an appreciable effect. Under the liberal federal pleading standards, we therefore agree with the Court of Appeals that dismissal

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have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" 409 U. S., at 208.

[18] According to the Court of Appeals, the population of the city of Richmond as of 1978 was 219,883, while that of Henrico County was 172,922. 633 F. 2d, at 391, n. 5.

on the pleadings is inappropriate at this stage of the litigation. At the same time, we note that the extreme generality of the complaint makes it impossible to say that respondents have made factual averments sufficient if true to demonstrate injury in fact. Accordingly, on remand, the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint. Cf. Fed. Rule Civ. Proc. 12(e). If after that opportunity the pleadings fail to make averments that meet the standing requirements established by the decisions of this Court, the claims should be dismissed.

C

HOME brought suit against petitioners both as a representative of its members and on its own behalf. In its representative capacity, HOME sought only injunctive relief. See App. 17, ¶ 16; *id.*, at 18–20, ¶ 18. Under the terms of the letter settlement reached between petitioners and respondents, however, HOME has agreed to abandon its request for injunctive relief in the event the District Court ultimately approves the settlement. *Supra*, at 370–371, and n. 10. Additionally, in its brief in this Court, HOME suggests that we need not decide whether the organization has standing in its representative capacity. Brief for Respondents 8, n. 8; *id.*, at 39, n. 35. In view of HOME's apparent willingness to abandon this claim, we think it inappropriate that the Court use its resources to resolve an issue for which "such small embers of controversy . . . remain." *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 225 (1970) (*per curiam*). While we therefore will not decide the question involving HOME's representative standing, we do proceed to decide the question whether HOME has standing in its own right; the organization continues to press a right to claim damages in that latter capacity.

In determining whether HOME has standing under the Fair Housing Act, we conduct the same inquiry as in the case of an individual: Has the plaintiff "'alleged such a personal stake in the outcome of the controversy' as to warrant his in-

vocation of federal-court jurisdiction"? *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 261 (emphasis omitted), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).[19] In the instant case, HOME's complaint contained the following claims of injury to the organization:

> "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's *[sic]* racially discriminatory steering practices." App. 17, ¶ 16.

If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests, see *Sierra Club* v. *Morton*, 405 U. S., at 739.[20] We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.[21]

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[19] We have previously recognized that organizations are entitled to sue on their own behalf for injuries they have sustained. *E. g.*, *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975).

[20] That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 263 (1977), and accordingly does not deprive the organization of standing.

[21] Of course, HOME will have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief.

IV

Petitioners argue that even if respondents do have standing to sue under the Fair Housing Act, their claims are time-barred under § 812(a) of the Fair Housing Act, 42 U. S. C. § 3612(a). That section requires that a civil suit be brought within 180 days after the alleged occurrence of a discriminatory housing practice.[2] As petitioners note, although five different specific incidents allegedly in violation of the Fair Housing Act are detailed in the complaint, the four involving Coleman occurred more than 180 days before the complaint was filed, and the fifth, which was within 180 days of filing, involved only Coles, whose claims are already the subject of a consent order entered by the District Court. The Court of Appeals, adopting a "continuing violation" theory, held that because the Coles incident fell within the limitations period, none of the claims was barred.

We agree with the Court of Appeals that for purposes of § 812(a), a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. See *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, see *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 417 (1968). Cf. *Zipes* v. *Trans World Airlines, Inc.*, *post*, at 398. Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant

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[2] The section reads in pertinent part:

"A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice[23] that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Applying this principle to the "neighborhood" claims of Coleman and Willis, we agree with the Court of Appeals that the 180-day statute of limitations is no bar. Willis and Coleman have alleged that petitioners' continuing pattern, practice, and policy of unlawful racial steering has deprived them of the benefits of interracial association arising from living in an integrated neighborhood. Plainly the claims, as currently alleged, are based not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents—including at least one (involving Coles) that is asserted to have occurred within the 180-day period. HOME, too, claims injury to its counseling and referral services not only from the incidents involving Coleman and Willis, but also from a continuing policy and practice of unlawful racial steering that extends through the last alleged incident. We do not agree with the Court of Appeals, however, that insofar as respondent Coleman has standing to assert a claim as a "tester," she may take advantage of the "continuing violation" theory. Her tester claim is, in essence, that on four isolated occasions she received false information from petitioners in violation of § 804(d). It is not alleged, nor could it be, that the incident of steering involving Coles on July 13, 1978, deprived Coleman of her § 804(d) right to truthful housing information. See App. 16, ¶ 13.

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[23] Petitioners read § 813 of the Act, 42 U. S. C. § 3613, as permitting only the Attorney General to bring a civil suit under the Act challenging a "pattern or practice" of unlawful conduct. We disagree. That section serves only to describe the suits that the Attorney General may bring, and not to limit suits that private parties may bring under § 812. See *Fort* v. *White*, 383 F. Supp. 949 (Conn. 1974).

V

In sum, we affirm the judgment of the Court of Appeals insofar as the judgment reversed the District Court's dismissal of the claims of Coleman and Willis as individuals allegedly deprived of the benefits of interracial association, and the claims of HOME as an organization allegedly injured by the racial steering practices of petitioners; we reverse the judgment insofar as it directed that Coleman and Willis may proceed to trial on their tester claims. Further proceedings on the remand directed by the Court of Appeals shall be consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

In claiming standing based on a deprivation of the benefits of an integrated community, the individual respondents alleged generally that they lived in the city of Richmond or in Henrico County. This is an area of roughly 259 square miles, inhabited in 1978 by about 390,000 persons. Accordingly, as the Court holds, it is at best implausible that discrimination within two adjacent apartment complexes could give rise to "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), throughout this vast area. See *ante*, at 377. This, to me, is the constitutional core of the Court's decision. "Distinct and palpable" injury remains the minimal constitutional requirement for standing in a federal court.

Although I join the opinion of the Court, I write separately to emphasize my concern that the Art. III requirement of a genuine case or controversy not be deprived of all substance by meaningless pleading. Our prior cases have upheld standing, in cases of this kind, where the effects of discrimination were alleged to have occurred only within "a relatively compact neighborhood." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., 91, 114 (1979). By implication

we today reaffirm that limitation. See *ante*, at 377. I therefore am troubled, not by the opinion of the Court, but by the record on which that opinion is based. After nearly four years of litigation we know only what the individual respondents chose to plead in their complaint—that they live or lived within a territory of 259 square miles, within which petitioners allegedly committed discrete acts of housing discrimination. The allegation would have been equally informative if the area assigned had been the Commonwealth of Virginia.

In *Warth*, *supra*, at 501–502, we noted that a district court properly could deal with a vague averment as to standing by requiring amendment:

> "[I]t is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed."

The Federal Rules of Civil Procedure also permit a defendant to move for a more definite statement of the claims against him:

> "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just." Fed. Rule. Civ. Proc. 12(e).

See *United States* v. *SCRAP*, 412 U. S. 669, 689–690, n. 15 (1973) (Rule 12(e) motion would have been appropriate for defendants confronted with standing allegations "wholly barren of specifics").

In this case neither the District Court nor apparently counsel for the parties took appropriate action to prevent the case from reaching an appellate court with only meaningless averments concerning the disputed question of standing. One can well understand the impatience of the District Court that dismissed the complaint. Yet our cases have established the preconditions to dismissal because of excessive vagueness, *e. g.*, *Gladstone, Realtors, supra*, at 112–115, with regard to standing, and those conditions were not observed. The result is more than a little absurd: Both the Court of Appeals and this Court have been called upon to parse pleadings devoid of any hint of support or nonsupport for an allegation essential to jurisdiction.

Liberal pleading rules have both their merit and their price. This is a textbook case of a high price—in terms of a severe imposition on already overburdened federal courts as well as unjustified expense to the litigants. This also is a particularly disturbing example of lax pleading, for it threatens to trivialize what we repeatedly have recognized as a *constitutional* requirement of Art. III standing. See, *e. g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472–473, 475–476 (1982); *Warth, supra*, at 498.

In any event, in the context of this case, as it reaches us after some four years of confusing and profitless litigation, it is not within our province to order a dismissal. I therefore join the opinion of the Court.

ZIPES ET AL. v. TRANS WORLD AIRLINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78–1545. Argued December 2, 1981—Decided February 24, 1982*

In 1970, the union then representing flight attendants employed by respondent Trans World Airlines, Inc. (TWA), brought a federal-court class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 by its policy of grounding all female flight attendants who became mothers while their male counterparts who became fathers were permitted to continue flying. Subsequently, individual members of the class (petitioners in No. 78–1545) were appointed as class representatives to replace the union, which was found to be an inadequate representative. The District Court later denied TWA's motion to exclude class members who had not filed charges with the Equal Employment Opportunity Commission (EEOC) within the time limit specified in Title VII, holding that while such filing requirement is a jurisdictional prerequisite not subject to waiver, any violation by TWA continued against all the class members until TWA changed its challenged policy. The court also granted the plaintiff class' motion for summary judgment on the issue of TWA's liability for violating Title VII. The Court of Appeals affirmed the grant of summary judgment and held that timely filing of EEOC charges was a jurisdictional prerequisite, but declined to extend the "continuing violation" theory so as to include in the plaintiff class those terminated employees who failed to file timely EEOC charges. However, the court stayed its mandate pending the filing of petitions in this Court, which, in turn, deferred consideration of the petitions pending completion of settlement proceedings in the District Court. In such proceedings, the District Court designated two subclasses: Subclass A, consisting of women who were terminated on or after March 20, 1970, and those who were discharged earlier but who had accepted reinstatement in ground positions, and Subclass B, consisting of all other members of the class, whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely-filing requirement. The flight at-

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*Together with No. 80–951, *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc., et al.*, also on certiorari to the same court.

tendants' current union (petitioner in No. 80–951) was permitted to intervene and object to the proposed settlement. On the basis of the Court of Appeals' stay of its mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. It also approved the settlement and awarded restoration of retroactive seniority. The Court of Appeals affirmed, rejecting the union's contention that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or to order retroactive seniority with respect to Subclass B.

Held:

1. Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of this Court's prior cases all lead to this conclusion. Pp. 392–398.

2. The District Court had authority to award retroactive seniority to the members of Subclass B as well as Subclass A. Pp. 398–401.

(a) The union's contention in No. 80–951 that there was no finding of discrimination with respect to Subclass B and thus no predicate for relief under § 706(g) of Title VII is without merit. The District Court found unlawful discrimination against the plaintiff class as a whole, at a time when the class had not yet been divided into the two subclasses, and the court's summary judgment ran in favor of the entire class. Since the Court of Appeals erred in ruling that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment, there was no jurisdictional barrier to the District Court's finding of discrimination with respect to the entire class. Pp. 398–399.

(b) Equally meritless is the union's contention that retroactive seniority contrary to the collective-bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. Class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g). And, as made clear in *Teamsters* v. *United States*, 431 U. S. 324, once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. Pp. 399–400.

No. 78–1545, 582 F. 2d 1142, reversed; No. 80–951, 630 F. 2d 1164, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 401. STEVENS, J., took no part in the consideration or decision of the cases.

A. Raymond Randolph, Jr., argued the cause for petitioners in No. 78–1545. With him on the brief were *Aram A. Hartunian, Arnold I. Shure*, and *Kevin M. Forde*. *William A. Jolley* argued the cause for petitioner in No. 80–951. With him on the briefs were *Steven A. Fehr, Scott A. Raisher*, and *George Kaufmann*.

Laurence A. Carton argued the cause for Trans World Airlines, Inc. With him on the brief was *James A. Velde*.†

JUSTICE WHITE delivered the opinion of the Court.

The primary question in these cases is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.* (1970 ed.) is a jurisdictional prerequisite to a suit in the District Court. Secondarily, we resolve a dispute as to whether retroactive seniority was a proper remedy in these Title VII cases.

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†*Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Barry Sullivan, Jessica D. Silver, Mark L. Gross, Constance L. Dupre*, and *Philip B. Sklover* filed a brief for the United States et al. as *amici curiae* urging reversal in No. 78–1545 and affirmance in No. 80–951.

J. Albert Woll, Robert M. Weinberg, Michael H. Gottesman, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal in No. 80–951.

Robert E. Williams, Douglas S. McDowell, and *Daniel R. Levinson* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance in both cases.

I

In 1970, the Air Line Stewards and Stewardesses Association (ALSSA), then the collective-bargaining agent of Trans World Airlines (TWA) flight attendants, brought a class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII by its policy of grounding all female flight cabin attendants who became mothers, while their male counterparts who became fathers were permitted to continue flying. After collective bargaining eliminated the challenged practice prospectively, the parties in the case reached a tentative settlement. The settlement, which provided neither backpay nor retroactive seniority, was approved by the District Court. The Court of Appeals for the Seventh Circuit, however, found the union to be an inadequate representative of the class because of the inherent conflict between the interests of current and former employees. It remanded the case with instructions that the District Court name individual members of the class to replace ALSSA as the class representative.[1] *Air Line Stewards and Stewardesses Assn.* v. *American Airlines, Inc.*, 490 F. 2d 636 (1973).

Upon remand, petitioners in No. 78-1545 were appointed as class representatives. TWA moved to amend its answer to assert that the claims of plaintiffs and other class members were barred by Title VII's "statute of limitations" because they had failed to file charges with the Equal Employment Opportunity Commission (EEOC) within the statutory time

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[1] The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965, for reasons of pregnancy. The Court of Appeals assumed the class to include only those who would have resumed flight duty after becoming mothers but for TWA's policy. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1147, and n. 9 (CA7 1978). The class thus included both former employees and current employees, that is, both those who declined and those who accepted ground positions.

limit. 1 App. 89a.[2] Although the District Court granted the motion to amend, it noted that the "delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense." *Id.*, at 101a.

Subsequently, on October 15, 1976, the District Court denied TWA's motion to exclude class members who had not filed timely charges with the EEOC. In support of its motion, TWA argued that instead of an affirmative defense analogous to a statute of limitations, timely filing with the EEOC is a jurisdictional prerequisite not subject to waiver by any action of the defendants. While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airline continued against all the class members until the airline changed the challenged policy. *Id.*, at 131a–132a. On October 19, 1976, the District Court granted the motion of the plaintiff class for summary judgment on the issue of TWA's liability for violating Title VII. *Id.*, at 133a–134a.

The Court of Appeals affirmed the order of October 18, 1976, granting summary judgment on liability, expressly holding that "TWA's no motherhood policy . . . provides a clear example of sex discrimination prohibited by § 2000e–2(a)." *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1145 (1978). It declined, however, "to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges." *Id.*, at 1149.

The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. Because TWA could not waive the timely-filing requirement, the

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[2] When suit was filed, 42 U. S. C. § 2000e–5(d) (1970 ed.) required charges to be filed within 90 days of the alleged unlawful employment practice. In 1972, this provision was amended to extend the time limit to 180 days and is now codified as § 2000e–5(e).

Court of Appeals found that approximately 92% of the plaintiffs' claims were jurisdictionally barred by the failure of those plaintiffs to have filed charges of discrimination with the EEOC within 90 days of the alleged unlawful employment practice. The Court of Appeals, however, stayed its mandate pending the filing of petitions in this Court. Petitions for certiorari were filed by the plaintiff class, No. 78–1545, and by TWA, No. 78–1549. This Court granted motions to defer consideration of the petitions pending completion of settlement proceedings in the District Court. 442 U. S. 916 (1979).

In connection with the settlement proceedings, the District Court designated two subclasses. Subclass A, consisting of some 30 women, comprised those who were terminated on or after March 2, 1970, as well as those who were discharged earlier, but who had accepted reinstatement in ground duty positions. Subclass B, numbering some 400 women, covered all other members of the class and consisted of those whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely-filing requirement. 2 App. 3.

The proposed settlement divided $3 million between the two groups. It also provided each class member with full company and union seniority from the date of termination. The agreement specified that "in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA."[3] App. to Pet. for Cert. in No. 80–951, p. 29a.

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[3] Section 706(g) of Title VII, 78 Stat. 253, as amended, 42 U. S. C. § 2000e–5(g) provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the

The Independent Federation of Flight Attendants (union), which had replaced ALSSA as the collective-bargaining agent for the flight attendants, was permitted to intervene and to object to the settlement. On the basis that the Court of Appeals had not issued the mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. *Id.*, at 14a–15a. After holding three days of hearings, the District Court approved the settlement and awarded competitive seniority. It explicitly found that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases. *Id.*, at 18a–19a.

The union appealed. It argued that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or to order retroactive seniority with respect to Subclass B. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." *Air Line Stewards and Stewardesses Assn.* v. *Trans World Airlines, Inc.*, 630 F. 2d 1164, 1169 (1980). It further explained that the question of jurisdiction as to Subclass B had not been finally determined because a challenge to its decision was pending before this Court and observed that the Courts of Appeals were split on the issue. The Court of Appeals noted that the District Court clearly had subject-matter jurisdiction over the claims of Subclass A. It concluded: "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement

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complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with cr without back pay . . . , or any other equitable relief as the court deems appropriate. . . ."

that is otherwise appropriate for district court approval." *Ibid.*

The Court of Appeals also affirmed the award of seniority. According to the court, the settlement served the public policy of remedying past acts of sex discrimination and the consequences of those past acts. Moreover, "[t]he right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects." *Ibid.*[4]

The union petitioned for certiorari, No. 80-951. We granted its petition together with the petitions in No. 78-1545 and No. 78-1549, 450 U. S. 979 (1981), but later removed the TWA case, No. 78-1549,[5] from the argument docket and limited the grant in No. 80-951. 451 U. S. 980 (1981).

II

The single question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel. In reaching its decision that the requirement is jurisdictional, the Court of Appeals for the Seventh Circuit relied on its reading of the statutory language, the absence of any indication to the con-

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[4] The Court of Appeals relied on language in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 779, n. 41 (1976):

"[D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and . . . such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases."

[5] In No. 78-1549, TWA contends (a) that the Court of Appeals erred in affirming summary judgment for plaintiffs on the issue of liability, (b) that TWA should be required to grant only prospective relief to plaintiffs, and (c) that the Court of Appeals erred in defining the subclass of plaintiffs who had filed timely charges with the EEOC. In view of our decision in No. 78-1545 and No. 80-951, we now dismiss the petition in No. 78-1549 as improvidently granted.

trary in the legislative history, and references in several of our cases to the 90-day filing requirement as "jurisdictional."[6] Other Courts of Appeals that have examined the same materials have reached the opposite conclusion.[7]

We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.[8] The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

The provision granting district courts jurisdiction under Title VII, 42 U. S. C. §§ 2000e–5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC.[9] It contains no reference to the timely

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[6] See *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 240 (1976); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 555, n. 4 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973).

[7] See *Carlile* v. *South Routt School District Re 3–J*, 652 F. 2d 981 (CA10 1981); *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584 (CA5 1981); *Leake* v. *University of Cincinnati*, 605 F. 2d 255 (CA6 1979); *Hart* v. *J. T. Baker Chemical Corp.*, 598 F. 2d 829 (CA3 1979); *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D.C. 322, 567 F. 2d 429 (1976).

[8] One of the questions on which we granted certiorari in No. 80–951 was whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims. In reaching its decision, the Court of Appeals for the Seventh Circuit explicitly declined to follow *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (CA5 1978) (en banc). *Air Line Stewards and Stewardesses Assn.* v. *TWA*, 630 F. 2d 1164, 1168–1169 (1980). In *McArthur*, the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction because no plaintiff had filed a timely charge of discrimination with the EEOC. Because of our holding in No. 78–1545 that timely filing with the EEOC is not a jurisdictional prerequisite, this issue need not be resolved.

[9] Title 42 U. S. C. § 2000e–5(f)(3), for example, reads:

"Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction

filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.[10] The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a "period of limitations," 110 Cong. Rec. 12723 (1964), and Senator Case described its purpose as preventing the pressing of "stale" claims, *id.*, at 7243, the end served by a statute of limitations.

Although subsequent legislative history is not dispositive, see *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U. S. 677, 686, n. 7 (1979), the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement. In the Final Conference Committee section-by-section analysis of H. R. 1746, The Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167 (1972), the Committee not only termed the filing period a "time limitation," but explained:

> "This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have

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of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. . . ."

[10] Section 2000e–5(e), the amended version of the filing provision, reads simply: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."

shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection."[11]

This result is entirely consistent with prior case law. Although our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute.[12]

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[11] The Senate Labor Committee's section-by-section analysis of the amendments explained that "[t]his subsection would permit . . . a limitation period similar to that contained in the Labor-Management Relations Act, as amended." S. Rep. No. 92–415, p. 37 (1971). We have recognized that the National Labor Relations Act was "the model for Title VII's remedial provisons," *Teamsters* v. *United States*, 431 U. S. 324, 366 (1977). Because the time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board, see *NLRB* v. *Local 264, Laborers' Int'l Union*, 529 F. 2d 778, 781–785 (CA8 1976); *Shumate* v. *NLRB*, 452 F. 2d 717, 720 (CA4 1971); *NLRB* v. *A. E. Nettleton Co.*, 241 F. 2d 130, 133 (CA2 1957); *NLRB* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506–507 (CA5 1950), the time limitations under Title VII should be treated likewise.

Moreover, when Congress in 1978 revised the filing requirement of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U. S. C. § 621 *et seq.*, which was modeled after Title VII, see *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), the House Conference Report explicitly stated that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." H.R. Conf. Rep. 95–950, p. 12.

[12] As the Court of Appeals for the Fifth Circuit points out in its opinion in *Coke*, 640 F. 2d, at 588–589, references to the filing requirement as a statute of limitations have come to dominate in our opinions:

"The trend of the Supreme Court cases is also significant. In the early cases, the Court in dicta referred to such time provisions using the label

More weighty inferences however, are to be drawn from other cases. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), was a Title VII suit against an employer and a union. The District Court denied relief for unnamed class members on the ground that those individuals had not filed administrative charges under the provisions of Title VII and that relief for them was thus not appropriate. The Court of Appeals did not disturb this ruling, but we reversed, saying:

> "The District Court stated two reasons for its denial of seniority relief for the unnamed class members. The first was that those individuals had not filed administrative charges under the provision of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in *Albemarle Paper* [*Co.* v. *Moody*, 422 U. S. 405 (1975),] and . . . reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected by the courts of appeals, and Congress ratified that construction by the 1972 amendments. . . ." *Id.*, at 771 (footnote omitted).

'jurisdictional prerequisite.' *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 . . . (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 . . . (1974). In the 1976 *Robbins & Myers* decision the jurisdictional label was used once, but there were numerous references to 'tolling the limitations period,' 429 U. S. at 239, . . . and other labels obviously referring to a statute of limitations, as opposed to subject matter jurisdiction. See also *United Air Lines* v. *Evans*, 431 U. S. 553 . . . (1977), in which both labels are used. From and after late 1977, all nine justices have concurred in opinions containing dicta using the limitations label to the exclusion of the jurisdictional label. *Occidental Life Insurance Company* v. *EEOC*, 432 U. S. 355, 371–[3]72 . . . (1977); *United Air Lines, Inc.* v. *McDonald*, 432 U. S. 385, 391–[3]92 . . . (1977); *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 818–823 . . . (1980), *Delaware State College* v. *Ricks*, [449] U. S. [250] . . . (1980)."

If the timely-filing requirement were to limit the jurisdiction of the District Court to those claimants who have filed timely charges with the EEOC, the District Courts in *Franks* and *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority. We did not so hold. Furthermore, we noted that Congress had approved the Court of Appeals cases that awarded relief to class members who had not exhausted administrative remedies before the EEOC. It is evident that in doing so, Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court.

In *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.*, at 527. That principle must be applied here as well.

The reasoning of other cases assumes that the filing requirement is not jurisdictional. In *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229 (1976), we rejected the argument that the timely-filing requirement should be tolled because the plaintiff had been pursuing a grievance procedure set up in the collective-bargaining agreement. We did not reach this decision on the basis that the 180-day period was jurisdictional. Instead, we considered the merits of a series of arguments that grievance procedures should toll the requirement. Such reasoning would have been gratuitous if the filing requirement were a jurisdictional prerequisite.[13]

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[13] In *Robbins & Myers*, we also held that the expanded 180-day "limitations period," enacted by the 1972 amendments, was retroactive. 429 U. S., at 244. This holding presupposes that the requirement is not juris-

Similarly, we did not *sua sponte* dismiss the action in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980), on the basis that the District Court lacked jurisdiction because of plaintiff's failure to comply with a related Title VII time provision. Instead, we merely observed in a footnote that "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense." *Id.*, at 811, n. 9.

By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

We therefore reverse the Court of Appeals in No. 78–1545.

III

In No. 80–951, the union challenges on several grounds the District Court's authority to award, over the union's objection, retroactive seniority to the members of Subclass B. We have already rejected the union's first contention, namely, that the District Court had no jurisdiction to award relief to those who had not complied with Title VII's filing requirement. The union also contends that in any event there has been no finding of discrimination with respect to Subclass B members and that the predicate for relief under § 706(g) is therefore missing. This contention is also without merit.

The District Court unquestionably found an unlawful discrimination against the plaintiff class, and the class at that

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dictional. Moreover, in reaching this conclusion, we quoted from *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 316 (1945): "[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." Several Courts of Appeals have read *Robbins & Myers* as implicitly approving equitable tolling. *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d, at 588; *Hart* v. *J. T. Baker Chemical Corp.*, 598 F. 2d, at 833; *Smith* v. *American President Lines, Ltd.*, 571 F. 2d 102, 108–109 (CA2 1978).

time had not been subdivided into Subclasses A and B. Summary judgment ran in favor of the entire class, including both those members who had filed timely charges and those who had not. The Court of Appeals affirmed the summary judgment order as well as the finding of a discriminatory employment practice. The court went on, however, to hold that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment. But as we have now held, that ruling is erroneous. The District Court did have jurisdiction over nonfiling class members. Thus, there was no jurisdictional barrier to its finding of discrimination with respect to the entire class. With the reversal of the Court of Appeals judgment in No. 78–1545 and our dismissal of No. 78–1549, which had challenged the affirmance of the summary judgment order, the order that found classwide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice.

Equally meritless is the union's contention that retroactive seniority contrary to the collective-bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. In *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 764, we read the legislative history of Title VII as giving

> "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole in so far as possible the victims of . . . discrimination . . . ."

While recognizing that backpay was the only remedy specifically mentioned in the provision, we reasoned that adequate relief might be denied without a seniority remedy. We concluded that the class-based seniority relief for identifiable vic-

tims of illegal discrimination is a form of relief generally appropriate under § 706(g).

In *Franks*, the District Court had found both that the employer had engaged in discrimination and that the discriminatory practices were perpetuated in the collective-bargaining agreements with the unions. 424 U. S., at 751. *Teamsters* v. *United States*, 431 U. S. 324 (1977), however, makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." *Id.*, at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination. *Id.*, at 356, n. 43.[14] Here, as in *Teamsters*, the settlement left to the District Court the final decision as to retroactive seniority.

In resolving the seniority issue, the District Court gave the union all the process that was due it under Title VII in our cases. The union was allowed to intervene. The District Court heard its objections, made appropriate findings, and determined that retroactive seniority should be awarded. The Court of Appeals agreed with that determination, and

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[14] In noting that the union in *Teamsters* properly remained a defendant in the litigation, we cited to Federal Rule of Civil Procedure 19(a). The union here was not joined under Rule 19 when individuals replaced the union as class representatives, but intervened later. Cf. *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA6 1974) (joinder under Rule 19(a) provides union with full opportunity to participate in the litigation and the formulation of proposed relief, although as practical matter union does not play role in litigation until court finds violation of Title VII).

we have eliminated from our consideration here the question whether on the facts of this case the Court of Appeals and the District Court were in error in this respect.

Accordingly, the judgment in No. 78–1545 is reversed and the judgment in No. 80–951 is affirmed.

So ordered.

JUSTICE STEVENS took no part in the consideration or decision of these cases.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in No. 78–1545 and concurring in the judgment in No. 80–951.

The above cases arise out of the same protracted controversy, and the Court disposes of them in a single opinion. The only question in No. 78–1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit. I agree that timely filing is not jurisdictional and is subject to waiver and estoppel. Accordingly, I join Parts I and II of the Court's opinion.

I join only the judgment in No. 80–951. My concern with the Court's opinion is that it does not make clear that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a bona fide seniority system protected by § 703(h), 42 U. S. C. § 2000e–2(h).[1] This was made

[1] In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), timely charges of discrimination had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a district court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the

clear in *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 559 (1977), a case not discussed in the Court's opinion.[2] I nevertheless concur in the remand of No. 80–951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when." I believe, however, that one can conclude that the requirements of *Evans* were met.

As noted in the Court's opinion, *ante*, at 398–399, the District Court's order finding classwide discrimination is now final. The District Court also entered an order finding that timely charges had been filed for all class members, and that order is similarly final. The timely-charge order was entered on October 15, 1976, three days before the entry of the order finding classwide discrimination. These orders were consolidated on appeal to the Court of Appeals for the Seventh Circuit. Although the October 18th order, finding discrimination, was affirmed, the Court of Appeals vacated the other order, holding that the members of Subclass B had failed to meet the jurisdictional requirements of Title VII because they had not filed timely claims. No District Court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and classwide discrimination, are now final.

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employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

[2] The Court refers to *United Air Lines* v. *Evans* twice, see *ante*, at 393, n. 6, and at 396, n. 12; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.

I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks* v. *Bowman Transportation Co.*[3]

[3] I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the courts have addressed specifically whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Rather than prolong this disruptive litigation, it may well be in the best interest of all of the parties to approve the settlement—as the Court's judgment does today.

G. D. SEARLE & CO. *v.* COHN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-644. Argued December 7, 1981—Decided February 24, 1982

A New Jersey statute tolls the limitation period for an action against a foreign corporation that "is not represented" in New Jersey by any person or officer upon whom process may be served. In respondents' action against petitioner foreign corporation, originally brought in a New Jersey state court and removed to Federal District Court, petitioner moved for summary judgment based upon the applicable New Jersey statute of limitation, and respondents countered with the tolling provision. Although ruling that petitioner was not represented in New Jersey for purposes of the tolling provision, the District Court nevertheless held that the suit was barred. Reasoning that the tolling provision operated to preserve only causes of action against corporate defendants that were not subject to *in personam* jurisdiction in New Jersey, and that with the enactment of New Jersey's long-arm rule, the rationale for the pre-existing tolling provision ceased to exist, the District Court found the tolling provision invalid under the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals reversed. That court's decision was based upon an intervening decision of the New Jersey Supreme Court holding that, as a matter of New Jersey law, the tolling provision continued in force despite the advent of long-arm jurisdiction, and that such provision did not violate the Equal Protection Clause, because the increased difficulty of out-of-state service provided a rational basis for tolling the statute of limitation in a suit against an unrepresented foreign corporation.

Held:

1. The tolling provision does not violate the Equal Protection Clause. Rational reasons support the provision despite the institution of long-arm jurisdiction in New Jersey. The unrepresented foreign corporation remains potentially difficult to locate, and the institution of long-arm jurisdiction has not made service upon such a corporation the equivalent of service upon a corporation with a New Jersey representative but requires additional conditions for effective service. Because of these burdens connected with suing unrepresented foreign corporations, as opposed to suing a domestic corporation or a represented foreign corporation, the tolling provision does not deprive an unrepresented foreign corporation of the equal protection of the laws. Pp. 408–412.

2. But since neither lower court addressed directly the question

whether the tolling provision violates the Commerce Clause, and since, moreover, the Commerce Clause issue is clouded by an ambiguity in state law, the Court of Appeals' judgment is vacated, and the case is remanded for consideration of such issue. Pp. 412–414.

628 F. 2d 801, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., and POWELL, J., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., joined, *post*, p. 414. STEVENS, J., filed a dissenting opinion, *post*, p. 420.

William P. Richmond argued the cause for petitioner. With him on the briefs was *David W. Carpenter*.

Walter R. Cohn argued the cause and filed a brief for respondents.*

JUSTICE BLACKMUN delivered the opinion of the Court.

A New Jersey statute, N. J. Stat. Ann. § 2A:14–22 (West 1952), tolls the limitation period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has in New Jersey no person or officer upon whom process may be served. The United States Court of Appeals for the Third Circuit in this case held that the statute does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We agree, but we vacate the Court of Appeals' judgment and remand the case for consideration of petitioner's Commerce Clause challenge to the statute.

I

Respondents, Susan and Walter Cohn, are husband and wife. In 1963, Susan Cohn suffered a stroke. Eleven years later, in 1974, the Cohns sued petitioner, G. D. Searle & Co., in the Superior Court of New Jersey, Essex County, alleging that Susan Cohn's stroke was caused by her use of an oral

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**Stephen J. Pollak*, *I. Michael Greenberger*, and *Franklin D. Kramer* filed a brief for Brinco Mining Limited as *amicus curiae* urging reversal.

Arthur Ian Miltz and *Richard F. Gerry* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

contraceptive manufactured by petitioner.[1] Petitioner was served under New Jersey's long-arm rule, N. J. Ct. Rule 4:4–4(c)(1) (1969). Petitioner removed the suit to federal court and thereafter moved for summary judgment based upon New Jersey's 2-year statute of limitation, N. J. Stat. Ann. § 2A:14–2 (West 1952), governing an "action at law for an injury to the person caused by . . . wrongful act." Respondents countered with § 2A:14–22. That section tolls the statute of limitation for a cause of action against a foreign corporation that "is not represented" in New Jersey "by any person or officer upon whom summons or other original process may be served."[2]

The District Court ruled that petitioner was not represented in New Jersey for the purposes of the tolling provision.[3] 447 F. Supp. 903, 907–909 (NJ 1978). Nevertheless,

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[1] Petitioner is a Delaware corporation with principal place of business in Illinois. At all times pertinent to this case, petitioner was engaged in the business of manufacturing and selling pharmaceutical products.

[2] Section 2A:14–22 reads in pertinent part:

"If any person against whom there is any of the causes of action specified in sections 2A:14–1 to 2A:14–5 and 2A:14–8 . . . is not a resident of this state when such cause of action accrues, . . . or if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

[3] Petitioner had so-called "detailmen" in New Jersey. These were employees who promoted its products among New Jersey physicians. The District Court, contrary to petitioner's urging, held that the detailmen were not "persons" or "officers" for the purpose of the tolling provision, 447 F. Supp. 903, 906–907 (NJ 1978), and the Court of Appeals agreed, *Hopkins* v. *Kelsey-Hayes, Inc.*, 628 F. 2d 801, 808 (CA3 1980). That holding is not disputed in this Court.

it held that respondents' suit was barred. According to the District Court, the tolling provision had operated to preserve only causes of action against corporate defendants that were not subject to *in personam* jurisdiction in New Jersey. With the enactment of New Jersey's long-arm rule, now N. J. Ct. Rule 4:4–4(c),[4] the rationale for the pre-existing tolling provision ceased to exist. On this reasoning, the court held that the tolling provision served no logical purpose, found it invalid under the Equal Protection Clause, and ruled that the 2-year statute of limitation therefore barred respondents' suit. 447 F. Supp., at 911–913.

Respondents appealed. Before the Court of Appeals reached a decision, however, the Supreme Court of New Jersey decided *Velmohos* v. *Maren Engineering Corp.*, 83 N. J. 282, 416 A. 2d 372 (1980), appeal pending, No. 80–629. That court ruled, as a matter of New Jersey law, that the tolling provision continued in force despite the advent of long-arm jurisdiction. In addition, the court concluded that the tolling provision did not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment, because the increased difficulty of out-of-state service provided a rational basis for tolling the statute of limitation in a suit against an unrepresented foreign corporation.

The Court of Appeals then followed the New Jersey Supreme Court's lead and reversed the District Court.[5] Summing up what it felt to be the rational basis for the tolling provision, the Court of Appeals explained:

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[4] New Jersey's long-arm service rule was promulgated in 1958 as N. J. Ct. R. R. 4:4–4(d). In 1971, the New Jersey Supreme Court interpreted the rule to permit extraterritorial service to the full extent allowed by the United States Constitution. *Avdel Corp.* v. *Mecure*, 58 N. J. 264, 277 A. 2d 207. See generally *Velmohos* v. *Maren Engineering Corp.*, 83 N. J. 282, 289–292, 416 A. 2d 372, 376–378 (1980), appeal pending, No. 80–629.

[5] The Court of Appeals' decision was on consolidated appeals of the instant case and *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F. Supp. 539 (NJ 1978), aff'd, 628 F. 2d 801 (CA3 1980), cert. pending, No. 80–663. In *Hopkins*, a different New Jersey Federal District Judge had held the tolling provision to be consistent with the Equal Protection and Due Process Clauses.

"Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants." *Hopkins* v. *Kelsey-Hayes, Inc.*, 628 F. 2d 801, 811 (CA3 1980).

Because of the novel and substantial character of the federal issue involved, we granted certiorari, 451 U. S. 905 (1981).

II

Like the Court of Appeals, we conclude that the New Jersey statute does not violate the Equal Protection Clause. In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981). The New Jersey tolling provision need satisfy only this constitutional minimum. As the Court explained in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945):

> "[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

See also *Campbell* v. *Holt*, 115 U. S. 620 (1885).[6]

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[6] Before the Court of Appeals, petitioner conceded that the tolling provision does not implicate a suspect classification. See 628 F. 2d, at

Petitioner insists that the tolling statute no longer is rationally related to a legitimate state objective. Repeating the argument it made below, petitioner claims that the statute's only purpose was to preserve causes of action for those New Jersey plaintiffs unable to obtain *in personam* jurisdiction over unrepresented foreign corporations. With the presence now of long-arm jurisdiction, petitioner contends, there is no longer a valid reason for tolling the limitation period for a suit against an amenable foreign corporation without a New Jersey representative.

We note at the outset, and in passing, that petitioner's argument fails as a matter of state law. The New Jersey Supreme Court disagreed with petitioner's interpretation of the statute. That court observed that the State's original tolling provision did not mention corporations and thus treated them like all other defendants. In 1949, the state legislature amended the statute and exempted corporations except those foreign corporations "not represented" in New Jersey. The legislature, the New Jersey Supreme Court emphasized, did not limit the tolling provision to corporations "not amenable to service" in New Jersey. Consequently, the court reasoned, the tolling provision was not rendered meaningless by the subsequent acceptance of long-arm jurisdiction. *Velmohos* v. *Maren Engineering Corp.*, 83 N. J., at 288–293, 416 A. 2d, at 376–379. As construed by the highest judicial authority on New Jersey law, the meaning of the tolling statute cannot be confined as narrowly as petitioner would like.

808–809. Before this Court, petitioner argues for a heightened level of scrutiny because it is a corporation not doing business in New Jersey and therefore is without a voice in the New Jersey Legislature. Only a rational basis, however, is required to support a distinction between foreign and domestic corporations. *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648, 668 (1981). The same is true here where the tolling provision treats an unrepresented foreign corporation differently from a domestic corporation and from a foreign corporation having a New Jersey representative.

When the statute is examined under the Equal Protection Clause, it survives petitioner's constitutional challenge because rational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served. See *id.*, at 296, 416 A. 2d, at 380. It is true, of course, that respondents had little or no trouble locating this particular, well-known defendant-petitioner, but the tolling provision is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve. See *Weinberger* v. *Salfi*, 422 U. S. 749, 780–785 (1975).

Second, the institution of long-arm jurisdiction in New Jersey has not made service upon an unrepresented foreign corporation the equivalent of service upon a corporation with a New Jersey representative. The long-arm rule, N. J. Ct. Rule 4:4–4(c)(1) (1969), prescribes conditions upon extraterritorial service to ensure that New Jersey's long-arm jurisdiction has been properly invoked. In *Velmohos*, the New Jersey Supreme Court explained:

> "Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is 'consistent with due process of law.'" 83 N. J., at 296, 416 A. 2d, at 381.

Thus, there are burdens a plaintiff must bear when he sues a foreign corporation lacking a New Jersey representative that he would not bear if the defendant were a domestic

corporation or a foreign corporation with a New Jersey representative.

In response to these rationales for treating unrepresented foreign corporations differently from other corporations, petitioner argues that the tolling provision is unnecessary. Petitioner cites N. J. Ct. Rule 4:2–2 and contends that a plaintiff can preserve his cause of action against a hard-to-locate corporate defendant by filing a complaint and thereby halting the running of the limitation period. But this is not an adequate substitute for the tolling provision. A court may dismiss a case if it has not been prosecuted after six months, N. J. Ct. Rule 1:13–7, or if summons is not issued within 10 days of the filing of the complaint, N. J. Ct. Rule 4:4–1. In any event, a State may provide more than one solution for a perceived problem. The Court of Appeals appropriately commented: "Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against nonrepresented foreign corporations which is additional to any mechanism found in the Court Rules." 628 F. 2d, at 811.

Petitioner also argues that a New Jersey plaintiff's burdens do not justify leaving a defendant open to suit without any time limit. In *Velmohos*, however, the New Jersey Supreme Court expressly authorized an unrepresented foreign corporation to plead another defense in response to a tardy suit. While the tolling provision denies an unrepresented foreign corporation the benefit of the statute of limitation, the corporation, the court stated flatly, remains free to plead laches. "If a plaintiff's delay is inexcusable and has resulted in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim." 83 N. J., at 293, n. 10, 416 A. 2d, at 378, n. 10. Thus, under New Jersey law, an amenable, unrepresented foreign corporation may successfully raise a bar to a plaintiff's suit if the plaintiff's delay cannot be excused and the corporation has suffered "prejudice."

In sum, because of the burdens connected with serving unrepresented foreign corporations, we agree with the Court of Appeals and the New Jersey Supreme Court that the tolling provision does not deprive an unrepresented foreign corporation of the equal protection of the laws.[7] See *Dew* v. *Appleberry*, 23 Cal. 3d 630, 591 P. 2d 509 (1979) (holding similar tolling provision rationally related to a valid governmental interest); *Vaughn* v. *Deitz*, 430 S. W. 2d 487, 490 (Tex. 1968) (holding that absence from the State may, consistent with equal protection, support suspension of the statute of limitation). Cf. *Bauserman* v. *Blunt*, 147 U. S. 647 (1893) (applying Kansas statute tolling limitation period for out-of-state defendant subject to service, without discussing the constitutional issue).

III

Petitioner, however, raises another constitutional challenge. The tolling provision as interpreted by the New Jer-

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[7] Petitioner also presses a due process claim. In the Court of Appeals, petitioner argued that the tolling statute violates due process "by unfairly and irrationally denying certain foreign corporations the benefit of the Statute of Limitations without furthering any legitimate societal interest." Brief for Defendant-Appellee and Cross-Appellant in Nos. 79–2406 and 79–2605 (CA3), p. 29. The Court of Appeals rejected petitioner's due process challenge to the statute at the same time that it rejected petitioner's equal protection contention. See 628 F. 2d, at 808–809. Indeed, this due process argument is nothing more than a restatement of petitioner's equal protection claim. See *Velmohos*, 83 N. J., at 297, 416 A.2d, at 381.

In this Court, petitioner has attempted to put forward a new due process argument. Petitioner notes that it can obtain the benefit of the statute of limitation by appointing an agent to accept service. See *Velmohos*, 83 N. J., at 293, n. 10, 416 A. 2d, at 378, n. 10; see also *infra*, at 413–414. Fearing that appointment of an agent might subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit in that State under the Due Process Clause, see *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), petitioner insists that New Jersey law violates due process by conditioning the benefit of the limitation period upon the appointment of a New Jersey agent. Because petitioner did not present this argument to the Court of Appeals, we do not address it. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

sey Supreme Court, petitioner argues, violates the Commerce Clause. Petitioner insists that, in order to obtain the benefit of the statute of limitation, it must obtain a certificate of authority by registering to do business in New Jersey. See N. J. Stat. Ann. § 14A:13–2 (West 1969). As a result, it will subject itself to all the duties and liabilities imposed on a domestic New Jersey corporation. Petitioner points out that it is engaged solely in interstate commerce in New Jersey, and, relying on cases such as *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20 (1974), and *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914), petitioner contends that New Jersey violates the Commerce Clause by requiring it to register to do business in New Jersey in order to gain the benefit of the statute of limitation. For two reasons, we decline to resolve this issue.

First, neither the District Court nor the Court of Appeals addressed the question directly. There is no mention of the Commerce Clause in the opinion of the Court of Appeals. In a footnote, the District Court suggested that the tolling provision would violate the Commerce Clause. 447 F. Supp., at 911, n. 17. But the District Court there was answering respondents' contention that the tolling provision was enacted as a penalty to induce corporations to register to do business in New Jersey, an argument respondents no longer make.[8] Thus, neither court considered the Commerce Clause argument in its present form.

Second, the Commerce Clause issue is clouded by an ambiguity in state law. The dispute over the Commerce Clause

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[8] At that time, respondents were seeking to supply a rational basis for the tolling provision by arguing that it was intended as a penalty to induce foreign corporations to obtain New Jersey licenses. The District Court rejected that interpretation of the tolling provision before suggesting that respondents' reading of the statute would violate the Commerce Clause. 447 F. Supp., at 911, n. 17. It seems to us that the District Court was on sound ground when it rejected this theory of the statute's origin, since there is no hint in *Velmohos* that the tolling provision was designed to be a penalty for failure to obtain a New Jersey license.

centers in what seems to us to be an opaque footnote in the New Jersey Supreme Court's majority opinion in *Velmohos*. That court, without citation, commented: "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 N. J., at 293, n. 10, 416 A. 2d, at 378, n. 10. Petitioner, contending that there is no procedure in New Jersey for simply appointing an agent, interprets this sentence as requiring it to register to do business in New Jersey pursuant to N. J. Stat. Ann. § 14A:13–2 (West 1969) in order to obtain the benefit of the statute of limitation. Respondents, on the other hand, read the footnote as referring to the mere appointment of an agent, to be accomplished in some manner unexplained to us.

The lone sentence in the *Velmohos* footnote by itself does not clearly demonstrate the correctness of either view or lucidly inform us as to what the state law is. We consider it unwise for us to pass upon the constitutionality of this aspect of New Jersey law when we are uncertain of the critical footnote's meaning, particularly in light of the fact that the lower courts in this case did not address the Commerce Clause or the state-law issues. Consequently, we vacate the Court of Appeals' judgment and remand the case, so that the Court of Appeals may determine whether petitioner's Commerce Clause argument, if it was properly raised below, has merit.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. In Part III of its opinion, the Court addresses the Commerce Clause question and "decline[s] to resolve" it because "neither the District Court nor the Court of Appeals addressed the question directly." A further reason assigned by the Court for

remanding on this issue is that one sentence in a footnote to *Velmohos* v. *Maren Engineering Corp.*, 83 N. J. 282, 293, n. 10, 416 A. 2d 372, 378, n. 10 (1980), is "ambiguous."

The Commerce Clause question was not presented to the District Court by petitioner,[1] and normally this would fully justify a remand. It was, however, presented and argued to the Court of Appeals for the Third Circuit. Pet. for Cert. 6–7.[2] Curiously, that court did not mention the question in its opinion. Petitioner continued, as it had a right to do, to rely on the ground. Its petition for certiorari expressly included the question whether New Jersey's tolling statute "constitutes the imposition of a burden [on] interstate commerce." *Id.*, at i. With full knowledge that the Court of Appeals had ignored petitioner's Commerce Clause argument, we granted certiorari. Our grant did not limit the questions presented. See 451 U. S. 905 (1981). And respondents have not suggested that this question is not properly before us. Indeed, the issue was addressed at length by both parties in their briefs and in oral argument. In my view, the question is properly before us.

As I do not share the Court's view that ambiguity exists as to New Jersey law, I would decide the question on which we granted this case.

I

Petitioner argues that under New Jersey law the only way a foreign corporation may appoint an agent for service of process, and thereby obtain the benefit of the statute of limitations, is to obtain a certificate of authority to transact busi-

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[1] The District Court, apparently *sua sponte*, suggested that the tolling provision would violate the Commerce Clause but did not decide the question. See *ante*, at 413, and n. 8.

[2] Petitioner's assertion that it argued the Commerce Clause issue before the Court of Appeals is confirmed by its Third Circuit brief. See Brief for Defendant-Appellee and Cross-Appellant G. D. Searle & Co. in Nos. 79–2406 and 79–2605 (CA3), pp. 2, 33–38.

ness in the State. Respondents answer that other means of appointing such an agent—without qualifying to do business—are provided by New Jersey law. This difference between the parties is critical to the resolution of the Commerce Clause question, as significant consequences follow from registration. Neither *Velmohos*, nor any other New Jersey case brought to our attention, identifies any means—other than qualification—of appointing a duly authorized agent for service of process.

The Court perceives ambiguity in the following footnote in *Velmohos:*

> "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit [due to tolling of the statute of limitations] can be easily eliminated by the designation of an agent for service of process within the State." 83 N. J., at 293, n. 10., 416 A. 2d, at 378, n. 10.

The question before us was not the issue in *Velmohos*. The footnote merely says that the statute of limitations tolling problem may be eliminated "by the designation of an agent for service of process." This is simply a neutral observation that says *nothing* as to the means of designation of an agent under New Jersey law. If there were a genuine ambiguity in New Jersey statutes a remand would indeed be justified. I find no such ambiguity.

II

Only three New Jersey statutes have been identified as relevant, one by petitioner and two by respondents.

Petitioner cites N. J. Stat. Ann. §§ 14A:4–1 and 14A:13–4 (West 1969). This is a conventional type of statute requiring the qualification of foreign corporations that transact business in the State. It includes the requirement of a registered agent. Section 14A:13–4(1) requires the foreign corporation to file in the office of the Secretary of State an application setting forth specified information, including the

name and address of the registered agent and "a statement that the registered agent is an agent of the corporation upon whom process against the corporation may be served."

Counsel for petitioner obtained—and filed with the Court—an opinion from the New Jersey Secretary of State advising, in effect, that the foregoing statute is the *only* means of designating a registered agent for service of process.[3]

The *Velmohos* opinion itself suggests that this statute is the means by which a corporation must appoint an agent to gain the benefit of New Jersey's statute of limitations. In *Velmohos*, the New Jersey Supreme Court reviewed the legislative history of the tolling provision at issue in this case. As originally enacted, it simply tolled limitations periods while a *person* was not a resident of the State; there was no specific reference to corporations. The provision was amended in 1949 to add the current language, which grants the benefit of the statutes of limitations to foreign corporations that are "represented" in New Jersey. The *Velmohos* court quoted a portion of the 1949 legislative history: "'Foreign corporations *licensed to do business in New Jersey* are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation.'" 83 N. J., at 290, 416 A. 2d, at 377, quoting *Statement Accompanying Assembly No. 467* (1949) (emphasis added). See also *Coons* v. *Honda Motor Co., Ltd. of Japan*, 176 N. J. Super. 575, 582, 424 A. 2d 446, 450 (1980), cert. pending, No. 80–2003. This reference to a conventional scheme of licensing foreign corporations is further confirma-

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[3] The opinion reads in full as follows:

"In response to your recent letter, please be advised that it is the view of the Department of State that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process." Letter from Frank Capece, Executive Assistant to the New Jersey Secretary of State, to James H. Freis, Esq. (Oct. 22, 1981).

tion that § 14A:4–1 *et seq.* are the means by which corporations are to gain relief from the disputed tolling provision.

Respondents are represented by New Jersey counsel. They do not dispute that statutory authority is necessary. Rather, they insist that the qualification statute is not the only statute authorizing appointment of a New Jersey agent for service. They cite two other statutes: the New Jersey fictitious corporate name statute, N. J. Stat. Ann. § 14A:2–2.1 (West Supp. 1981–1982), and the New Jersey business and partnership name registration statute. § 56:1–1 (West 1964). Respondents cite no New Jersey case, and present no opinion from any state official, in support of their view that these statutes provide a means of appointing an agent for service without complying with § 14A:4–1 *et seq.*

Neither of the statutes cited by respondents appears to have anything to do with the appointment by foreign corporations of agents for the service of process. The fictitious corporate name statute makes no reference either to appointment of agents of any type or to provisions for service of process. According to the accompanying comments of the New Jersey Corporation Law Revision Commission, "[t]he purpose of this [statute] is to create a public record of fictitious names used by corporations and thereby eliminate the possibility of deception." Commissioners' Comment—1972 Amendment, reprinted after N. J. Stat. Ann. § 14A:2–2.1 (West Supp. 1981–1982). Moreover, counsel for respondents makes no claim that petitioner uses—or has ever used—a fictitious name in New Jersey.

The New Jersey business and partnership name registration law appears to be equally irrelevant. The New Jersey Corporation Law Revision Commission explains the relationship between these two fictitious name statutes:

> "Until adoption of [the corporate fictitious name statute], there was no requirement that a corporation register a fictitious name, although there was a requirement that proprietorships and partnerships transacting busi-

ness under assumed names file business name certificates. N. J. S. A. 56:1–1 *et seq.* *That statute is expressly inapplicable to corporations.* N. J. S. A. 56:1–5." *Ibid.*

Counsel for respondent has offered no answer to the statement of the Revision Commission that the proprietorship and partnership registration statute is "inapplicable to corporations."[4]

Thus, counsel have brought to our attention only three statutes, and I have found no others. The registration statute, § 14A:4–1 *et seq.*, explicitly provides for the designation of an agent for service. Neither of the statutes relied on by respondents has *any* provision for the appointment of an agent by a foreign corporation. In these circumstances, we are justified in concluding—as the opinion from the office of the New Jersey Secretary of State advises—that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business.

This squarely presents the serious question whether the consequences of registration in the State, solely to obtain the protection of the statute of limitations, unduly burden interstate commerce.[5] See *Allenberg Cotton Co.* v. *Pittman*, 419

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[4] In addition to their facial inapplicability, it is apparent that both of these statutes are administered by the New Jersey Secretary of State—the same office that has advised that foreign corporations are unable to designate a registered agent for service of process without qualifying to do business. See n. 3, *supra*.

[5] Corporations that obtain such certificates apparently must maintain a registered business office, N. J. Stat. Ann. § 14A:4–1 (West Supp. 1981–1982); report annually, § 14A:4–5 (West Supp. 1981–1982), and pay taxes. § 54:10A–2 (West Supp. 1981–1982). In addition, New Jersey apparently also requires such corporations to waive their defense against defending lawsuits in a forum with which they have no minimum contacts, see *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), for *all* future lawsuits in New Jersey. See N. J. Stat. Ann. § 14A:13–4(1)(d) (West 1969); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N. J. Super. 52, 61, 283 A. 2d 551, 556 (1971). Cf. Restatement (Second)

U. S. 20 (1974). This challenge has considerable force. As this was a question on which we granted certiorari and as it has been fully argued by counsel, I think in all fairness we should decide it rather than remand the case for a continuation of this litigation.

I therefore dissent from the decision of the Court to remand.

JUSTICE STEVENS, dissenting.

The equal protection question in this case is novel. I agree with the Court that there is a rational basis for treating unregistered foreign corporations differently from registered corporations because they are somewhat more difficult to locate and to serve with process. Thus, a provision that merely gave plaintiffs a fair opportunity to overcome these difficulties—for example, a longer period of limitations for suits against such corporations, or a tolling provision limited to corporations that had not filed their current address with the Secretary of State—would unquestionably be permissible. But does it follow that it is also rational to deny such corporations the benefit of any statute of limitations? Because there is a rational basis for *some* differential treatment, does it automatically follow that *any* differential treatment is constitutionally permissible? I think not; in my view the Constitution requires a rational basis for the special burden imposed on the disfavored class as well as a reason for treating that class differently.

The Court avoids these troubling questions by noting that the New Jersey Supreme Court has stated that an unrepresented foreign corporation may plead the defense of laches in an appropriate case. *Ante*, at 411. But there are material

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of Conflict of Laws § 44 and Comment *a* (1971) (States may exercise jurisdiction over foreign corporations that have authorized an agent to accept service of process to the extent of the agent's authority to accept service, even though no other basis for jurisdiction exists).

differences between laches—which requires the defendant to prove inexcusable delay and prejudice—and the bar of limitations, which requires no such proof. Thus, the availability of this alternative defense neither eliminates the differential treatment nor provides a justification for it; the defense merely lessens its adverse consequences.

I can find no legitimate state purpose to justify the special burden imposed on unregistered foreign corporations by the challenged statute.* I would reverse the judgment of the Court of Appeals.

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*I do not understand the Court to be holding that New Jersey has a legitimate interest in attempting to require all corporations to submit in all cases to the jurisdiction of its courts, and that discrimination against unregistered foreign corporations is justified by the State's desire to accomplish this purpose. Since a State may not enact a law that prohibits a foreign corporation from asserting a due process defense to an exercise of personal jurisdiction by a state court, I do not believe that the State may justify a classification that disfavors unregistered foreign corporations on the ground that they refused to take action that would accomplish the same purpose. See *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648, 674 (STEVENS, J., dissenting).

LOGAN *v.* ZIMMERMAN BRUSH CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 80-5950. Argued October 14, 1981—Decided February 24, 1982

The Illinois Fair Employment Practices Act (FEPA) barred employment discrimination on the basis of physical handicap unrelated to ability. To obtain relief, a complainant had to bring a charge of unlawful conduct before the Illinois Fair Employment Practices Commission (Commission) within 180 days of the occurrence of such alleged conduct. The statute then gave the Commission 120 days within which to convene a factfinding conference to obtain evidence, ascertain the parties' positions, and explore the possibility of a settlement. Appellant, an employee of appellee, was discharged purportedly because his short left leg made it impossible for him to perform his duties as a shipping clerk. Appellant filed a timely charge alleging unlawful termination of his employment, but apparently through inadvertence the Commission scheduled the factfinding conference for a date 5 days after expiration of the 120-day statutory period. The Commission denied appellee's motion that the charge be dismissed for failure to hold a timely conference. On appeal, the Illinois Supreme Court held that the failure to comply with the 120-day convening requirement deprived the Commission of jurisdiction to consider appellant's charge, and rejected appellant's argument that his federal due process and equal protection rights would be violated were the Commission's error allowed to extinguish his cause of action.

Held: The judgment is reversed, and the case is remanded.

82 Ill. 2d 99, 411 N. E. 2d 277, reversed and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court, concluding that appellant was deprived of a protected property interest in violation of the Due Process Clause of the Fourteenth Amendment. Pp. 428–437.

(a) Appellant's right to use the FEPA's adjudicatory procedures is a species of property protected by the Due Process Clause. Cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause," and appellant's right shares this characteristic. The 120-day limitation is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim. Pp.428–433.

(b) A consideration of the competing interests involved—the importance of the private interest and the length or finality of the deprivation,

the likelihood of governmental error, and the magnitude of the governmental interests—leads to the conclusion that appellant is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. The State's interest in refusing appellant's procedural request is, on the record, insubstantial. Pp. 433–435.

(c) The availability of a post-termination tort action does not provide appellant due process. It is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference; appellant is challenging not the Commission's error but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards. *Parratt* v. *Taylor*, 451 U. S. 527, distinguished. The Fourteenth Amendment requires "'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case,'" *Boddie* v. *Connecticut*, 401 U. S. 371, 378, and here appellant was denied such an opportunity. Pp. 435–437.

JUSTICE BLACKMUN, in a separate opinion, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR, concluded that under the "rational-basis" standard, the Illinois statute, as interpreted and applied by the Illinois Supreme Court to establish two categories—those processed within the prescribed 120 days and thus entitled to full consideration on the merits, and otherwise identical claims not processed within the prescribed time and thus terminated without a hearing—deprived appellant of his Fourteenth Amendment right to equal protection of the laws. Pp. 438–442.

JUSTICE POWELL, joined by JUSTICE REHNQUIST, while not joining all the broad pronouncements on the law of equal protection in JUSTICE BLACKMUN's separate opinion, also concluded that the challenged classification, as construed and applied in this case, failed to be rationally related to a state interest that would justify it, and thus violated appellant's right to equal protection of the laws. Pp. 443–444.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BLACKMUN, J., also filed a separate opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 438. POWELL, J., filed an opinion concurring in the judgment, in which REHNQUIST, J., joined, *post*, p. 443.

Gary H. Palm argued the cause and filed briefs for appellant. *Tyrone C. Fahner*, Attorney General of Illinois, filed a

brief for the Illinois Human Rights Commission et al. as appellees under this Court's Rule 10.4 in support of appellants. With him on the brief were *Paul J. Bargiel* and *Russell C. Grimes, Jr.*, Assistant Attorneys General.

Jay A. Canel argued the cause and filed briefs for appellee Zimmerman Brush Co.*

JUSTICE BLACKMUN delivered the opinion of the Court.†

The issue in this case is whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure.

I

A

The Illinois Fair Employment Practices Act (FEPA or Act), Ill. Rev. Stat., ch. 48, ¶851 *et seq.* (1979), barred employment discrimination on the basis of "physical . . . handicap unrelated to ability." ¶853(a). It also established a comprehensive scheme for adjudicating allegations of discrimination. To begin the process, a complainant had to bring a charge of unlawful conduct before the Illinois Fair Employment Practices Commission (Commission) within 180 days of the occurrence of the allegedly discriminatory act. ¶858(a). The statute—in the provision directly at issue here—then gave the Commission 120 days within which to convene a factfinding conference designed to obtain evidence, ascertain the positions of the parties, and explore the possibility of a negotiated settlement. ¶858(b). If the Commission found "substantial evidence" of illegal conduct, it was to attempt to "eliminate the effect thereof . . . by means of

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**James D. Weill* filed a brief for the Congress of Organizations of the Physically Handicapped and Chicago Lawyers' Committee for Civil Rights Under Law, Inc., as *amicus curiae* urging reversal.

†JUSTICE O'CONNOR joins only the separate opinion, *post*, p. 438.

conference and conciliation," ¶858(c), and, if that proved impossible, to issue a formal complaint against the employer within 180 days after the expiration of the 120-day period. ¶858(d). A formal adversary hearing was then to be held before a commissioner or duly appointed adjudicator, who was to make findings and who was empowered to recommend reinstatement, backpay, and reasonable attorney's fees. ¶858.01. If the commissioner or adjudicator did not find substantial evidence of discrimination, he was to recommend dismissal of the charge. *Ibid.*

The findings and recommended order were to be filed with the Commission. A complainant was entitled to obtain review by the full Commission of any of the possible dispositions of his charge, including an initial determination that the evidence did not justify a complaint. The Commission was to file a written order and decision. ¶858.02; Illinois Fair Employment Practices Commission, Rules and Regulations, §4.5 (1979). If still not satisfied, the complainant could seek judicial review of any Commission order. ¶860.[1]

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[1] After the inception of the present litigation, the Illinois Legislature repealed the FEPA, and put in its place the more comprehensive Illinois Human Rights Act. 1979 Ill. Laws, P. A. 81-1216, later amended by 1980 Ill. Laws, P. A. 81-1267. The new statute bars discrimination in real estate and financial transactions and in public accommodations, as well as in employment. It replaces the Fair Employment Practices Commission with two agencies: a Department of Human Rights, ¶7-101 *et seq.*, which is given the responsibility for investigating charges and issuing complaints upon a finding of substantial evidence, and a Human Rights Commission, ¶8-101 *et seq.*, which reviews the Department's findings and holds hearings upon issued complaints. The new Act modifies a number of the FEPA's procedural provisions; most important for present purposes, it commits to the Department's *discretion* the decision whether to hold a factfinding conference. ¶7-102(C)(3).

These revisions have no effect on Logan's case, however, for the Illinois Supreme Court has ruled that the Human Rights Act is not to be applied retroactively. *Zimmerman Brush Co.* v. *Fair Employment Practices Comm'n*, 82 Ill. 2d 99, 108-109, 411 N. E. 2d 277, 282-283 (1980).

B

On November 9, 1979, appellant Laverne L. Logan, a probationary employee hired one month previously, was discharged by appellee Zimmerman Brush Company, purportedly because Logan's short left leg made it impossible for him to perform his duties as a shipping clerk. Five days later, Logan, acting *pro se*, filed a charge with the Commission alleging that his employment had been unlawfully terminated because of his physical handicap. App. 3. This triggered the Commission's statutory obligation under ¶ 858(b) to convene a factfinding conference within 120 days; in Logan's case, this meant by March 13, 1980. Apparently through inadvertence, the Commission's representative scheduled the conference for March 18, five days *after* expiration of the statutory period. Notice of the meeting, which was mailed to both parties in January 1980, specified the hearing's date and location and declared that attendance was "required." It, however, did not allude to the FEPA's 120-day time limit. App. 5. The Commission also asked the company to complete a short questionnaire concerning its employment practices, and directed that it submit its answers by March 10. *Ibid.* The company did this without objection.

When the conference date arrived, the company moved that Logan's charge be dismissed because the Commission had failed to hold the conference within the statutorily mandated 120-day period. *Id.*, at 12. This request was rejected. *Id.*, at 16. The company thereupon petitioned the Supreme Court of Illinois for an original writ of prohibition. That court stayed proceedings on Logan's complaint pending decision on the request for a writ. *Id.*, at 24. Logan meanwhile obtained counsel, and—because 180 days had not yet passed since the occurrence of the allegedly discriminatory act—filed a second charge with the Commission. *Id.*, at 26.

Before the Illinois Supreme Court, Logan argued that terminating his claim because of the Commission's failure to convene a timely conference—a matter beyond Logan's, or in-

deed the company's, control—would violate his federal rights to due process and equal protection of the laws. But the court noted that the statutory provision at issue, ¶858(b), declared: "Within 120 days of the proper filing of a charge, the Commission *shall* convene a fact finding conference. . . ." (Emphasis added.) The Illinois court found this legislative language to be mandatory, and accordingly it held that failure to comply deprived the Commission of jurisdiction to consider Logan's charge. *Zimmerman Brush Co.* v. *Fair Employment Practices Comm'n*, 82 Ill. 2d 99, 411 N. E. 2d 277 (1980).

The court found controlling its decision in *Springfield-Sangamon County Regional Planning Comm'n* v. *Fair Employment Practices Comm'n*, 71 Ill. 2d 61, 373 N. E. 2d 1307 (1978),[2] where it had determined that ¶858(c)'s 180-day deadline for issuing a complaint was mandatory; since the state legislature wrote ¶858(b) after the *Springfield-Sangamon* decision, and used language similar to that employed in ¶858(c), it must have intended the 120-day time limit to be jurisdictional as well. This result, reasoned the court, comported with the statute's purposes by facilitating the "just and expeditious resolutions of employment disputes," 82 Ill. 2d, at 107, 411 N. E. 2d, at 282, while protecting employers "'from unfounded charges of discrimination,'" *id.*, at 106, 411 N. E. 2d, at 281, quoting ¶851.

The Illinois Supreme Court summarily rejected Logan's argument that his due process and equal protection rights would be violated were the Commission's error allowed to extinguish his cause of action. The state legislature had established the right to redress for discriminatory employment practices, it was said, and "[t]he legislature could establish reasonable procedures to be followed upon a charge . . . ."

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[2] See also *Board of Governors* v. *Fair Employment Practices Comm'n*, 78 Ill. 2d 143, 149, 399 N. E. 2d 590, 593 (1979); *Wilson* v. *All-Steel, Inc.*, 87 Ill. 2d 28, 428 N. E. 2d 489 (1981).

Id., at 108, 411 N. E. 2d, at 282. The court then went on to rule that Logan could not file a second charge with the Commission based upon the same act of alleged discrimination, for to allow the second complaint to proceed would circumvent the design of the Act and frustrate the public interest in an expeditious resolution of disputes.[3] *Id.*, at 108–109, 411 N. E. 2d, at 282–283.

Logan appealed, bringing his federal claims to this Court. We noted probable jurisdiction. 450 U. S. 909 (1981).

II

A

Justice Jackson, writing for the Court in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), observed: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313. At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.

The first question, we believe, was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.[4] There, the Court confronted a challenge to a state law that provided for the settle-

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[3] The Illinois court also refused to give retroactive application to the new Illinois Human Rights Act, which makes the convening of a factfinding conference discretionary. 82 Ill. 2d, at 108–109, 411 N. E. 2d, at 282–283. See n. 1, *supra*.

[4] Two years ago, in *Martinez* v. *California*, 444 U. S. 277, 281–282 (1980), the Court noted that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause."

ment of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the statute was to terminate "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund." *Id.*, at 311. This, the Court concluded, worked to deprive the beneficiaries of property by, among other things, "cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.*, at 313. Such a result was impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. *Id.*, at 315. Despite appellee's arguments to the contrary, we see no meaningful distinction between the cause of action at issue in *Mullane* and Logan's right to use the FEPA's adjudicatory procedures.

This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale* v. *Rogers*, 357 U. S. 197 (1958), for example—where a plaintiff's claim had been dismissed for failure to comply with a trial court's order—the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.*, at 209. See also *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 349–351 (1909) (power to enter default judgment); *Hovey* v. *Elliott*, 167 U. S. 409 (1897) (same); *Windsor* v. *McVeigh*, 93 U. S. 274 (1876) (same). Cf. *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such

an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie* v. *Connecticut*, 401 U. S. 371, 380 (1971).[5]

In any event, the view that Logan's FEPA claim is a constitutionally protected one follows logically from the Court's more recent cases analyzing the nature of a property interest. The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975); *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 646 (1949) (Frankfurter, J., dissenting); *Arnett* v. *Kennedy*, 416 U. S. 134,

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[5] The Court's cases involving the right of access to courts provide an analogous method of analysis supporting our reasoning here. In *Boddie*, the Court established that, at least where interests of basic importance are involved, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U. S., at 377. Thus, the State's imposition of substantial filing and other fees upon indigents seeking divorces was held to deny them due process. In *United States* v. *Kras*, 409 U. S. 434 (1973), we agreed that a due process right of access to the courts exists when fundamental interests are present and the State has exclusive control over "the adjustment of [the] legal relationship[s]" involved. *Id.*, at 445. The relationship between these opinions and the right to procedural due process at issue in the instant case is made clear in *Boddie*, which relied in large part on the analysis of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and its guarantee "to all individuals [of] a meaningful opportunity to be heard." *Boddie*, 401 U. S., at 379; see also *id.*, at 377–378, 380, 382. Thus, while the right to seek a divorce may not be a property interest in the same sense as is a tort or a discrimination action, the theories of the cases are not very different: having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme.

207–208, and n. 2 (1974) (MARSHALL, J., dissenting); *Board of Regents* v. *Roth*, 408 U. S., at 571–572, 576–577. See, *e. g.*, *Barry* v. *Barchi*, 443 U. S. 55 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div.* v. *Craft*, *supra* (utility service); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976) (disability benefits); *Goss* v. *Lopez*, *supra* (high school education); *Connell* v. *Higginbotham*, 403 U. S. 207 (1971) (government employment); *Bell* v. *Burson*, 402 U. S. 535 (1971) (driver's license); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) (welfare benefits).

The right to use the FEPA's adjudicatory procedures shares these characteristics. A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence. And an FEPA claim, which presumably can be surrendered for value, is at least as substantial as the right to an education labeled as property in *Goss* v. *Lopez*, *supra*.[6] Certainly, it would require a remarkable reading of a "broad and majestic ter[m]," *Board of Regents* v. *Roth*, 408 U. S., at 571, to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right to redress discrimination is not.

The Illinois Supreme Court nevertheless seemed to believe that no individual entitlement could come into being under the FEPA until the Commission took appropriate action within the statutory deadline. Because the entitlement arises from statute, the court reasoned, it was the legisla-

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[6] An FEPA claim is therefore distinguishable from an enforcement action like those conducted by the National Labor Relations Board pursuant to the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* In such a proceeding, the prosecution is controlled by the NLRB's General Counsel, and the Counsel's refusal to issue a complaint is generally not reviewable either by the Board or by the courts. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 138–139 (1975).

ture's prerogative to establish the "procedures to be followed upon a charge." 82 Ill. 2d, at 108, 411 N. E. 2d, at 282. This analysis, we believe, misunderstands the nature of the Constitution's due process guarantee.

Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980). See *Arnett* v. *Kennedy*, 416 U. S., at 166–167 (POWELL, J., concurring in part); *id.*, at 211 (MARSHALL, J., dissenting). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: "'While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'" *Vitek* v. *Jones*, 445 U. S., at 490–491, n. 6, quoting *Arnett* v. *Kennedy*, 416 U. S., at 167 (opinion concurring in part).

Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez* v. *California*, 444 U. S. 277 (1980), where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels. Cf.

U. S. Railroad Retirement Bd. v. *Fritz*, 449 U. S. 166, 174 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 575 (1979); *Flemming* v. *Nestor*, 363 U. S. 603, 609–610 (1960); *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 312, n. 8, 315–316 (1945). In each case, the legislative determination provides all the process that is due, see *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U. S. 441, 445–446 (1915); it "remain[s] true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez* v. *California*, 444 U. S., at 282. Indeed, as was acknowledged in *Martinez*, it may well be that a substantive "immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest." *Id.*, at 282, n. 5. Cf. *Ferri* v. *Ackerman*, 444 U. S. 193, 198 (1979).

The 120-day limitation in the FEPA, ¶ 858(b), of course, involves no such thing. It is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim. Because the state scheme has deprived Logan of a property right, then, we turn to the determination of what process is due him.

B

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "*some* form of hearing" is required before the owner is finally deprived of a protected property interest. *Board of Regents* v. *Roth*, 408 U. S., at 570–571, n. 8 (emphasis in original). And that is why the Court has stressed that, when a "statutory scheme makes liability an important factor in the State's determination . . . the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Bell* v. *Burson*, 402

U. S., at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.[7] See *id.*, at 542.

On the other hand, the Court has acknowledged that the timing and nature of the required hearing[8] "will depend on appropriate accommodation of the competing interests involved." *Goss* v. *Lopez*, 419 U. S., at 579. These include the importance of the private interest and the length or finality of the deprivation, see *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 19, and *Mathews* v. *Eldridge*, 424 U. S., at 334–335; the likelihood of governmental error, see *id.*, at 335; and the magnitude of the governmental interests involved, see *ibid.*, and *Wolff* v. *McDonnell*, 418 U. S., at 561–563.

Each of these factors leads us to conclude that appellant Logan is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and—more intangibly—in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner, as is apparently true of ¶ 858(b), necessarily

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[7] This is not to suggest, of course, that the State must consider the merits of the claim when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge. See *infra*, at 437.

[8] Here, of course, we are not concerned with the timing of the required review on the merits. The Commission must consider the merits before the case may proceed; it is not meaningful to discuss the possibility of a post-termination hearing, because the property interest here is destroyed when the case is terminated.

presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial.

There has been no suggestion that any great number of claimants are in Logan's position, or that directing the State to consider the merits of Logan's claim will be unduly burdensome. In any event, the State by statute has eliminated the mandatory hearing requirement, see n. 1, *supra*, demonstrating that it no longer has any appreciable interest in defending the procedure at issue.

Despite appellee's arguments, the recent decision in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), is not to the contrary. There, a state employee negligently lost a prisoner's hobby kit; while the Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment, it held that all the process due was provided by the State's tort claims procedure. In such a situation, the Court observed, "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.*, at 541. The company suggests that Logan is complaining of the same type of essentially negligent deprivation, and that he therefore should be remitted to the tort remedies provided by the Illinois Court of Claims Act, Ill. Rev. Stat., ch. 37, ¶ 439.1 *et seq.* (1979). That statute allows an action "against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person." ¶ 439.8(d).[9]

This argument misses *Parratt*'s point. In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by

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[9] Logan might also have a remedy under the Equal Opportunities for the Handicapped Act (EOHA), Ill. Rev. Stat., ch. 38, ¶ 65–21 *et seq.* (1979), which provided an action for damages and "other relief" to those discriminated against on the basis of physical handicap. ¶ 65–29. While the EOHA also was repealed when the Illinois Human Rights Act was passed, see n. 1, *supra*, the latter statute does not disturb claims arising or accruing under the EOHA prior to July 1, 1980. ¶ 9–102(B)(2). It is not clear

a state employee . . . not a result of some established state procedure." 451 U. S., at 541. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference—whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. See *id.*, at 545 (second concurring opinion). Unlike the complainant in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

In any event, the Court's decisions suggest that, absent "the necessity of quick action by the State or the impracticality of providing any predeprivation process," a postdeprivation hearing here would be constitutionally inadequate. *Parratt*, 451 U. S., at 539. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 19–20; *Board of Regents* v. *Roth*, 408 U. S., at 570, n. 7; *Bell* v. *Burson*, 402 U. S., at 542; *Boddie* v. *Connecticut*, 401 U. S., at 379. Cf. *Barry* v. *Barchi*, 443 U. S., at 64–65 (post-termination hearing permitted where the decision to terminate was based on a reliable pretermination finding); *Mathews* v. *Eldridge*, 424 U. S., at 343–347 (same). That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action.[10] Seeking redress through a

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to us, however, that such an action is available to Logan; the Illinois Supreme Court concluded that allowing Logan to file a second FEPA claim would frustrate the design of the FEPA by prejudicing the employer's rights, 82 Ill. 2d, at 109, 411 N. E. 2d, at 283, and it might well apply a similar analysis to bar an EOHA claim here. We would hesitate to remit Logan to so speculative a remedy. In any event, our conclusion about the inadequacy of any post-termination remedy here makes the availability of an EOHA suit irrelevant for present purposes.

[10] In *Ingraham* v. *Wright*, 430 U. S. 651 (1977), the Court concluded that state tort remedies provided adequate process for students subjected to

tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole: the Illinois Court of Claims Act does not provide for reinstatement—as the appellee conceded at oral argument, Tr. of Oral Arg. 39—and even a successful suit will not vindicate entirely Logan's right to be free from discriminatory treatment.

Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, cf. *Chase Securities Corp.* v. *Donaldson*, 325 U. S., at 314–316, or, in an appropriate case, filing fees. *United States* v. *Kras*, 409 U. S. 434 (1973). And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co.* v. *Arkansas*, 212 U. S., at 351; *Windsor* v. *McVeigh*, 93 U. S., at 278. What the Fourteenth Amendment does require, however, "is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co.*, *supra*, at 313." *Boddie* v. *Connecticut*, 401 U. S., at 378. It is such an opportunity that Logan was denied.

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corporal punishment in school. In doing so, however, the Court emphasized that the state scheme "preserved what 'has always been the law of the land,'" *id.*, at 679, quoting *United States* v. *Barnett*, 376 U. S. 681, 692 (1964), and that adding additional safeguards would be unduly burdensome. 430 U. S., at 680–682. Here, neither of those rationales is available. Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions. And the State's abandonment of the challenged practice makes it difficult to argue that requiring a determination on the merits will impose undue burdens on the state administrative process.

III

The judgment of the Supreme Court of Illinois, accordingly, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join.

The Court's opinion, *ante*, considers appellant Logan's due process claim and decides that issue in his favor. As has been noted, Logan also raised an equal protection claim and that issue has been argued and briefed here. Although the Court considered that it was unnecessary to discuss and dispose of the equal protection claim when the due process issue was being decided in Logan's favor, I regard the equal protection issue as sufficiently important to require comment on my part,[1] particularly inasmuch as a majority of the Members of the Court are favorably inclined toward the claim, although, to be sure, that majority is not the one that constitutes the Court for the controlling opinion.

On its face, Logan's equal protection claim is an unconventional one. The Act's ¶ 858(b) establishes no explicit classifications and does not expressly distinguish between claimants, and the company therefore argues that Logan has no more been deprived of equal protection than anyone would be who is injured by a random act of governmental misconduct. As the Illinois Supreme Court interpreted the statute, however, ¶ 858(b) unambiguously divides claims—and thus, necessarily, claimants—into two discrete groups that are accorded radically disparate treatment. Claims processed within 120 days are given full consideration on the merits,

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[1] "It cannot be suggested that in cases where the author [in writing by assignment] is the mere instrument of the Court he must forego expression of his own convictions." *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 576 (1949) (separate opinion). See also *Abbate* v. *United States*, 359 U. S. 187, 196 (1959) (separate opinion); *Helvering* v. *Davis*, 301 U. S. 619, 639–640 (1937).

and complainants bringing such charges are awarded the opportunity for full administrative and judicial review. In contrast, otherwise identical claims that do not receive a hearing within the statutory period are unceremoniously, and finally, terminated. Because the Illinois court recognized, in so many words, that the FEPA establishes two categories of claims, one may proceed to determine whether the classification drawn by the statute is consistent with the Fourteenth Amendment.

For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the Equal Protection Clause's guarantees.[2] At the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981). This is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith. But the "rational-basis standard is 'not a toothless one,'" *id.*, at 234, quoting *Mathews* v. *Lucas*, 427 U. S. 495, 510 (1976); the classificatory scheme must "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker* v. *Wilson*, 450 U. S., at 235. I see no need to explore the outer bounds of this test, for I find that the Illinois statute runs afoul of the lowest level of permissible equal protection scrutiny.

The FEPA itself has two express purposes: eliminating employment discrimination, and protecting employers and other potential defendants "from unfounded charges of discrimination." ¶ 851. It is evident at a glance that neither of these objectives is advanced by ¶ 858(b)'s deadline provision. Terminating potentially meritorious claims in a random manner obviously cannot serve to redress instances of discrimina-

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[2] "Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear . . . and about the degree of deference afforded the legislature in suiting means to ends . . . ." *Schweiker* v. *Wilson*, 450 U. S. 221, 243, n. 4 (1981) (dissenting opinion).

tion. And it cannot protect employers from unfounded charges, for the frivolousness of a claim is entirely unrelated to the length of time the Commission takes to process that claim. So far as this purpose is concerned, ¶ 858(b) stands on precisely the same footing as the state statute invalidated in *Lindsey* v. *Normet*, 405 U. S. 56 (1972). There, the Court struck down a provision requiring a tenant to post a double bond before appealing an adverse forcible entry judgment. "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive," the Court noted, "for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.*, at 78. Accord, *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966). Here, of course, the FEPA may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. While it may well be true that "[n]o bright line divides the merely foolish from the arbitrary law," *Schweiker* v. *Wilson*, 450 U. S., at 243 (dissenting opinion), I have no doubt that ¶ 858(b) is patently irrational in the light of its stated purposes.

In its opinion, however, the Illinois Supreme Court recognized a third rationale for ¶ 858(b): that provision, according to the court, was designed to further the "just and expeditious resolutio[n]" of employment disputes. *Zimmerman Brush Co.* v. *Fair Employment Practices Comm'n*, 82 Ill. 2d 99, 107, 411 N. E. 2d 277, 282 (1980). Insofar as the court meant to suggest that a factfinding conference may help settle controversies and frame issues for a more efficient future resolution, it was undoubtedly correct. But I cannot agree that terminating a claim that the State itself has mis-scheduled is a rational way of expediting the resolution of disputes.[3]

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[3] The Illinois court concluded that the factfinding conference itself would help to resolve disputes expeditiously, by encouraging settlement and "aid-[ing] the Commission in setting up a procedural framework for the concilia-

Most important, the procedure at issue does not serve generally to hasten the processing or ultimate termination of employment controversies. Once the Commission has scheduled a factfinding conference and issued a complaint, there are no statutory time limits at all on the length of time it can take to resolve the claim. And ¶858(b) does not serve to protect employers from stale charges, because it does not function as a statute of limitation; Logan does not and could not quarrel with the requirement that complainants file their charges in a timely fashion.

It is true, of course, that ¶858(b) serves to expedite the resolution of certain claims—those not processed within 120 days—in a most obvious way, and in that sense it furthers the purpose of terminating disputes expeditiously. But it is not enough, under the Equal Protection Clause, to say that the legislature sought to terminate certain claims and succeeded in doing so, for that is "a mere tautological recognition of the fact that [the legislature] did what it intended to do." *U. S. Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 180 (1980) (STEVENS, J., concurring in judgment). This Court still has an obligation to view the classificatory *system*, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary. *Rinaldi* v. *Yeager*, 384 U. S., at 308 ("The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes"). Cf. *U. S. Railroad Retirement Bd.* v. *Fritz*, 449 U. S., at 178.

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tory process which follows." 82 Ill. 2d, at 106, 411 N. E. 2d, at 281. It is less clear to me that the court viewed the practice of terminating misscheduled claims as one that would aid the just and expeditious resolution of controversies. In light of my conclusions about the rationality of such a justification, however, it is irrelevant whether the Illinois Supreme Court intended to state that this was the actual or articulated rationale for ¶858(b)'s deadline proviso. I note that the rationales discussed in the text have not been expressed by the State's representatives; the Illinois Human Rights Commission, by the State's Attorney General, has filed a brief in this Court supporting Logan.

Here, that inquiry yields an affirmative result. So far as the State's purpose is concerned, every FEPA claimant's charge, when filed with the Commission, stands on the same footing. Yet certain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. In other words, the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe, is the very essence of arbitrary state action. "[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out,'" *James* v. *Strange*, 407 U. S. 128, 140 (1972), quoting *Rinaldi*, 384 U. S., at 308–309, and that rationality is absent here. The Court faced an analogous situation in a case involving sex-based classifications, and its conclusion there is applicable to the case before us now: giving preference to a discrete class "merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." *Reed* v. *Reed*, 404 U. S. 71, 76 (1971).

Finally, it is possible that the Illinois Supreme Court meant to suggest that the deadline contained in ¶ 858(b) can be justified as a means of thinning out the Commission's caseload, with the aim of encouraging the Commission to convene timely hearings. This rationale, however, suffers from the defect outlined above: it draws an arbitrary line between otherwise identical claims. In any event, the State's method of furthering this purpose—if this was in fact the legislative end—has so speculative and attenuated a connection to its goal as to amount to arbitrary action. The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis. That is not so here.

I thus agree with appellant Logan that the Illinois scheme also deprives him of his Fourteenth Amendment right to the equal protection of the laws.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in the judgment.

As the challenged statute now has been amended, this is a case of little importance except to the litigants. The action commenced with an isolated example of bureaucratic oversight that resulted in the denial even of a hearing on appellant's claim of discrimination. One would have expected this sort of negligence by the State to toll the statutory period within which a hearing must be held. The Supreme Court of Illinois, however, read the statutory terms as mandatory and jurisdictional.

The issue presented, at least for me, is too simple and straightforward to justify broad pronouncements on the law of procedural due process or of equal protection. I am particularly concerned by the potential implications of the Court's expansive due process analysis. In my view this is a case that should be decided narrowly on its unusual facts.*

The decision of the Illinois Supreme Court effectively created two classes of claimants: those whose claims were, and those whose claims were not, processed within the prescribed 120 days by the Illinois Fair Employment Practices Commission. Under this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time. The question is whether this unusual classification is rationally related to a state interest that would justify it.

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*It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved. Yet I suppose we would all agree—at least in theory—that unnecessarily broad statements of doctrine frequently do more to confuse than to clarify our jurisprudence. I have not always adhered to this counsel of restraint in my own opinion writing, and therefore imply no criticism of others. But it does seem to me that this is a case that requires a minimum of exposition.

The State no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end—or indeed any other—in a rational way. As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so. The State also has asserted goals of redressing valid claims of discrimination and of protecting employers from frivolous lawsuits. Yet the challenged classification, which bore no relationship to the merits of the underlying charges, is arbitrary and irrational when measured against either purpose.

This Court has held repeatedly that state-created classifications must bear a rational relationship to legitimate governmental objectives. See, *e. g.*, *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981); *Lindsey* v. *Normet*, 405 U. S. 56 (1972). Although I do not join JUSTICE BLACKMUN's separate opinion, I agree that the challenged statute, as construed and applied in this case, failed to comport with this minimal standard. I am concerned by the broad sweep of the Court's opinion, but I do join its judgment.

WHITE v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-5887. Argued November 30, 1981—Decided March 2, 1982

Petitioner filed an action in Federal District Court alleging that respondent New Hampshire Department of Employment Security failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating a provision of the Social Security Act, the Due Process Clause, and 42 U. S. C. § 1983. Ultimately, the District Court approved the parties' consent decree and entered judgment accordingly. Approximately four and one-half months after the entry of the judgment, petitioner filed a motion requesting an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which authorizes the award, in the court's discretion, of attorney's fees to the prevailing party "as part of the costs" in constitutional and civil rights litigation of various kinds. The District Court granted attorney's fees and denied respondents' subsequent motion to vacate the consent decree. The Court of Appeals reversed the District Court's decision to award attorney's fees under § 1988. It held that petitioner's motion for attorney's fees constituted a "motion to alter or amend the judgment" under Federal Rule of Civil Procedure 59(e) and was governed by the Rule's requirement that such a motion be served not later than 10 days after entry of the judgment.

Held: Rule 59(e) is not applicable to postjudgment requests for attorney's fees under § 1988. Pp. 450–454.

(a) The Rule has generally been invoked only to support reconsideration of matters properly encompassed in a decision on the merits. Since § 1988 provides for awards of attorney's fees only to a "prevailing party," the decision of entitlement to fees requires an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Pp. 451–452.

(b) Application of Rule 59(e) to § 1988 fee requests is neither necessary nor desirable to promote finality, judicial economy, or fairness. Many orders may issue in the course of a civil rights action, but it may be

unclear which orders are and which are not "final judgments." If Rule 59(e) were applicable, lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling. No useful purpose would be served by encouragement of this practice, or by litigation over the "finality" of interim orders in connection with which fee requests were not filed within the 10-day period. The Rule's 10-day limit could also deprive counsel of the time necessary to negotiate private settlements of fee questions, thus generating increased litigation of fee questions. The discretion conferred on the court by § 1988 with regard to the award of attorney's fees will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party. Pp. 452–454.

629 F. 2d 697, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 455.

E. Richard Larson argued the cause for petitioner. With him on the briefs were *Bruce J. Ennis* and *Raymond J. Kelly*.

Marc R. Scheer, Assistant Attorney General of New Hampshire, argued the cause for respondents. With him on the brief was *Gregory H. Smith*, Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case arises from a postjudgment request for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. The question is whether such a request is a "motion to alter or

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*Briefs of *amici curiae* urging reversal were filed by *Donald E. Ware* and *Scott C. Moriearty* for the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association et al.; and by *Jack Greenberg, James M. Nabrit III*, and *Charles Stephen Ralston* for the NAACP Legal Defense and Educational Fund, Inc.

Marc L. Parris, Charles Apotheker, and *Martin Hurwitz* filed a brief for the County of Rockland, New York, as *amicus curiae*.

amend the judgment," subject to the 10-day timeliness standard of Rule 59(e) of the Federal Rules of Civil Procedure.[1]

I

This litigation began in March 1976, when the petitioner Richard White filed suit against respondent New Hampshire Department of Employment Security (NHDES) and its Commissioner. White claimed that the respondent failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating an applicable provision of the Social Security Act, 42 U. S. C. § 503(a)(1), the Due Process Clause of the Constitution of the United States, and 42 U. S. C. § 1983. Alleging federal jurisdiction under 28 U. S. C. § 1343, he sought declaratory and injunctive relief and "such other and further relief as may be equitable and just." App. 15. His complaint did not specifically request attorney's fees.

Following certification of the case as a class action, the District Court granted relief on petitioner's claim under the Social Security Act.[2] Pending an appeal by NHDES to the Court of Appeals, however, the parties signed a settlement agreement. The case was then remanded to the District Court, which approved the consent decree and gave judgment accordingly on January 26, 1979.

Five days after the entry of judgment, counsel to White wrote to respondent's counsel, suggesting that they meet to discuss the petitioner's entitlement to attorney's fees as a prevailing party under 42 U. S. C. § 1988. No meeting appears to have been held. On June 7, 1979, approximately

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[1] Rule 59(e) of the Federal Rules of Civil Procedure provides:

"(e) Motion to Alter or Amend a Judgment

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

[2] Civ. No. 76-71 (NH, Nov. 15, 1977), as amended, Civ. No. 76-71 (NH, Dec. 16, 1977).

four and one-half months after the entry of a final judgment, the petitioner White filed a motion in which an award of fees formally was requested.

In a hearing in the District Court, respondent's counsel claimed he had been surprised by petitioner's postjudgment requests for attorney's fees.[3] He averred he understood that the consent decree, by its silence on the matter, implicitly had waived any claim to a fee award. White's counsel asserted a different understanding. Apparently determining that the settlement agreement had effected no waiver,[4] the District Court granted attorney's fees in the sum of $16,644.40.

Shortly thereafter, respondent moved to vacate the consent decree. It argued, in effect, that it had thought its total liability fixed by the consent decree and that it would not have entered a settlement knowing that further liability might still be established. The District Court denied the motion to vacate.

On appeal, the Court of Appeals for the First Circuit reversed the District Court's decision to award attorney's fees under § 1988. 629 F. 2d 697 (1980). The court held that petitioner's postjudgment motion for attorney's fees constituted a motion to alter or amend the judgment, governed by Rule 59(e) of the Federal Rules of Civil Procedure and its 10-day time limit. 629 F. 2d, at 699.

In holding as it did, the Court of Appeals recognized that § 1988 provided for the award of attorney's fees "as part of the costs."[5] But it declined to follow a recent decision of the

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[3] Transcript of the District Court Hearing on Plaintiffs' Motion for Attorney's Fees (Aug. 21, 1979), App. 56, 68–69.

[4] The District Court found specifically that the parties' prejudgment "attempts" to negotiate a waiver of costs and fees had proved "nugatory." *Id.*, at 75.

[5] The pertinent language of 42 U. S. C. § 1988 provides that:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U. S. C. 1681 *et seq.*], . . . the court, in its discretion, may allow the prevailing

Court of Appeals for the Fifth Circuit[6] that treated a § 1988 fee request as a motion for "costs" under Federal Rules of Civil Procedure 54(d)[7] and 58[8]—Rules that contain no explicit time bars. Despite the language of § 1988, the Court of Appeals reasoned that attorney's fees could not be the kind of "costs" contemplated by Rules 54(d) and 58. It reached this conclusion by looking to 28 U. S. C. § 1920, which specifies various "costs" that can be assessed by a clerk of court under Rule 54. The court found all to be "capable of routine computation" on a day's notice. 629 F. 2d, at 702. By contrast, an award of attorney's fees must be made by a judge. Further, as in this case, a fee award could affect substantially the total liability of the parties.

The Court of Appeals found this case distinguishable from *Hutto* v. *Finney*, 437 U. S. 678 (1978), in which this Court characterized attorney's fees, under the Fees Act, as "costs" taxable against a State. In *Hutto*, the Court of Appeals reasoned, the narrow question was whether the States have Eleventh Amendment immunity against liability for attorney's fees. The question was not whether attorney's fees are costs under Rule 54. The court also dismissed the argument that a request for attorney's fees is "a collateral and in-

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party, other than the United States, a reasonable attorney's fee as part of the costs."

[6] *Knighton* v. *Watkins*, 616 F. 2d 795 (1980).

[7] Rule 54(d) provides:

"(d) Costs

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . . Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Unless so defined by statute, attorney's fees are not generally considered "costs" taxable under Rule 54(d). *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975).

[8] Rule 58 states in pertinent part:

"Entry of the judgment shall not be delayed for taxing of costs."

dependent claim" properly adjudicated separately from a claim on the merits.

Because other Courts of Appeals have reached different conclusions about the applicability of Rule 59(e) to postjudgment motions for the award of attorney's fees,[9] we granted certiorari in this case to resolve the conflict.[10] We now reverse.

II

A

Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment.[11] The question of the court's authority to do so had arisen in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321, 322 (CA8 1944). According to their report, the draftsmen intended Rule 59(e) specifically "to care for a situation such as that arising in Boaz."[12]

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[9] Courts of Appeals for the Fifth, Sixth, and Seventh Circuits have held that postjudgment requests for attorney's fees are not motions to alter or amend a judgment under Rule 59(e), but rather applications for "costs" under Rules 54(d) and 58. See *Johnson* v. *Snyder*, 639 F. 2d 316, 317 (CA6 1981); *Bond* v. *Stanton*, 630 F. 2d 1231, 1234 (CA7 1980); *Knighton* v. *Watkins*, *supra*, at 797–798. Like the Court of Appeals for the First Circuit in this case, the Court of Appeals for the Tenth Circuit has held squarely that postjudgment requests for fees *are* motions to alter or amend a judgment under Rule 59(e). *Glass* v. *Pfeffer*, 657 F. 2d 252 (1981). The Court of Appeals for the Eighth Circuit has taken still a third position: that a postjudgment motion for attorney's fees raises a "collateral and independent claim" that is not governed either by Rule 59(e) or by the "costs" provisions of Rules 54(d) and 58 of the Federal Rules of Civil Procedure. *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F. 2d 574, 582 (1981).

[10] 451 U. S. 982 (1981).

[11] Notes of Advisory Committee on 1946 Amendment to Rules, 28 U. S. C., p. 491; 5 F. R. D. 433, 476 (1946).

[12] *Ibid.*

B

Consistently with this original understanding, the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. *E. g., Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257 (1978). By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action[13]—issues to which Rule 59(e) was never intended to apply.

Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on

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[13] Petitioner argues that the "collateral" and "independent" character of his request for attorney's fees is conclusively established by *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939). In *Sprague* this Court considered the power of a federal court to award counsel fees pursuant to an application filed several years after the entry of a judgment on the merits. Rejecting arguments that the request sought an impermissible reopening of the underlying judgment, the Court held that the petition for reimbursement represented "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree." *Id.*, at 170. The passage of time thus presented no bar to an award of fees. Although *Sprague* was decided under the then-applicable rules of equity, the Court suggested that the same result would follow under the new Federal Rules of Civil Procedure. *Id.*, at 169, n. 9.

This case arises in a posture different from that of *Sprague*. In *Sprague* the prevailing plaintiff had produced a "benefit" commonly available to others similarly situated. Although she "neither avowed herself to be the representative of a class nor . . . establish[ed] a fund in which others could participate," *id.*, at 166, her lawsuit had a *stare decisis* effect that inured to the benefit of others asserting similar claims. It was from the benefits accrued by them—not, as in this case, from the defendant—that the plaintiff sought an equitable award of fees.

Because of this difference between the cases, we cannot agree that *Sprague* controls the question now before us. Nonetheless, we agree with petitioner to this extent: *Sprague* at least establishes that fee questions are not inherently or necessarily subsumed by a decision on the merits. See also *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 66 (1980) (a

the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial. See *Hutto* v. *Finney*, 437 U. S., at 695, n. 24.

As the Court of Appeals for the Fifth Circuit recently stated:

> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)." *Knighton* v. *Watkins*, 616 F. 2d 795, 797 (1980).[14]

III

In holding Rule 59(e) applicable to the postjudgment fee request in this case, the Court of Appeals emphasized the need to prevent fragmented appellate review and unfair postjudgment surprise to nonprevailing defendants. See 629 F. 2d, at 701–704. These are important concerns. But we do not think that the application of Rule 59(e) to § 1988 fee requests is either necessary or desirable to promote finality, judicial economy, or fairness.

A

The application of Rule 59(e) to postjudgment fee requests could yield harsh and unintended consequences. Section

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claimed entitlement to attorney's fees is sufficiently independent of the merits action under Title VII to support a federal suit "solely to obtain an award of attorney's fees for legal work done in state and local proceedings").

[14] There is implicit support for this view in decisions of the Courts of Appeals holding that decisions on the merits may be "final" and "appealable" prior to the entry of a fee award. See, *e. g.*, *Memphis Sheraton Corp.* v.

1988 authorizes the award of attorney's fees in constitutional and civil rights litigation of various kinds. In civil rights actions, especially in those involving "relief of an injunctive nature that must prove its efficacy only over a period of time," this Court has recognized that "many final orders may issue in the course of the litigation." *Bradley* v. *Richmond School Bd.*, 416 U. S. 696, 722–723 (1974). Yet sometimes it may be unclear even to counsel which orders are and which are not "final judgments." If Rule 59(e) were applicable, counsel would forfeit their right to fees if they did not file a request in conjunction with each "final" order. Cautious to protect their own interests, lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling. Yet encouragement of this practice would serve no useful purpose. Neither would litigation over the "finality" of various interim orders in connection with which fee requests were not filed within the 10-day period.

The 10-day limit of Rule 59(e) also could deprive counsel of the time necessary to negotiate private settlements of fee questions. If so, the application of Rule 59(e) actually could generate increased litigation of fee questions—a result ironically at odds with the claim that it would promote judicial economy.[15]

Kirkley, 614 F. 2d 131, 133 (CA6 1980); *Hidell* v. *International Diversified Investments*, 520 F. 2d 529, 532, n. 4 (CA7 1975); see also *Obin* v. *District 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F. 2d, at 583–584. If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining fee issue must be "collateral" to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as "final" and "appealable." *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, *supra*, at 584. Although "piecemeal" appeals of merits and fee questions generally are undesirable, district courts have ample authority to deal with this problem. See *infra*, at 454, and n. 16.

[15] As an additional reason for finding Rule 59(e) inapplicable to postjudgment fee requests, the petitioner and *amici* have urged that prejudgment fee negotiations could raise an inherent conflict of interest be-

B

Section 1988 authorizes the award of attorney's fees "in [the] discretion" of the court. We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees.[16] And of course the district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims to attorney's fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits.[17]

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tween the attorney and client. Because the defendant is likely to be concerned about his total liability, it is suggested, he may offer a lump-sum settlement, but remain indifferent as to its distribution as "damages" or "attorney's fees." In pursuing negotiations, the argument continues, the lawyer must decide what allocation to seek as between lawyer and client. Accordingly, petitioner argues, to avoid this conflict of interest any fee negotiations should routinely be deferred until after the entry of a merits judgment. Although sensitive to the concern that petitioner raises, we decline to rely on this proffered basis. In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

[16] See, *e. g.*, *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, *supra*, at 583 (recommending adoption of "a uniform rule requiring the filing of a claim for attorney's fees within twenty-one days after entry of judgment"); *Knighton* v. *Watkins*, 616 F. 2d, at 798, n. 2 (practices governing requests for attorney's fees "can be handled best by local rule"). As different jurisdictions have established different procedures for the filing of fee applications, there may be valid local reasons for establishing different time limits.

[17] The petitioner has urged us to hold expressly that the § 1988 provision for attorney's fees "as part of . . . costs" establishes that postjudgment fee requests constitute motions for "costs" under Rules 54(d) and 58, which specify no time barrier for motions for "costs." Because this question is

IV

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the cause remanded for action consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with much that is said in the Court's opinion and I therefore concur, of course, in its judgment. I wish, however, that the Court had gone one step further.

We granted certiorari in this case, as the Court notes, *ante*, at 450, to resolve the existing conflict among the Courts of Appeals regarding postjudgment requests for attorney's fees under 42 U. S. C. § 1988. Three Circuits have held that these fee requests are not within Federal Rule of Civil Procedure 59(e), but are within the reach of Rules 54(d) and 58. Two have held that the requests are subject to Rule 59(e). And a sixth has held that such a request is not governed by *any* of the three Rules. See *ante*, at 450, n. 9. The Court today settles the conflict so far as Rule 59(e) and its inapplicability to a fee request are concerned. But it leaves unanswered the applicability of Rules 54(d) and 58 because "this question is unnecessary to our disposition of this case." *Ante*, at 454 and this page, n. 17.

I would answer that question, and hold that Rules 54(d) and 58 also do not apply to postjudgment § 1988 fees requests. I believe that the federal courts and the lawyers that practice in them should have an answer so that we shall not have yet another case to decide before the correct procedure for evaluating such requests is settled for all concerned.

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unnecessary to our disposition of this case, we do not address it. We note that the district courts would be free to adopt local rules establishing standards for timely filing of requests for costs, even if attorney's fees were so treated. See *Knighton* v. *Watkins*, *supra*, at 798, n. 2. Further, the district courts retain discretion under Rules 54(d) and 58 to deny even motions for costs that are filed with unreasonable tardiness.

I note, happily, that the Court at least touches upon the ultimate answer, *ante*, at 454, and n. 17, when it observes that district courts are free to adopt local rules. By so saying, the Court comes close to approving the position taken by the United States Court of Appeals for the Eighth Circuit in *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F. 2d 574 (1981). I think the Eighth Circuit is correct in its approach to the general problem. Thus, I would approve that approach and have the matter settled, eliminating the inconsistency which the Court leaves between the views of the Fifth, Sixth, and Seventh Circuits, on the one hand, and the view of the Eighth Circuit on the other.

RAILWAY LABOR EXECUTIVES' ASSN. v. GIBBONS, TRUSTEE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 80–415. Argued December 2, 1981—Decided March 2, 1982*

In 1975, the Chicago, Rock Island and Pacific Railroad Co. (Rock Island) petitioned the District Court for reorganization under the Bankruptcy Act of 1898, and thereafter continued operation under the protection of that Act until September 1979, when it ceased operation as a result of a labor strike. The District Court concluded that reorganization was not possible and directed appellee Trustee of Rock Island's estate (hereafter appellee) to liquidate the estate's assets. On June 2, 1980, the reorganization court ordered abandonment of the Rock Island system and concluded that no claim or arrangement "for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court." However, three days before the court's order, the Rock Island Railroad Transition and Employee Assistance Act (RITA) was signed into law. Under §§ 106 and 110 of the statute, appellee must pay benefits of up to $75 million to those Rock Island employees who are not hired by other carriers, and the United States guarantees Rock Island's employee protection obligations. The statute also requires that such obligations must be considered administrative expenses of the Rock Island estate for purposes of determining the priority of the employees' claims to the estate's assets. On June 5, 1980, a complaint was filed in the reorganization court challenging the constitutionality of RITA and seeking injunctive relief. On June 9, the court issued a preliminary injunction against enforcement of §§ 106 and 110, holding that those provisions constituted an uncompensated taking of private property (Rock Island's creditors' interests in the estate's assets) for a public purpose in violation of the Just Compensation Clause of the Fifth Amendment. Pursuant to 28 U. S. C. § 1252, the District Court's order was appealed to this Court (No. 80–415). Congress responded to the District Court's injunction by enacting § 701 of the Staggers Rail Act of 1980, which re-enacted §§ 106 and 110 of RITA and added a provision seeking to avoid any implication that appellee and creditors had been deprived of any Tucker Act remedy otherwise available to pursue their takings claim against the United

*Together with No. 80–1239, *Railway Labor Executives' Assn.* v. *Gibbons, Trustee, et al.*, on appeal from the United States Court of Appeals for the Seventh Circuit.

States. Thereafter, the reorganization court denied a motion of appellant and the United States to vacate its June 9 injunction on the asserted ground that it was rendered moot by the passage of the Staggers Act, and issued a new order enjoining implementation of the labor protection provisions of RITA, as amended and re-enacted by the Staggers Act. This order was appealed to the Court of Appeals pursuant to § 124(a)(1) of RITA, as added by the Staggers Act. The Court of Appeals affirmed, and an appeal was then taken to this Court (No. 80–1239).

Held:

1. The June 9 injunction was rendered moot by the enactment of the Staggers Act, and accordingly the appeal in No. 80–415 is dismissed as moot and the District Court is ordered to vacate the injunction. P. 465.

2. The Court of Appeals' judgment is affirmed in No. 80–1239 because RITA, as amended by the Staggers Act, is repugnant to Art. I, § 8, cl. 4, of the Constitution, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." Pp. 465–473.

(a) The labor protection provisions of RITA are an exercise of Congress' power under the Bankruptcy Clause, rather than under the Commerce Clause. Although the subject of bankruptcies is incapable of final definition, "bankruptcy" has been defined as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 513–514. By its terms, the subject matter of RITA is the relationship between a bankrupt railroad and its creditors; Congress did nothing less than to prescribe the manner in which Rock Island's property is to be distributed among its creditors. The events surrounding RITA's passage, as well as its legislative history, also indicate that Congress was exercising its powers under the Bankruptcy Clause. Pp. 465–468.

(b) The Bankruptcy Clause's uniformity requirement does not prohibit Congress from distinguishing among classes of debtors, or from treating railroad bankruptcies as a distinctive problem. Nor does it deny Congress power to fashion legislation to resolve geographically isolated problems. However, RITA is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem. By its terms, RITA applies to only one regional bankrupt railroad; *only* Rock Island's creditors are affected by RITA's employee protection provisions and *only* Rock Island employees may take benefit of the arrangement. The language of the Bankruptcy Clause itself compels the conclusion that such a bankruptcy law is not within Congress' power to enact. Although meager, the debate in the Constitutional Convention regarding the Clause also supports the conclusion that the uniformity requirement prohibits Congress from enact-

ing bankruptcy laws that specifically apply to the affairs of only one named regional debtor. Pp. 468–473.

No. 80–415, vacated and remanded; No. 80–1239, 645 F. 2d 74, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 473.

John O'B. Clarke, Jr., argued the cause for appellant. With him on the briefs was *William G. Mahoney*.

Elinor H. Stillman argued the cause for the federal parties as appellees under this Court's Rule 10.4 in support of appellant. On the briefs were *Solicitor General Lee*, former *Solicitor General McCree, Richard A. Allen*, and *Henri F. Rush*.

Daniel R. Murray argued the cause for appellees. With him on the briefs were *Robert L. Stern, Milton L. Fisher, Harold L. Kaplan, Terry F. Moritz, Nicholas G. Manos, Albert E. Jenner, Jr.*, and *Barbara S. Steiner*.

JUSTICE REHNQUIST delivered the opinion for the Court.

In March 1975, the Chicago, Rock Island and Pacific Railroad Co. (Rock Island) petitioned the United States District Court for the Northern District of Illinois for reorganization under § 77 of the Bankruptcy Act of 1898, as added, 47 Stat. 1474, and amended, 11 U. S. C. § 205. Under the protection of § 77, the Rock Island continued to operate for approximately four and one-half years until it ceased all operations in September 1979 as a result of a labor strike that had depleted its cash reserves. Pursuant to 49 U. S. C. § 11125 (1976 ed., Supp. IV), the Interstate Commerce Commission (ICC) directed the Kansas City Terminal Railway Co. to provide rail service over the Rock Island lines. On January 25, 1980, the reorganization court concluded that reorganization was not possible. It then directed the Trustee of the Rock Island estate to prepare a plan for liquidation, and to continue planning for the cessation of rail operations upon the March 1980

expiration of the ICC's directed service order. App. 239a–240a. Since the entry of the January 25, 1980, order, the Trustee has been liquidating the assets of the Rock Island estate.

On March 4, 1980, various railroads and labor organizations representing Rock Island employees reached an agreement as to Rock Island employees hired by carriers acquiring the Rock Island's trackage. The agreement covered such matters as hiring preferences, monetary protection, and seniority, but it did not cover those Rock Island employees who are not employed by acquiring carriers.

On April 14, 1980, the Rock Island Trustee petitioned the reorganization court to confirm the Rock Island's abandonment of all rail lines and operations. The reorganization court referred the petition to the ICC for its recommendation. On May 23, the ICC concluded that the Rock Island's abandonment and dissolution as an operating railroad was necessary.

On June 2, the reorganization court ordered the total abandonment of the Rock Island system and the discontinuance of its service. The court found that to order the Rock Island to continue its operations indefinitely at a loss for the public's benefit would violate the "Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396 (1920)." *Id.*, at 270a. The reorganization court also concluded that "no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court" pursuant to § 17(a) of the Milwaukee Railroad Restructuring Act (MRRA), Pub. L. 96–101, 93 Stat. 744, 45 U. S. C. § 915(a) (1976 ed., Supp. IV).[1] App. 271a. The court reasoned that § 17(a) of the

[1] Section 17(a) of MRRA provides in relevant part: "In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49." 45 U. S. C. § 915(a) (1976 ed., Supp. IV).

MRRA does not apply to a total, systemwide abandonment of a railroad. App. 263a–264a.

Congress responded to the crisis resulting from this demise of the Rock Island by enacting the Rock Island Railroad Transition and Employee Assistance Act (RITA), Pub. L. 96–254, 94 Stat. 399, 45 U. S. C. § 1001 *et seq.* (1976 ed., Supp. IV). The President signed the Act into law on May 30, 1980, three days before the reorganization court's abandonment order. At issue in these cases are RITA's employee protections provisions. Sections 106[2] and 110[3] re-

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Title 49 U. S. C. § 11347 (1976 ed., Supp. IV) provides in relevant part: "[T]he Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected . . . as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. . . . The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission."

[2] Section 106, as originally enacted, provided in relevant part:

"(a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means

[*Footnote 3 appears on p. 462*]

quire the Rock Island Trustee to provide economic benefits of up to $75 million to those Rock Island employees who are not hired by other carriers.[4] 45 U. S. C. §§ 1005, 1008 (1976 ed.,

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no less protective of the interests of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U. S. C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

. . . . .

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the [Railroad Retirement] Board . . . .

"(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances *shall be treated as administrative expenses of the estate of the Rock Island Railroad.*" 94 Stat. 401–402 (emphasis added).

[3] Section 110, as originally enacted, provided in relevant part:

"(a) The Secretary . . . shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

"(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

"(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

"(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

"(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title." 94 Stat. 403.

[4] Those employees hired by other carriers are covered by the March 4, 1980, agreement. *Supra*, at 460.

Supp. IV). Benefits must be paid from the estate's assets. The employee benefit obligations must be considered administrative expenses of the Rock Island estate for purposes of determining the priority of the employees' claims to the assets of the estate upon liquidation.

On June 5, 1980, appellees filed a complaint in the reorganization court seeking to declare RITA unconstitutional and to enjoin its enforcement. On June 9, the reorganization court issued a preliminary injunction prohibiting the enforcement of §§ 106 and 110 of RITA. Although it suggested that RITA might have other constitutional infirmities, the court concluded that RITA's employee protection provisions constituted an uncompensated taking of private property for a public purpose in violation of the Just Compensation Clause of the Fifth Amendment. The court reasoned: "[T]he Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. What ever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. . . . But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept." App. 153a. Since it determined that the Rock Island is no longer subject to the obligations of an operating railroad, the court concluded that the Rock Island creditors' and bondholders' interests in the estate's remaining assets may not be taken to serve the public's interest in providing economic protection for displaced employees. *Id.*, at 154a. Appellant appealed to this Court pursuant to 28 U. S. C. § 1252 (No. 80–415).

Congress responded to the reorganization court's injunction by enacting § 701 of the Staggers Rail Act of 1980,

Pub. L. 96–448, 94 Stat. 1959. With certain modifications,[5] § 701 of the Staggers Act re-enacted RITA §§ 106 and 110. The Staggers Act also added § 124 to RITA, 45 U. S. C. § 1018 (1976 ed., Supp. IV), which sought to avoid any implication that it had deprived appellees of any Tucker Act remedy otherwise available for the Trustee and creditors to pursue their takings claim against the United States.[6] The Staggers Act was signed into law on October 14, 1980.

Six days previously, appellant and the United States had moved the reorganization court to vacate its June 9 injunction on the basis that the passage of the Staggers Act rendered the injunction moot. In addition, it was argued that no irreparable injury could be shown because the Staggers Act amendments provided that a remedy under the Tucker Act, 28 U. S. C. § 1346, would be available if the labor protection provisions were found to constitute a taking. On October 15, the reorganization court denied the motion to vacate and issued a new order enjoining implementation of the labor protection provisions of the "Rock Island Act, as amended and re-enacted by the Staggers Rail Act." App. to Juris. Statement in No. 80–1239, p. 6a. Pursuant to § 124(a)(1) of RITA, as added by the Staggers Act, 45 U. S. C. § 1018(a)(1) (1976 ed., Supp. IV),[7] appellant and the United States appealed this order to the Court of Appeals for

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[5] In §§ 106(a) and (b), the respective time limits were shortened to five days after the enactment of the Staggers Act. The judicial review provisions of § 106(d) were modified substantially. In § 110(e), Congress added the words "to employees" after "liability," apparently in reference to the Tucker Act remedy alluded to in new § 124(c).

[6] Section 124(c) provides that "[n]othing in this chapter or in the Milwaukee Railroad Restructuring Act shall limit the right of any person to commence an action in the United States Court of Claims under [the Tucker Act.]" 45 U. S. C. § 1018(c) (1976 ed., Supp. IV).

[7] Section 124(a)(1), 45 U. S. C. § 1018(a)(1) (1976 ed., Supp. IV), provides that "any decision of the bankruptcy court with respect to the constitutionality of any provision of this chapter . . . shall be taken to the United States Court of Appeals for the Seventh Circuit."

the Seventh Circuit. The Court of Appeals affirmed without opinion by an equally divided vote. *In re Chicago, R. I. & P. R. Co.*, 645 F. 2d 74 (1980) (en banc).

This Court noted probable jurisdiction in No. 80–1239 and postponed the question of jurisdiction in No. 80–415 until our hearing the case on the merits. 451 U. S. 936 (1981). We now dismiss the appeal in No. 80–415 as moot and order the District Court for the Northern District of Illinois to vacate its injunction of June 9, 1980.[8] We affirm in No. 80–1239 because we conclude that RITA, as amended by the Staggers Act, is repugnant to Art. I, § 8, cl. 4, of the Constitution, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." We therefore find it unnecessary to determine whether the employee protections provisions of RITA violate any other provision of the Constitution.[9]

Article I, § 8, cl. 4, of the United States Constitution provides that Congress shall have power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." It is necessary first to determine whether the labor protection provisions of amended RITA are an exercise of Congress' power under the Bankruptcy Clause, as contended by appellees, or under the Commerce Clause, as contended by appellant and the United States. Distinguishing a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause is admittedly not an easy task, for the two Clauses are closely related. As James Madison observed, "[t]he power of estab-

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[8] The injunction of June 9, 1980, was rendered moot by the enactment of the Staggers Act which re-enacted and amended the sections of RITA declared unconstitutional by the reorganization court.

[9] In addition to the Bankruptcy Clause and the Just Compensation Clause of the Fifth Amendment, appellees have challenged RITA pursuant to principles of separation of powers, the equal protection component of the Fifth Amendment, and the Due Process Clause of the Fifth Amendment. We find it unnecessary to reach any of these additional contentions.

lishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 285 (N. Y. Heritage Press 1945). See *Sturges* v. *Crowninshield*, 4 Wheat. 122, 195 (1819) (Marshall, C. J.) ("The bankrupt law is said to grow out of the exigencies of commerce").

Although we have noted that "[t]he subject of bankruptcies is incapable of final definition," we have previously defined "bankruptcy" as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 513–514 (1938). See *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 673 (1935). Congress' power under the Bankruptcy Clause "contemplate[s] an adjustment of a failing debtor's obligations." *Ibid.* This power "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors." *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 186 (1902). It "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do." *Id.*, at 188.

An examination of the employee protection provisions of RITA, we think, demonstrates that RITA is an exercise of Congress' power under the Bankruptcy Clause. Section 106 authorizes the ICC to impose upon the Rock Island estate "a fair and equitable" employee protection arrangement. After such an employee protection arrangement is imposed, "the bankruptcy court shall immediately authorize and direct the Rock Island trustee to . . . immediately implement such arrangement." Section 106(c), 45 U. S. C. § 1005(c) (1976 ed.,

Supp. IV). Section 106(e)(2) provides that employee protection benefits shall be paid from Rock Island's assets and employee claims shall be treated as administrative expenses of the Rock Island estate. 45 U. S. C. § 1005(e)(2) (1976 ed., Supp. IV). Section 108(a) provides that any employee who elects to receive benefits under § 106 "shall be deemed to waive any employee protection benefits otherwise available to such employee" under the Bankruptcy Act, subtitle IV of Title 49 of the United States Code, or any applicable contract or agreement. 45 U. S. C. § 1007(a) (1976 ed., Supp. IV). Claims for "otherwise available" benefits are not accorded priority as an administrative expense of the estate. § 1007(c). Under § 110, the United States guarantees the Rock Island's employee protections obligations. 45 U. S. C. § 1008(a) (1976 ed., Supp. IV). As with the employee protection obligation itself, the guaranty is treated as an administrative expense of the Rock Island estate. § 1008(b).

In sum, RITA imposes upon a bankrupt railroad the duty to pay large sums of money to its displaced employees, and then establishes a mechanism through which these "obligations" are to be satisfied. The Act provides that the claims of these employees are to be accorded priority over the claims of Rock Island's commercial creditors, bondholders, and shareholders. It follows that the subject matter of RITA is the relationship between a bankrupt railroad and its creditors. See *Wright* v. *Union Central Life Ins. Co.*, *supra*, at 513–514. The Act goes as far as to alter the relationship among the claimants to the Rock Island estate's remaining assets. In enacting RITA, Congress did nothing less than to prescribe the manner in which the property of the Rock Island estate is to be distributed among its creditors.

The events surrounding the passage of RITA, as well as its legislative history, indicate that Congress was exercising its powers under the Bankruptcy Clause. In RITA, Congress was responding to the crisis resulting from the demise of the

Rock Island as an operating entity. The Act was passed almost five years after the Rock Island had initiated reorganization proceedings under § 77 of the Bankruptcy Act, and approximately 10 months after a strike had rendered the Rock Island unable to pay its operating expenses. In addition to providing for the continuation of the Rock Island under a directed service order until its lines could be acquired by other carriers, Congress sought to provide displaced employees with economic protection. Congress wanted to make liquidation of a railroad costly for the estate. As the House Conference Report explains, "it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest." H. R. Conf. Rep. No. 96-1430, pp. 138–139 (1980). Moreover, Congress was attempting to eliminate the confusion that existed at the time as to whether the labor protection provisions of the Interstate Commerce Act, 49 U. S. C. § 11347 (1976 ed., Supp. IV), applied to railroads that were in liquidation proceedings and arguably had no remaining common carrier responsibilities. See 126 Cong. Rec. 4870 (1980) (remarks of Sen. Kassebaum). In RITA, Congress intended that a labor protection arrangement be included as a part of the liquidation of the Rock Island estate.

We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. *Hodel* v. *Indiana*, 452 U. S. 314, 332 (1981); *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 616 (1950) (distinguishing the Commerce Clause from Art. I, § 8, cl. 4). Thus, if we

were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws. It is therefore necessary for us to determine the nature of the uniformity required by the Bankruptcy Clause.

Pursuant to Art. I, § 8, cl. 4, of the Constitution, Congress has power to enact bankruptcy laws that are uniform throughout the United States. Prior to today, this Court has never invalidated a bankruptcy law for lack of uniformity. The uniformity requirement is not a straitjacket that forbids Congress from distinguishing among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Stellwagen* v. *Clum*, 245 U. S. 605, 613 (1918). Thus, uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions. *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 172 (1946) (Frankfurter, J., concurring). In *Hanover National Bank* v. *Moyses*, 186 U. S., at 189–190, this Court held that Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement. The uniformity requirement, moreover, permits Congress to treat "railroad bankruptcies as a distinctive and special problem" and "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Railroad Reorganization Act Cases*, 419 U. S. 102, 159 (1974) (*3R Act Cases*). In the *3R Act Cases*, we upheld Congress' response to the existing rail transportation crisis in the Northeast. Since no railroad reorganization proceeding was then pending outside of the region defined by

the Regional Railroad Reorganization Act of 1973 (3R Act), 87 Stat. 985, 45 U. S. C. § 701 *et seq.*, the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings.

But a quite different sort of "uniformity" question is presented in these cases. By its terms, RITA applies to only one regional bankrupt railroad.[10] *Only* Rock Island's creditors are affected by RITA's employee protection provisions and *only* employees of the Rock Island may take benefit of the arrangement. Unlike the situation in the *3R Act Cases*, there are other railroads that are currently in reorganization proceedings,[11] but these railroads are not affected by the employee protection provisions of RITA. The conclusion is thus inevitable that RITA is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad. The employee protection provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular

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[10] By contrast, the 3R Act applied to the reorganization proceedings of 8 major railroads and 15 lessors of leased lines of the Penn Central. *3R Act Cases*, 419 U. S., at 108–109, n. 3.

[11] At the time RITA was enacted, the New York, Susquehanna and Western Railroad was in the process of liquidation under § 77 of the Bankruptcy Act of 1898. *In re New York, S. & W. R. Co.*, 504 F. Supp. 851 (NJ 1980), aff'd, 673 F. 2d 1301 (CA3 1981). Another bankrupt railroad is undergoing liquidation proceedings under the Bankruptcy Act of 1978, 11 U. S. C. §§ 1161–1174 (1976 ed., Supp. IV). *In re Auto-Train Corp.*, 11 B. R. 418 (Bkrtcy. DC 1981). The Milwaukee Road is in an income-based reorganization. That railroad is subject to its own employee protection requirements under §§ 5 and 9 of the MRRA, 45 U. S. C. §§ 904, 908 (1976 ed., Supp. IV). As with the case of §§ 106 and 108 of RITA, these sections of the MRRA apply only to one railroad. We have no occasion in this case to consider the constitutionality of these provisions of the MRRA. Nevertheless, it is no argument that RITA is uniform because another statute imposes similar obligations upon another railroad, as the United States appears to contend. The issue is not whether Congress has discriminated against the Rock Island estate, but whether RITA's employee protection provisions are uniform bankruptcy laws. The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts.

problem of one bankrupt railroad. Albeit on a rather grand scale, RITA is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money.[12]

The language of the Bankrupcty Clause itself compels us to hold that such a bankruptcy law is not within the power of Congress to enact. A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor. *In re Sink*, 27 F. 2d 361, 362 (WD Va. 1928), appeal dism'd per stipulation, 30 F. 2d 1019 (CA4 1929). As the legislative history to the Staggers Act indicates, *supra*, at 468, Congress might deem it sound policy to impose labor protection obligations in all bankruptcy proceedings involving major railroads. By its specific terms, however, RITA applies to only one regional bankrupt railroad, and cannot be said to apply uniformly even to major railroads in bankruptcy proceedings throughout the United States. The employee protection provisions of RITA therefore cannot be said to "apply equally to all creditors and all debtors." *3R Act Cases*, *supra*, at 160.

Although the debate in the Constitutional Convention regarding the Bankruptcy Clause was meager, we think it lends some support to our conclusion that the uniformity requirement of the Clause prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one named debtor.

The subject of bankruptcy was first introduced on August 29, 1787, by Charles Pinckney during discussion of the Full Faith and Credit Clause. Pinckney proposed the following grant of authority to Congress: "To establish uniform laws upon the subject of bankruptcies, and respecting the dam-

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[12] By its very terms, RITA applies only to the Rock Island. 45 U. S. C. §§ 1001, 1005, 1007–1008 (1976 ed., Supp. IV). Thus, we have no occasion to review a bankruptcy law which defines by identifying characteristics a particular class of debtors. Cf. *3R Act Cases*, *supra*, at 156–160.

ages arising on the protest of foreign bills of exchange." 2 M. Farrand, Records of the Federal Convention of 1787, p. 447 (1911). Two days later, John Rutledge recommended that the following be added to Congress' powers: "To establish uniform laws on the subject of bankruptcies." *Id.*, at 483. The Bankruptcy Clause was adopted on September 3, 1787, with only Roger Sherman of Connecticut voting against. *Id.*, at 489.[13]

Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am. J. Legal Hist. 215, 221–223 (1957). Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. See *Millar* v. *Hall*, 1 Dall. 229 (Pa. 1788); *James* v. *Allen*, 1 Dall. 188 (Pa. Ct. Common Pleas 1786). Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States. See Nadelmann, *supra*, at 224–227. Similarly, the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws. See H. Black, Constitutional Prohibitions 6 (1887) (States had discriminated against British creditors). The States' practice of enacting private bills had rendered uniformity impossible.[14]

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[13] "Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England—& He did not chuse to grant a power by which that might be done here." 2 M. Farrand, Records of the Federal Convention of 1787, p. 489 (1911).

[14] The Framers' intent to achieve uniformity among the Nation's bankruptcy laws is also reflected in the Contract Clause. Apart from and independently of the Supremacy Clause, the Contract Clause prohibits the

Our holding today does not impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly. We have upheld bankruptcy laws that apply to a particular industry in a particular region. See *3R Act Cases*, 419 U. S. 102 (1974). The uniformity requirement, however, prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors. A bankruptcy law, such as RITA, confined as it is to the affairs of one named debtor can hardly be considered uniform. To hold otherwise would allow Congress to repeal the uniformity requirement from Art. I, §8, cl. 4, of the Constitution.

Since that result may be accomplished only by the process prescribed in that document for its amendment, the judgment of the Court of Appeals in No. 80–1239 is affirmed, and the judgment of the District Court in No. 80–415 is vacated with instructions to dismiss the complaint as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that the Rock Island Railroad Transition and Employee Assistance Act (RITA) violates the uniformity requirement of the Bankruptcy Clause. I write separately, however, because the Court accords a broader scope to that requirement than the Clause's language, its history, and the Court's cases justify. In particular, I am concerned that the Court's rationale may unduly restrict Congress' power to legislate with respect to the distinctive needs of a

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States from enacting debtor relief laws which discharge the debtor from his obligations, *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197–199 (1819), unless the law operates prospectively. *Ogden* v. *Saunders*, 12 Wheat. 213 (1827).

particular railroad or its employees. I conclude that the Clause permits such legislation if Congress finds that the application of the law to a single debtor (or limited class of debtors) serves a national interest apart from the economic interests of that debtor or class, and if the identified national interest justifies Congress' failure to apply the law to other debtors. However, because RITA does not satisfy this more stringent test, I agree that RITA is unconstitutional.

The Court argues that the uniformity requirement forbids Congress to enact any bankruptcy law affecting a single debtor. But I do not believe that uniformity invariably requires that a bankruptcy law apply to a multiplicity of debtors. The term "uniform" does not necessarily imply either that the law must avoid specifying the debtors to which it applies or that the law must affect more than a single debtor. As we have noted in different contexts, a named individual may constitute a "legitimate class of one." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 472 (1977) (rejecting claim that statute applying, and referring by name, only to a single former President is a bill of attainder). Cf. *Morey* v. *Doud*, 354 U. S. 457 (1957) (invalidating a statute expressly exempting the American Express Co. by name), overruled in *New Orleans* v. *Dukes*, 427 U. S. 297 (1976) (*per curiam*).

In reviewing the scanty history of the Clause, the Court notes that one principal purpose was to avoid conflict between state laws concerning debtor insolvency. That concern, of course, is satisfied simply by uniform interstate application of federal bankruptcy laws under the Supremacy Clause. Another purpose, according to the Court, may have been to prevent the passage of private Acts to relieve individual debtors. However, the references to private Acts contained in the debates may have been intended only as examples of the first problem, in that other States failed to give credit to such Acts. To the extent that the Framers were concerned about the passage of private Acts, the question re-

mains whether they intended to prohibit all such Acts, and thus to disable Congress from enacting legislation applying to a specified debtor but promoting more general national policies than the simple economic interests of the debtor.

Our cases do not support the Court's view that any bankruptcy law applying to a single named debtor is unconstitutional. In the most relevant case, *Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974) (*3R Act Cases*), this Court held that the Regional Rail Reorganization Act did not violate the Uniformity Clause even though it applied only to eight railroads in a specified geographic region. The Court squarely rejected the argument that the geographic nonuniformity of the Rail Act violated the Bankruptcy Clause. "The argument has a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision." *Id.*, at 158. Reviewing earlier cases, the Court emphasized Congress' power to recognize geographic differences and "to fashion legislation to resolve geographically isolated problems." *Id.*, at 159. The Court also noted that no other railroad was in reorganization during the time that the Act applied. The Court concluded that the Act satisfies the uniformity requirement because it is "designed to solve 'the evil to be remedied.'" *Id.*, at 161, quoting *Head Money Cases*, 112 U. S. 580, 595 (1884).

The Court's analysis in this case, too, "has a certain surface appeal." If a law applies to one debtor, it is invalid; if it applies to more than one debtor, it is valid if it satisfies the *3R Act Cases* test, *i.e.*, if it was designed to solve an identified evil. But there is nothing magical about a law that specifies only one object. I discern no principled ground for refusing to apply the same test without regard to the number of businesses regulated by the law.[1]

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[1] The Court implies that a law which is general in its terms but in operation applies only to a single debtor might satisfy the uniformity requirement. Again, such a formalistic requirement is not a principled reason for striking down congressional legislation.

I would apply the *3R Act Cases* test in every instance. Congress may specify what debtors, or (which is often the same thing) what portion of the country, will be subject to bankruptcy legislation. The constraint of uniformity, however, requires Congress to legislate uniformly with respect to an identified "evil." In the Regional Rail Reorganization Act, Congress imposed certain requirements on all railroads in reorganization; all were deemed to present the same "evil." If Congress has legislated pursuant to its bankruptcy power, furthering federal bankruptcy policies, and if the specificity of the legislation is defensible in terms of those policies, then, but only then, has Congress satisfied the uniformity requirement. Where, as here, the law subjects one named debtor to special treatment, I would require especially clear findings to justify the narrowness of the law.

Although the question is close, I conclude that Congress did not justify the specificity of RITA in terms of national policy. Rather, the legislative history indicates an attempt simply to protect employees of a single railroad from the consequences of bankruptcy. No explanation for the specificity of the law is given that would justify such narrow application. In its statutory findings, Congress stated that "uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions," and that a cessation of services would seriously affect certain state economies and the shipping public. 45 U. S. C. § 1001 (1976 ed., Supp. IV). The findings explicitly refer, however, only to the Rock Island Railroad. To be sure, in the legislative history Congress did recite more general purposes. Congressional Reports advert to the need for labor protection in "bankruptcy proceedings involving major rail carriers," H. R. Conf. Rep. No. 96–1430, p. 139 (1980), and the need "to avoid disruption of rail service and undue displacement of employees." H. R. Conf. Rep. No. 96–1041, p. 26 (1980). See S. Rep. No. 96–614, p. 5 (1980). But recitation of a general purpose does not justify narrow application to a

single debtor where, as here, that purpose does not explain the nonuniform treatment of other comparable railroads that are now, or may be, in reorganization. See *ante*, at 470, n. 11. With respect to such railroads, reorganization will result in the same displacement of employees and disruption of service—the same "evil"—that Congress purported to address in RITA. Because Congress' findings fail to demonstrate that the narrowness of RITA is addressed to a particular kind of problem, the law does not satisfy the uniformity requirement.

I agree with the Court that "[t]he employee protection provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad." *Ante*, at 470–471. I do not agree that Congress may not legislate with respect to a single debtor, even if only that debtor presents "a particular type of problem." If, for example, Consolidated Rail Corp. were to fail, I cannot believe that Congress would be prohibited from enacting legislation addressed to the peculiar problems created by the bankruptcy of one of the Nation's principal freight carriers.[2]

For the foregoing reasons, I concur in the result reached by the Court.

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[2] It is indeed ironic that under the Court's approach, bankruptcy legislation respecting Conrail might be invalid. Conrail was created by the 3R Act, which reorganized eight bankrupt railroads into a single viable system operated by a private, for profit corporation. It is difficult to understand why legislation affecting the eight railroads passed constitutional muster in the *3R Act Cases*, 419 U. S., at 156–161, yet legislation affecting their successor might not.

MURPHY, DISTRICT JUDGE, FOURTH JUDICIAL DISTRICT OF NEBRASKA, DOUGLAS COUNTY *v.* HUNT

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-2165. Argued January 18, 1982—Decided March 2, 1982

Appellee was charged with first-degree sexual offenses under Nebraska law. His pretrial requests for bail were denied by state courts pursuant to a provision of the Nebraska Constitution prohibiting bail in cases of first-degree sexual offenses "where the proof is evident or the presumption is great" (which appellee conceded). Pending trial, appellee filed suit in Federal District Court under 42 U. S. C. § 1983, seeking declaratory and injunctive relief on the ground that the Nebraska constitutional provision violated his federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. On October 17, 1980, the District Court dismissed appellee's civil rights complaint. In the meantime, however, appellee had been convicted of two of the three charges against him in state-court prosecutions, and on November 13, 1980, he was convicted of the remaining charge. Appellee appealed these convictions to the Nebraska Supreme Court, and the appeals are pending before that court. On May 13, 1981, the Court of Appeals reversed, holding that the exclusion of violent sexual offenses from bail before trial violates the Excessive Bail Clause of the Eighth Amendment.

Held: Appellee's constitutional claim became moot following his state-court convictions. A favorable decision on his claim to *pretrial* bail would not have entitled him to bail once he was convicted. And he did not pray for damages or seek to represent a class of pretrial detainees in his federal-court action. Nor does this case fall within the "capable of repetition, yet evading review" exception to the general rule of mootness when the issues are no longer "live" or the parties lack a legally cognizable interest in the outcome of the case. Application of this exception depends upon a "reasonable expectation" or "demonstrated probability" that the same controversy will recur involving the same complaining party. There is no reasonable expectation that all of appellee's convictions will be overturned on appeal and that he will again be in the position to seek pretrial bail.

648 F. 2d 1148, vacated and remanded.

Terry R. Schaaf, Assistant Attorney General of Nebraska, argued the cause for appellant. With him on the brief was *Paul L. Douglas*, Attorney General.

Bennett G. Hornstein argued the cause and filed a brief for appellee.*

PER CURIAM.

Appellee Hunt was charged with first-degree sexual assault on a child and three counts of first-degree forcible sexual assault. He appeared on these charges in Omaha Municipal Court where his request for bail was denied.[1] On May 23, 1980, a bail review hearing was held in Douglas County District Court. Relying on Art. I, § 9, of the Nebraska Constitution, Judge Murphy, appellant here, denied Hunt's second application for bail.[2] That section of the Nebraska Constitution provides in relevant part: "All persons shall be bailable . . . except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption

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*Briefs of *amici curiae* urging reversal were filed by *James P. Manak*, *G. Joseph Bertain, Jr.*, *Lloyd F. Dunn*, *George Nicholson*, *Robert L. Toms*, *Donald E. Santarelli*, *Jack Yelverton*, *George Deukmejian*, Attorney General of California, and *Richard S. Gebelein*, Attorney General of Delaware, for Laws at Work (L.A.W.) et al.; and by *Daniel J. Popeo* and *Paul D. Kamenar* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Irvin B. Nathan* and *David P. Towey* for the American Civil Liberties Union; by *David Crump* for the Legal Foundation of America; by *Sheldon Portman* for the National Legal Aid and Defender Association et al.; and by *Quin Denvir* and *David R. Lipson* for the Public Defender of California.

[1] Appellee was also charged with several counts of nonsexual felonies and one count of nonforcible sexual assault. Bail was set as to each of these charges.

[2] The court relied as well upon a decision of the Supreme Court of Nebraska holding that Art. I, § 9, of the Nebraska Constitution violates neither the Sixth, Eighth, nor Fourteenth Amendment to the United States Constitution. See *Parker* v. *Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979).

great." For purposes of his application for bail, Hunt's counsel stipulated that, in this case, "the proof [was] evident and the presumption [was] great."

On June 9, 1980, pending trial on the charges against him, Hunt filed a complaint under 42 U. S. C. § 1983 in the United States District Court for the District of Nebraska. He claimed that Art. I, § 9, of the State Constitution, limiting bail in cases of first-degree sexual offenses, violated his federal constitutional rights to be free from excessive bail and cruel and unusual punishment, to due process and equal protection of the laws, and to the effective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments. He sought declaratory and injunctive relief only. On October 17, 1980, the District Court dismissed Hunt's civil rights complaint. Hunt appealed to the Court of Appeals for the Eighth Circuit.

Meanwhile, the prosecutions against Hunt had proceeded. On September 10, 1980—even prior to the District Court decision—and November 5, 1980, he was found guilty of two of the three first-degree forcible sexual assault charges against him. On November 13, 1980, he was sentenced to consecutive terms of 8–15 years in prison for these offenses.[3] On October 8, 1980, again prior to the decision of the District Court, Hunt was convicted of first-degree sexual assault on a child. On December 11, 1980, he was sentenced to 12–15 years in prison on this charge. Hunt appealed each of these convictions to the Nebraska Supreme Court and each of these appeals remains pending before that court.

On May 13, 1981, the Court of Appeals for the Eighth Circuit decided Hunt's appeal from the dismissal of his § 1983 claim. *Hunt* v. *Roth*, 648 F. 2d 1148 (1981). The court reversed the District Court and held that the exclusion of violent sexual offenses from bail before trial violates the Excessive Bail Clause of the Eighth Amendment of the United

[3] The remaining first-degree sexual assault charge against him was dismissed on December 11, 1980.

States Constitution.[4] Because we find that Hunt's constitutional claim to pretrial bail became moot following his convictions in state court, we now vacate the judgment of the Court of Appeals.

In general a case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 396 (1980), quoting *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969). It would seem clear that under this general rule Hunt's claim to *pretrial* bail was moot once he was convicted.[5] The question was no longer live because even a favorable decision on it

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[4] "The constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree. . . .

"We hold, therefore, that the portion of Article I, section 9 of the Nebraska Constitution denying bail to persons charged with certain sexual offenses violates the eighth amendment of the United States Constitution, as incorporated in the fourteenth amendment." 648 F. 2d, at 1164–1165.

[5] Hunt made no claim of a constitutional right to bail pending appeal. Indeed, at the time he initiated this action he had not yet been convicted. The decision of the Court of Appeals held the Nebraska constitutional provision unconstitutional only as applied to "persons '*charged* with certain . . . offenses.'" See n. 4, *supra* (emphasis added). Hunt's arguments before this Court are similarly limited to the constitutional rights of a person accused, but not convicted, of a noncapital offense.

The constitutionality of Art. I, § 9, as applied to a person awaiting trial is a question distinct from the constitutionality of that section as applied to a person who has been tried and convicted. The Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment may well apply differently in the two situations. As the Court has often noted: "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). Therefore, even assuming that Hunt had raised a claim for bail pending appeal, it would be that claim that the Court should decide—not the related but quite distinct claim for bail by a presumptively innocent person waiting trial. For the same reasons it cannot be said as a

would not have entitled Hunt to bail. For the same reason, Hunt no longer had a legally cognizable interest in the result in this case. He had not prayed for damages nor had he sought to represent a class of pretrial detainees.

We have recognized an exception to the general rule in cases that are "capable of repetition, yet evading review." In *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) (*per curiam*), we said that "in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." See *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 187 (1979); *Sosna* v. *Iowa*, 419 U. S. 393 (1975). Because the Nebraska Supreme Court might overturn each of Hunt's three convictions, and because Hunt might then once again demand bail before trial, the Court of Appeals held that the matter fell within this class of cases "capable of repetition, yet evading review."[6] We reach a different conclusion.

The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*. If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *Weinstein* v. *Bradford*, *supra*, at 149. We detect no such level of probability in this case.

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matter of federal law that a decision holding that Hunt was unconstitutionally denied bail prior to trial will have any consequences with respect to his right to bail pending appeal and after conviction.

In short, the fact that Hunt may have a live claim for bail *pending appeal*, does not save from dismissal his now moot claim to *pretrial* bail.

[6] Judge Arnold dissented from this conclusion for the same reasons advanced in this opinion.

All we know from the record is that Hunt has been convicted on three separate offenses and that his counsel was willing to stipulate that, for the purposes of Hunt's eligibility for bail, the proof of guilt was evident and the presumption great. Based on these two facts, we cannot say that there exists a "reasonable expectation" or "demonstrated probability" that Hunt will ever again be in this position. There is no reason to expect that all three of Hunt's convictions will be overturned on appeal.[7] Hunt's willingness to stipulate that the proof against him was "evident" does not encourage us to believe otherwise.

Nor is *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), relied upon by the Court of Appeals, to the contrary. In that case we held that the constitutionality of a pretrial restrictive order, entered prior to a criminal trial and that expired once the jury was impaneled, was not moot even though the order had long since expired. The Court found that the controversy between the parties was "capable of repetition" because the defendant's conviction might be overturned on appeal, requiring a new trial and possibly a new restrictive order, *and* because the dispute between the Nebraska Press Association and the State of Nebraska as to the use of restrictive orders was likely to recur in future criminal trials. It was the combination of these elements, both of which were capable of repetition, that permitted the Court to conclude that the matter was not moot under the standard stated in *Weinstein*.[8]

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[7] "What the likelihood of such a triple reversal might be, we have no way of knowing, since this record contains no hint of the facts relevant to Hunt's guilt or innocence. The possibility of three reversals is wholly speculative. They could come about, but one may be pardoned, I hope, for doubting it." 648 F. 2d, at 1166 (Arnold, J., dissenting).

[8] The Court in *Nebraska Press Assn.* cited our decision in *Weinstein* for support of its conclusion that the matter was not moot. The Court in no way purported to weaken the standard of a "reasonable expectation" or "demonstrated probability" stated in *Weinstein*. See also *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 585, n. 13 (BRENNAN, J., concurring in judg-

There is no comparable set of expectations in this case. We have no reason to believe that Hunt will once again be in a position to demand bail before trial.

Accordingly, we find that the case presented is now moot. Indeed, it was moot at the time of the decisions of both the District Court and the Court of Appeals. The judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals with instructions that the complaint be dismissed.

So ordered.

JUSTICE WHITE, dissenting.

Article I, § 9, of the Nebraska Constitution states that aside from individuals charged with treason, murder, or forcible rape where the proof is evident or the presumption great, "[a]ll persons shall be bailable." The section is not limited to persons awaiting trial. Moreover, the Nebraska statute concerning appeals to the State Supreme Court provides that "[n]othing herein shall prevent any person from giving supersedeas bond in the district court . . . nor affect the right of a defendant in a criminal case to be admitted to bail pending the review of such case in the Supreme Court." Neb. Rev. Stat. § 25–1912 (1979).[1] Thus, the provision in the Nebraska Constitution which allowed Judge Murphy to

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ment) ("It is evident that the decision of the Nebraska Supreme Court will subject petitioners to future restrictive orders with respect to pretrial publicity . . .").

[1] The "same criteria would remain applicable" to bail pending appeal as bail pending trial; there is no "separate section of our law" for the former. Tr. of Oral Arg. 21. See Neb. Rev. Stat. § 29–901 (1979). Thus, "if bail is to be denied Mr. Hunt . . . it must be done pursuant to this constitutional provision." Tr. of Oral Arg. 22.

In addition, the Nebraska Supreme Court has held that Nebraska courts have the inherent power to consider the propriety of bail even without a specific authorizing statute. *State* v. *Jensen*, 203 Neb. 441, 279 N.W. 2d 120 (1979).

deny appellee Hunt bail pending trial also serves to deny Hunt bail pending appeal of his conviction. Both parties agree that this is so.[2]

The Court does not dispute that Art. I, § 9, of the Nebraska Constitution applies to applications for bail pending appeal. Instead the Court considers this factor irrelevant because Hunt has not requested bail pending appeal and because the Court of Appeals held the Nebraska constitutional provision unconstitutional only as applied to *pretrial* detainees. *Ante*, at 481–482, n. 5.

I am not persuaded that the issue can be so lightly dismissed. The claim is plainly presented in this Court that the challenged provision effectively bars bail during Hunt's appeal to the Nebraska Supreme Court. If § 9 were declared unconstitutional here, Hunt could seek bail pending review of

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[2] Probable jurisdiction having been noted, and the parties being in agreement that the case was not moot, the issue was not briefed. At oral argument, however, both Mr. Schaaf, the assistant state Attorney General and Mr. Hornstein, representing Hunt, directly stated that Art. I, § 9, applied to applications for bail pending appeal.

"Question: [A]fter conviction in a criminal case, is anyone entitled to bail while his case is on appeal?

"Mr. Schaaf: Yes . . . .

"Question: . . . I suppose that this statute would prevent bail while the case is pending on appeal.

"Mr. Schaaf: Yes . . . .

"Question: So why is it moot until it is decided?

"Mr. Schaaf: We suggest that it is not [moot]." Tr. of Oral Arg. 19.

"Question: Wouldn't this constitutional amendment be a basis for denying bail pending appeal?

"Mr. Hornstein: I agree with that. Certainly.

"Question: However the factors might sort out under the other statute, this would be independently a reason for denying bail?

"Mr. Hornstein: I think it mandates a denial of bail.

"Question: [A]nd as long as the case is pending, this case isn't moot, is it?

"Mr. Hornstein: No, our position is that it is not moot. I mean, I think both sides agree that it is not moot." *Id.*, at 40.

his convictions by that court. The fact that he has not yet filed such a request in the state courts cannot be taken as a waiver of the right to request release. Because Hunt was denied bail pre-trial under § 9, a request for bail after conviction would have been a useless formality. The provision forbids releasing on bail an individual charged with forcible rape where the proof of guilt is evident or the presumption great. Since Judge Murphy found that standard satisfied before Hunt's conviction, appellant could reasonably conclude that further application under current Nebraska law would be futile.

Because § 9 is an independent barrier denying Hunt the ability to obtain bail pending appeal, the question is not whether his *pretrial* detention is "capable of repetition, yet evading review." We therefore need not ask whether there is a reasonable expectation that Hunt would again be denied bail *prior* to trial.[3] The unavailability of an opportunity for bail pending appeal may constitute a sufficiently live issue to maintain Hunt's interest in the outcome of this litigation.

The Court's analysis must therefore rest on the limitation of the Court of Appeals decision to pretrial detainees.

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[3] I am not convinced, however, that the Court is correct in finding that this case does not satisfy the conditions for the "capable of repetition, yet evading review" exception. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), suggests that the two bases for finding the events capable of repetition were independent. ("The controversy between the parties to this case is 'capable of repetition' in two senses." *Id.*, at 546.) Moreover, there is language in *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), which suggests that pretrial claims of this type are inherently within the exception when represented by a public defender:

"Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case."

This language, which the Court silently disavows by the result it has reached, may be read to suggest that the formalities of class certification are unnecessary because of the presence of the public defender, who, in effect, represents a continuing class of individuals subject to pretrial detention.

Even accepting this reading of the Court of Appeals' opinion, the Court's point appears to be no more than a restatement of the related observation that Hunt did not, in fact could not at the time this suit was filed, assert a claim to bail pending appeal. The Court of Appeals reasonably ruled no more broadly than required. Nevetheless, the consequences of the court's decision ruling the Nebraska provision unconstitutional extend to Hunt's rights to seek bail pending appeal. If the Eighth Amendment is applied to the States and does create an implied right to bail, then the State may not be able to categorically deny bail pending appeal in the manner Nebraska has chosen. If conversely, there is no right to pretrial bail, *a fortiori*, Hunt would not be able to obtain release under present circumstances.[4]

Because the Court of Appeals found Hunt's denial of pretrial bail not moot under *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), it had no cause to consider other reasons why the case remained alive. When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness. *Vitek* v. *Jones*, 436 U. S. 407 (1978); *Scott* v. *Kentucky Parole Board*, 429 U. S.

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[4] The Court misinterprets the significance of this point. Contrary to the Court's account, *ante*, at 481–482, n. 5, it is not that the Court should now decide whether the provision is unconstitutional with respect to persons requesting bail after conviction. Rather, the point is that deciding whether Hunt was unconstitutionally denied bail prior to trial will have important consequences with respect to Hunt's right to bail pending appeal—a collateral consequence giving Hunt a continuing stake in the resolution of this case. There is nothing novel in this approach. See, *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 51 (1968) ("mere release of a prisoner does not mechanically foreclose consideration of the merits [of his conviction] by this Court"); *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108–109, n. 3 (1977) ("possibility of a criminal defendant's suffering 'collateral legal consequences' from a sentence already served permits him to have his claims reviewed here on the merits"); *Powell* v. *McCormack*, 395 U. S. 486 (1969) (remaining claim for back salary justified determining whether Powell was properly excluded from membership in the House of Representatives despite the fact that he had already been seated).

60 (1976); *Indiana Employment Security Div.* v. *Burney*, 409 U. S. 540 (1973). A remand is particularly in order where, as here, the mootness issue has not been briefed and both parties agree that the case is not moot.

While couched in terms of justiciability, the effect of the Court's decision is to vacate the judgment of the Court of Appeals. The restrictions on bail struck down as unconstitutional by the Eighth Circuit are given new life; consequently, any attempt by Hunt to obtain release pending appeal of his convictions will be denied pursuant to the Nebraska Constitution. Because of Hunt's undeniable interest in securing his liberty, his interests remain adverse with those of the appellant, and an Art. III case or controversy may well exist. I would prefer that the Court of Appeals be allowed to explore the mootness issue further. I therefore dissent.

Reporter's Note

Orders commencing with February 22, 1982, begin with page 930. The preceding orders in 455 U. S., from January 15 through February 19, 1982, were reported in Part 1, at 901–930. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

FEBRUARY 9, 1982

Dismissal Under Rule 53

No. 81-625. MISSOURI *v.* MCGEE [and other cases under this Court's Rule 19.4]. Sup. Ct. Mo. Certiorari dismissed as to Bobby Joe McGee under this Court's Rule 53. Reported below: 619 S. W. 2d 70.

FEBRUARY 18, 1982

Dismissal Under Rule 53

No. 81-924. J. P. STEVENS EMPLOYEES EDUCATION COMMITTEE ET AL. *v.* DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 669 F. 2d 171.

FEBRUARY 19, 1982

Appeal Dismissed

No. ———. HALDEMAN, TRUSTEE OF LEHIGH VALLEY RAILROAD CO. *v.* UNITED STATES RAILWAY ASSN. ET AL. Appeal from Sp. Ct. R. R. R. A. dismissed without prejudice, it appearing that the appeal would not be in the interest of an expeditious conclusion to the proceedings.

FEBRUARY 22, 1982

Appeals Dismissed

No. 81-1028. WILLIAMS *v.* WILLIAMS. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. Reported below: 121 N. H. 728, 433 A. 2d 1316.

No. 81-1048. RAZATOS *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 636 P. 2d 666.

No. 81-1104. S. H. GOSS, INC., ET AL. *v.* PENNSYLVANIA DEPARTMENT OF AGRICULTURE. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 58 Pa. Commw. 516, 428 A. 2d 731.

No. 81-1164. HEIN *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., San Diego County, dismissed for want of substantial federal question.

No. 81-5943. BIXBY *v.* ROSS. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of substantial federal question.

No. 81-6012. CEPULONIS *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 427 N. E. 2d 17.

No. 81-1041. STAN MUSIAL & BIGGIES, INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of jurisdiction. Reported below: 402 So. 2d 1330.

No. 81-1183. SOUTHERN STATE COLLEGE ET AL. *v.* ARKANSAS GAZETTE CO. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 273 Ark. 248, 620 S. W. 2d 258.

No. 81-5967. ROBINSON, BY HIS MOTHER AND NEXT FRIEND, ROBINSON *v.* ARMAND ET AL. Appeal from D. C. N. D. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 81-723. HYBUD EQUIPMENT CORP. ET AL. *v.* CITY OF AKRON, OHIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Community Communications Co.* v. *Boulder, ante,* p. 40. Reported below: 654 F. 2d 1187.

No. 81-843. NORTHWEST EXCAVATING, INC. *v.* WAGGONER ET AL., TRUSTEES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kaiser Steel Corp.* v. *Mullins, ante,* p. 72. Reported below: 642 F. 2d 333.

Miscellaneous Orders

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. Report of the Special Master on the Equitable Apportionment of the Vermejo River is received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such Exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 449 U. S. 1007.]

No. 85, Orig. TEXAS *v.* OKLAHOMA. Report of the Special Master on motion for entry of judgment is received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 30 days. Reply briefs, if any, to such Exceptions may be filed within 15 days. [For earlier order herein, see, *e. g.*, 452 U. S. 957.]

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] Motion of respondent Trans World Airlines, Inc., for leave to file a supplemental brief after argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 80–644. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. [Certiorari granted, 451 U. S. 905.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 80–1002. BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY HER PARENTS, ROWLEY ET UX. C. A. 2d Cir. [Certiorari granted, 454 U. S. 961.] Motion of respondents to permit interpretation of oral argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–1012. RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL.;

No. 80–1030. BOHEMIAN DISTRIBUTING CO. *v.* NORMAN WILLIAMS CO. ET AL.; and

No. 80–1052. WINE & SPIRITS WHOLESALERS OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist. [Certiorari granted, 454 U. S. 1080.] Motion of petitioners Bohemian Distributing Co. and Wine & Spirits Wholesalers of California for divided argument granted. Motion of petitioner Baxter Rice for divided argument granted.

No. 80–1305. ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. QUIROS, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 80–1952. BLUM, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* YARETSKY ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 815.] Motion of National Citizens' Coalition for Nursing Home Reform for leave to file a brief as *amicus curiae* granted.

No. 80–2070. SUMITOMO SHOJI AMERICA, INC. *v.* AVAGLIANO ET AL.; and

No. 81–24. AVAGLIANO ET AL. *v.* SUMITOMO SHOJI AMERICA, INC. C. A. 2d Cir. [Certiorari granted, 454 U. S. 962.] Motion of Ministry of International Trade and Industry of the Government of Japan for leave to file a brief as *amicus curiae* granted.

No. 80–2116. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. [For order limiting grant of certiorari, see 454 U. S. 1096.] Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument *pro hac vice* granted.

No. 80-2162. RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO. Ct. App. N. M. [Probable jurisdiction noted, 454 U. S. 1079.] Motions of Navajo Tribe of Indians; Association on American Indian Affairs, Inc.; and Pueblo of Santa Ana for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81-9. WASHINGTON ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 454 U. S. 890.] Motion of NAACP Legal Defense and Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 81-55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motion of Covenant House for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81-150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81-546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. D. C. Minn. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of the Solicitor General for divided argument granted. Request for additional time for oral argument denied.

No. 81-202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1030.] Motion of petitioners to reconsider order denying motion for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 81–298. COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA *v.* GOTTFRIED ET AL.; and

No. 81–799. FEDERAL COMMUNICATIONS COMMISSION *v.* GOTTFRIED ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 1141.] Motion of the Solicitor General to consolidate these cases for briefing and oral argument granted.

No. 81–389. UNION LABOR LIFE INSURANCE CO. *v.* PIRENO; and

No. 81–390. NEW YORK STATE CHIROPRACTIC ASSN. *v.* PIRENO. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1052.] Motion of petitioners for divided argument denied.

No. 81–406. MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN. C. A. 5th Cir. [Certiorari granted, 454 U. S. 962.] Motion of National Women's Law Center et al. for leave to file a brief as *amici curiae* granted.

No. 81–431. GUARDIANS ASSN. ET AL. *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1140.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–554. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* WYOMING ET AL. D. C. Wyo. [Probable jurisdiction noted, 454 U. S. 1140.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–451. HATHORN ET AL. *v.* LOVORN ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1122.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–613. SPORHASE ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL. Sup. Ct. Neb. [Probable jurisdiction noted, 454 U. S. 1079.] Motion of appellants and City of El Paso for divided argument to permit City of El Paso to present oral argument as *amicus curiae* denied.

No. 81–460. MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, 454 U. S. 962.] Motions of American Civil Liberties Union; NAACP Legal Defense and Educational Fund, Inc., et al.; and National Alliance Against Racist and Political Repression for leave to file briefs as *amici curiae* granted. Motion of respondents to dismiss the writ of certiorari as improvidently granted denied.

No. 81–535. UNITED STATES DEPARTMENT OF STATE ET AL. *v.* WASHINGTON POST CO. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 1030.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied.

No. 81–837. CITY OF INDIANOLA, MISSISSIPPI, ET AL. *v.* DOTSON ET AL. D. C. N. D. Miss.;

No. 81–839. SKLAR ET AL. *v.* SHORES, EXECUTOR. C. A. 5th Cir.;

No. 81–982. FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL) *v.* BANCO NACIONAL DE CUBA. C. A. 2d Cir.;

No. 81–984. FIRST NATIONAL CITY BANK *v.* BANCO PARA EL COMERCIO EXTERIOR DE CUBA. C. A. 2d Cir.; and

No. 81–1097. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 81–920. VERLINDEN B. V. *v.* CENTRAL BANK OF NIGERIA. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1140.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 81–969. WASHINGTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted.

No. 81–5976. IN RE BALLA. Petition for writ of habeas corpus denied.

No. 81-5321. ENMUND *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 454 U. S. 939.] Motion of George R. Georgieff to permit Lawrence A. Kaden, Esquire, to present oral argument *pro hac vice* granted. Motion of William C. McLain to permit James S. Liebman, Esquire, to present oral argument *pro hac vice* granted.

No. 81-5900. IN RE TALLEY. Petition for writ of mandamus denied.

No. 81-1105. IN RE HOEHN. Petition for writ of mandamus and/or other relief denied.

No. 81-1119. IN RE ELLIS ET AL. Petition for writ of prohibition and/or other relief denied.

Certiorari Granted

No. 81-897. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* PERINI NORTH RIVER ASSOCIATES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 652 F. 2d 255.

No. 81-1055. POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* DUNCAN ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 657 F. 2d 691.

No. 81-1064. CITY OF LOS ANGELES *v.* LYONS. C. A. 9th Cir. Certiorari granted. Reported below: 656 F. 2d 417.

No. 81-1203. MOSES H. CONE MEMORIAL HOSPITAL *v.* MERCURY CONSTRUCTION CORP. C. A. 4th Cir. Certiorari granted. Reported below: 656 F. 2d 933 and 664 F. 2d 936.

No. 81-927. CONNECTICUT *v.* JOHNSON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: —— Conn. ——, 440 A. 2d 858.

Certiorari Denied. (See also Nos. 81-1183 and 81-5967, *supra.*)

No. 80-2079. RENO, STATE ATTORNEY OF DADE COUNTY, FLORIDA, ET AL. *v.* CONCERNED DEMOCRATS OF FLORIDA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 629.

No. 81-286. COEN ET AL. *v.* HARRISON COUNTY SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 24.

No. 81-291. ILLINOIS *v.* BOCHNIAK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 575, 417 N. E. 2d 722.

No. 81-433. COOPERS & LYBRAND *v.* SHARP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 175.

No. 81-586. DIAMOND M CO. *v.* RAINES ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 396 So. 2d 306.

No. 81-664. STODDARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-729. LADMER *v.* UNITED STATES; and
No. 81-730. DILAPI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 140.

No. 81-742. SUGGS *v.* ALABAMA; and
No. 81-761. SUGGS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: No. 81-742, 403 So. 2d 309; No. 81-761, 403 So. 2d 303.

No. 81-748. THOREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1332.

No. 81-763. KATZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 1184.

No. 81-756. BANK OF MIAMI ET AL. *v.* MEASON ET AL.; and BANK OF MIAMI, FORMERLY KNOWN AS NORTHSIDE BANK, ET AL. *v.* MEASON. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 542 (first case); 654 F. 2d 722 (second case).

No. 81-788. GERARD ET AL. *v.* LOUISIANA. 24th Jud. Dist. Ct. La., Jefferson Parish. Certiorari denied.

No. 81-815. SHAMY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 2d 951.

No. 81-841. E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 650 F. 2d 463.

No. 81-846. TAVELMAN *v.* UNITED STATES; and
No. 81-944. JOB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1133.

No. 81-859. RUCINSKI ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 658 F. 2d 741.

No. 81-863. J. R. SIMPLOT CO. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U. S. DEPARTMENT OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1134.

No. 81-867. YOUNG, MAYOR OF DETROIT, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 617.

No. 81-881. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY CO. *v.* LEER. Sup. Ct. Minn. Certiorari denied. Reported below: 308 N. W. 2d 305.

No. 81-890. RAPIDES PARISH SCHOOL BOARD ET AL. *v.* VALLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 925 and 653 F. 2d 941.

No. 81-892. GOINS ET AL. *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 62.

No. 81-895. SEREGOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 655 F. 2d 33.

No. 81-901. WEIGAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 948.

No. 81-902. 400 E. BALTIMORE STREET, INC., ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 147, 431 A. 2d 682.

No. 81-911. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 777.

No. 81-915. PERMANENT LABEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 512.

No. 81-925. MAINE CATERERS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 654 F. 2d 131.

No. 81-932. OSTRER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 910.

No. 81-939. RAMSEY ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 171.

No. 81-949. BLACKIE'S HOUSE OF BEEF, INC. *v.* CASTILLO, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 327, 659 F. 2d 1211.

No. 81-963. FRIENDLY RETIREMENT CENTER, INC. *v.* COLLING, SUCCESSOR TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81-979. TABCOR SALES CLEARING, INC., ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81-981. DEMA ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81-985. MORRONE *v.* UNITED STATES; and TURCHI *v.* UNITED STATES; and

No. 81-5874. KESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81-999. HAWG-N-ACTION, INC. *v.* TRUSTEES OF THE TEAMSTERS CONSTRUCTION WORKERS LOCAL NO. 13 HEALTH & WELFARE TRUST FUND FOR COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 651 F. 2d 1384.

No. 81-1016. AKERS *v.* UNITED STATES; and

No. 81-1017. KENDALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 199.

No. 81-1021. ZINSER ET AL. *v.* PALMBY ET AL.; and

No. 81-1036. CLEVELAND *v.* PALMBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 754.

No. 81-1023. LOCAL 359, UNITED SEAFOOD WORKERS, SMOKED FISH & CANNERY UNION *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81-1026. RUPPERT *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 81-1037. ISRAEL & RALEY *v.* FUTURONICS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 655 F. 2d 463.

No. 81-1040. JACOB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 49.

No. 81-1042. CLEMENTS ET AL. *v.* LOGAN. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 1007.

No. 81-1045. FENNER ET UX. *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 647.

No. 81-1051. WEAVER *v.* BOWERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 1356.

No. 81-1054. BP OIL, INC., ET AL. *v.* BANKERS TRUST CO. ET AL.;

No. 81-1065. VILLANEUVA COMPANIA NAVIERA, S.A. *v.* BANKERS TRUST CO. ET AL.; and

No. 81-1082. BANKERS TRUST CO. ET AL. *v.* VILLANEUVA COMPANIA NAVIERA, S.A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 651 F. 2d 160.

No. 81-1058. MORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81-1059. WEINSTEIN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 1369.

No. 81-1061. GANLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 733.

No. 81-1070. WOOD, DBA NATIONAL PHOTO SERVICES *v.* MCEWEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 797.

No. 81-1073. MOYER *v.* ELDER-BEERMAN STORES CORP. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1072.

No. 81-1074. MIDWEST GROWERS COOPERATIVE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1141.

No. 81-1075. SHERROD *v.* MEYERS ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 81-1079. NORTHEASTERN TELEPHONE CO. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 76.

No. 81-1080. BLOCH *v.* VETERAN CORPS OF ARTILLERY, STATE OF NEW YORK, CONSTITUTING THE MILITARY SOCIETY OF THE WAR OF 1812. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 829, 427 N. E. 2d 1193.

No. 81-1085. SANGIACOMO ET AL. *v.* ZIGAS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 120 Cal. App. 3d 827, 174 Cal. Rptr. 806.

No. 81-1088. EMI LTD. *v.* BENNETT ET AL.; and
No. 81-1177. CAPITOL INDUSTRIES-EMI, INC. *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 81-1092. WILLIAMS ET AL. *v.* GENERAL MOTORS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 656 F. 2d 120.

No. 81-1093. GOMEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 632 P. 2d 586.

No. 81-1096. EUBANK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81-1100. MERSKI *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 121 N. H. 901, 437 A. 2d 710.

No. 81-1107. HERZOG ET UX. *v.* ENDECO, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 661 F. 2d 1184.

No. 81-1111. JOHNS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 2d 325, 423 N. E. 2d 863.

No. 81-1112. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari before judgment denied.

No. 81-1121. ST. MARTIN *v.* HEGEWALD ET UX. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 783, 626 P. 2d 535.

No. 81-1122. FARMER *v.* STRICKLAND, SHERIFF OF PIERCE COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 427.

No. 81-1124. GREAT AMERICAN SCREEN, AKA BE-DOWN HOME DESIGNS, ET AL. *v.* MUSIDOR, B.V., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 60.

No. 81-1128. J. RAY MCDERMOTT & CO., INC. *v.* SIGNAL OIL & GAS CO. ET AL.; and

No. 81-1150. SUN OIL CO. ET AL. *v.* SIGNAL OIL & GAS CO. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 1164.

No. 81-1129. MITCHELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 95 Ill. App. 3d 779, 420 N. E. 2d 415.

No. 81-1130. COMAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1204, 420 N. E. 2d 1210.

No. 81-1136. MESSENGER ET UX. *v.* BUCYRUS-ERIE CO. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 903.

No. 81-1137. ALIOTO'S FISH CO., LTD., ET AL. *v.* HUMAN RIGHTS COMMISSION OF SAN FRANCISCO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 120 Cal. App. 3d 594, 174 Cal. Rptr. 763.

No. 81-1138. CONNECTICUT *v.* SMITH. Super. Ct. Conn., New Haven County. Certiorari denied.

No. 81-1140. EAST COAST TENDER SERVICE, INC. *v.* DUTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 933.

No. 81-1145. COOPER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 222, 422 N. E. 2d 885.

No. 81-1146. RICHARDSON, ADMINISTRATOR *v.* CITY OF INDIANAPOLIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 494.

No. 81-1148. BUTLER ET AL. *v.* UNITED STATES; and
No. 81-1237. ANGELILLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 23.

No. 81-1149. SLIGER ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 316, 282 S. E. 2d 291.

No. 81-1151. STEWART *v.* KUTNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1107.

No. 81-1153. TOOKES *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 159 Ga. App. 423, 283 S. E. 2d 642.

No. 81-1155. BADGETT *v.* ERSPAN. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 550 and 659 F. 2d 26.

No. 81-1156. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 256, 659 F. 2d 1140.

No. 81-1159. BASZNER *v.* UNITED STATES; and
No. 81-1353. CAGGIANO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 184.

No. 81-1158. McDANIEL ET AL. *v.* HELMS. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 800.

No. 81-1160. STROUP *v.* TUCKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1077.

No. 81-1162. CROWN PAINT CO. *v.* BANKSTON. Sup. Ct. Okla. Certiorari denied. Reported below: 640 P. 2d 948.

No. 81-1163. McCUTCHEON *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-1166. JACQUES SYL KNITWEAR, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 904.

No. 81-1167. ENSERCH EXPLORATION, INC., ET AL. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 614 S. W. 2d 215.

No. 81-1171. NELLIE-JEANNE CORP. *v.* CITY OF COLUMBUS, DIVISION OF RECREATION AND PARKS, ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 81-1173. CERTAIN-TEED PIPING MATERIALS, INC. *v.* HYDROAIRE, INC. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1085.

No. 81-1174. ORTIZ FUNERAL HOME CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 136.

No. 81-1176. HOAGLAND ET AL. *v.* LUMBERMENS MUTUAL CASUALTY CO. C. A. 10th Cir. Certiorari denied.

No. 81-1178. YUNKER *v.* KENTUCKY. Cir. Ct. Daviess, Ky. Certiorari denied.

No. 81-1179. DENMAN *v.* BULGER, PRESIDENT OF THE MASSACHUSETTS SENATE, ET AL. C. A. 1st Cir. Certiorari denied.

No. 81-1182. PETERSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 656 F. 2d 703.

No. 81-1187. MIDDLEBURY ASSOCIATES *v.* PIKE INDUSTRIES, INC., ET AL. Sup. Ct. Vt. Certiorari denied. Reported below: 140 Vt. 67, 436 A. 2d 725.

No. 81-1188. MONROE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 35, 429 N. E. 2d 97.

No. 81-1189. BLACKWELL *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 664 F. 2d 1049.

No. 81-1190. ZAN-CAR ENTERPRISES, INC., ET AL. *v.* HOME STATE SAVINGS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 935.

No. 81-1193. SPEIGHT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 159 Ga. App. 5, 282 S. E. 2d 651.

No. 81-1194. KAGARISE ET AL. *v.* CUMBERLAND, MARYLAND, AREA TEAMSTERS PENSION FUND. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 19.

No. 81-1201. DAVIDSON *v.* ROADWAY EXPRESS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 650 F. 2d 902.

No. 81-1202. WATERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 494.

No. 81-1204. MATTHEWS BROS., INC. *v.* PIERCE, GUARDIAN AD LITEM, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-1206. CHILDERS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 104, 418 N. E. 2d 959.

No. 81-1211. PURRAZZO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 95 Ill. App. 3d 886, 420 N. E. 2d 461.

No. 81-1212. SESSUMS ET AL. *v.* LOUISIANA POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 579.

No. 81-1215. SCHNAPPER ET AL. *v.* FOLEY, DIRECTOR, ADMINISTRATIVE OFFICE OF THE U. S. COURTS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 667 F. 2d 102.

No. 81-1217. NORTH RIVER INSURANCE CO. ET AL. *v.* FED SEA/FED PAC LINE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 985.

No. 81-1218. CUCCHIARA *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 28.

No. 81-1221. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 968.

No. 81-1224. BOLLOW *v.* FEDERAL RESERVE BANK OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1093.

No. 81-1226. HEPKE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 100.

No. 81-1230. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 736.

No. 81-1234. LANGFORD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 622 S. W. 2d 916.

No. 81-1235. MCINTOSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 80.

No. 81-1243. FIRST NATIONAL BANK OF ALABAMA-HUNTSVILLE, FORMERLY HENDERSON NATIONAL BANK *v.* HAILE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 816.

No. 81-1245. MARCHESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81-1246. BENSLIMANE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81-1261. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-1265. EDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1376.

No. 81-1269. AVEDISIAN *v.* HUBBARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 906.

No. 81-1285. FARACE *v.* NEW YORK; and
No. 81-1292. GRANATO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 643, 440 N. Y. S. 2d 557.

No. 81-1289. SUTHERLAND *v.* UNITED STATES; and
No. 81-1337. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1181.

No. 81-1293. GOLDSTEIN, SECRETARY, NEW MEXICO HEALTH AND ENVIRONMENT DEPARTMENT *v.* NUNEZ ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-1305. MAGUIRE *v.* UNITED STATES; and
No. 81-6092. HALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-1322. PALAMONE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1301.

No. 81-1334. HENRIQUE *v.* UNITED STATES MARSHAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1317.

No. 81-1366. DOWNING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81-1368. MCNEELY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 496.

No. 81-1378. MINTON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 277.

No. 81-1395. OUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1306.

No. 81-1396. SCULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 27.

No. 81-5079. MCMICHAEL *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1060.

No. 81-5573. GAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042.

No. 81-5633. BARRETT *v.* BUREAU OF CUSTOMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 1087.

No. 81-5638. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 435 A. 2d 1066.

No. 81-5655. WARREN *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 137, 659 F. 2d 183.

No. 81-5679. JIMENEZ *v.* MONTEZ ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-5703. FLEMING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81-5704. HALL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 635 P. 2d 618.

No. 81-5718. STINSON *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 911.

No. 81-5733. WASHINGTON *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 650 F. 2d 447.

No. 81-5738. ARCHIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 2d 1253.

No. 81-5740. KRALL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 81-5757. DONALDSON *v.* DALSHEIM, SUPERINTENDENT, OSSINING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 899.

No. 81-5767. BONNETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 663 F. 2d 495.

No. 81-5810. WILSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 755.

No. 81-5812. ANDERSON *v.* BAIRD. C. A. 6th Cir. Certiorari denied.

No. 81-5830. CORDLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81-5831. LEUSCHNER *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 81-5838. CLARK *v.* MUNICIPAL EMPLOYEES CREDIT UNION OF BALTIMORE, INC. Ct. App. Md. Certiorari denied.

No. 81-5845. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1055, 423 N. E. 2d 1206.

No. 81-5847. JONES ET AL. *v.* CONSOLIDATED EDISON COMPANY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 603, 426 N. E. 2d 755.

No. 81-5861. JONES *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 177 N. J. Super. 560, 427 A. 2d 123.

No. 81-5863. ROSA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1010, 418 N. E. 2d 124.

No. 81-5864. STANLEY *v.* CITY OF PORTLAND. Ct. App. Ore. Certiorari denied. Reported below: 53 Ore. App. 254, 631 P. 2d 826.

No. 81-5868. KINNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81-5870. SERE *v.* WELSH. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 501.

No. 81-5877. JOHNSON *v.* JOHNSON. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1040.

No. 81-5883. HERNANDEZ *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-5884. CARTER *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 2d 68.

No. 81-5885. GONZALEZ *v.* HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-5886. FRAZIER *v.* S/S DELTA MAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1073.

No. 81-5888. MADISON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 81-5892. HALE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 96 Ill. App. 3d 187, 420 N. E. 2d 1100.

No. 81-5893. EHL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 166.

No. 81-5895. GARCIA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 81-5896. COOPER *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 281.

No. 81-5898. VARGAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 1050.

No. 81-5901. OWENS *v.* ZIMMERMAN. C. A. 3d Cir. Certiorari denied.

No. 81-5902. VASQUEZ *v.* NEW YORK. Sup. Ct. N. Y., Bronx County. Certiorari denied.

No. 81-5903. REESE *v.* BYRNE ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-5904. MITCHELL *v.* BOLTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 655 F. 2d 234.

No. 81-5905. LOWE *v.* NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 81-5906. TOUGHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 733.

No. 81–5910. EICHER *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 81–5914. GETCH *v.* HAMMOCK, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 900.

No. 81–5917. TALAMANTEZ *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 122 Cal. App. 3d 629, 176 Cal. Rptr. 800.

No. 81–5920. SIMMONS *v.* WINSBERG ET AL. Sup. Ct. La. Certiorari denied. Reported below: 407 So. 2d 726.

No. 81–5921. RUSSELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5922. SPANN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 670, 422 N. E. 2d 1051.

No. 81–5924. ALEXANDER *v.* TEXAS. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied.

No. 81–5925. MACK *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1027.

No. 81–5926. BORNES *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 409 So. 2d 649.

No. 81–5927. CLAY *v.* TEXAS ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 81–5928. BLECHMAN *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 899.

No. 81–5929. FLENNER *v.* PONTIFEX ET AL. Sup. Ct. Va. Certiorari denied.

No. 81-5930. WHITELAW *v.* MWP LIMITED PARTNERSHIP. Ct. App. D. C. Certiorari denied.

No. 81-5931. BOSCH *v.* SPALDING. C. A. 9th Cir. Certiorari denied.

No. 81-5934. UNITED STATES EX REL. TOLBERT *v.* FRANZEN. C. A. 7th Cir. Certiorari denied.

No. 81-5936. LEE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 894, 417 N. E. 2d 1090.

No. 81-5938. VITE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 103 Wis. 2d 699, 316 N. W. 2d 832.

No. 81-5939. ALDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81-5941. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-5942. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 1087.

No. 81-5946. BRUCE *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 776.

No. 81-5951. JOHNSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81-5953. ANTONELLI *v.* DRUG ENFORCEMENT ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 920.

No. 81-5954. ANTWINE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81-5955. DIXON *v.* MACDOUGALL. Sup. Ct. Ariz. Certiorari denied.

No. 81-5956. WILLOUGHBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81-5958. ENGLEMAN *v.* ENGLEMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 2d 799.

No. 81-5959. JACKSON *v.* ALABAMA DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 689.

No. 81-5963. RUMPH *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 1130.

No. 81-5964. RUCKER *v.* BAKEWELL ET AL. C. A. 8th Cir. Certiorari denied.

No. 81-5965. REED *v.* PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81-5966. MCMILLION *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 81-5969. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81-5972. HOPKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 874.

No. 81-5973. COLLINS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81-5974. HOUSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 724.

No. 81-5975. KLEINSCHMIDT *v.* SUN BANK OF MIAMI, PERSONAL REPRESENTATIVE OF THE ESTATE OF KLEINSCHMIDT. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 403 So. 2d 493.

No. 81-5977. MACARTHUR *v.* PHILIPPINE AIR LINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1079.

No. 81-5978. CREASY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81-5981. WOLFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-5982. FONTANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1301.

No. 81-5983. MCDONALD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY. Sup. Ct. Tenn. Certiorari denied.

No. 81-5985. PARDUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1073.

No. 81-5987. SUTTERER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81-5991. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81-5992. DIAZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 967, 430 N. E. 2d 914.

No. 81-5993. GREEN *v.* DIRECTOR OF INSTITUTIONS, NORTH DAKOTA STATE PRISONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 2d 55.

No. 81-5994. COOPER *v.* SOWDERS, WARDEN, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81-5995. BALLET *v.* PENCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81-5997. KOPS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 104 Wis. 2d 749, 318 N. W. 2d 401.

No. 81-5998. SMITH *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-5999. CARLSEN *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 638 P. 2d 512.

No. 81-6000. RHODES *v.* UNITED STATES NAVY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1073.

No. 81-6001. OWENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81-6003. SIMMONS *v.* HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6004. MCQUADE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 938.

No. 81-6005. RELIFORD *v.* CITY OF KANSAS CITY, MISSOURI, PARKS AND RECREATION DEPARTMENT. C. A. 8th Cir. Certiorari denied.

No. 81-6007. PISCANIO *v.* BEANS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6008. THAYER *v.* PUERTO RICO. C. A. 1st Cir. Certiorari denied.

No. 81-6009. WALKER *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied.

No. 81-6010. SIMONS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 741.

No. 81-6011. SANDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81-6022. TURNER *v.* GILLESPIE ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6023. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1300.

No. 81-6024. HERRERA *v.* WHITE, WOODBURY COUNTY SHERIFF. Sup. Ct. Iowa. Certiorari denied.

No. 81-6026. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1080.

No. 81-6029. UPSHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 495 Pa. 620, 435 A. 2d 178.

No. 81-6033. OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 547.

No. 81-6034. WINLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 560.

No. 81-6035. PISANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81-6049. ZIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1304.

No. 81-6050. FLEMING *v.* UNITED STATES; and
No. 81-6109. RAGINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 440.

No. 81-6051. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81-6059. POSEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 37.

No. 81-6064. CASTRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81-6076. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81-6084. ODOM *v.* UNITED STATES; and
No. 81-6116. WOLF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 81-6084, 667 F. 2d 1032; No. 81-6116, 667 F. 2d 1033.

No. 81-6085. PERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 286.

No. 81-6086. ELLIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 874.

No. 81-6098. MURPHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-6104. HAMLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81-6113. GIBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81-6115. HORTON, AKA BYNUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81-6121. BOWLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1052.

No. 81-6128. SHORT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 672 F. 2d 897.

No. 81-6129. HANER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 80–2112. LONG ET AL. *v.* BONNES ET AL.; and

No. 80–2153. KENLEY, COMMISSIONER, DEPARTMENT OF HEALTH OF VIRGINIA, ET AL. *v.* YOUNG. C. A. 4th Cir. Certiorari denied. Reported below: No. 80–2112, 651 F. 2d 214; No. 80–2153, 641 F. 2d 192.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

By enacting the Civil Rights Attorney's Fees Awards Act of 1976 (Act), Congress created a statutory basis for courts, in the exercise of their sound discretion, to award attorney's fees to private litigants who prevail in litigation under various civil rights laws. The Courts of Appeals responsible for interpreting the Act have differed as to the correct construction of more than one of its provisions. Because the two cases from the Court of Appeals for the Fourth Circuit which the Court today declines to review present examples of this difference on the important issue of how to determine when a party "prevails" within the meaning of the Act, I dissent from the denial of certiorari.

The Act, codified as the last sentence of 42 U. S. C. § 1988, provides for the discretionary award of attorney's fees to the "prevailing party" in a lawsuit brought under one or more of eight specified statutes.[1] The Senate Report accompanying the Act, S. Rep. No. 94–1011 (1976), provides that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights

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[1] The relevant portion of 42 U. S. C. § 1988 provides:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U. S. C. § 1681 *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U. S. C. § 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Act."[2] *Id.*, at 4. Two principal cases from this Court deal with the question of when a party shall recover attorney's fees under the Civil Rights Act of 1964. *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U. S. 400 (1968), held that "one who succeeds in obtaining an injunction under . . . Title [II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*, at 402. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), held that a defendant who successfully defended a charge of employment discrimination under Title VII could recover attorney's fees where the District Court found that the plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, at 421.

In each of these cases, this Court found it unnecessary to decide any question respecting the definition of "prevailing party," because in each case the suit had gone to judgment in favor of the party seeking attorney's fees. Nor has this Court had occasion to define "prevailing party" as used in the Act. As more and more litigation has ensued in which claims for attorney's fees are made under the Act, however, more troublesome questions as to when a party has "prevailed" have confronted the Courts of Appeals.

The Court of Appeals for the Fourth Circuit, in one of the judgments which the Court today declines to review, has established a test for determining when a party "prevails" within the meaning of § 1988. That test requires the trial court to determine

> "'the precise legal/factual condition that the fee claimant has sought to change or affect so as to gain a benefit or

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[2] Section 706(k) of Title II of the Civil Rights Act of 1964 provides in full: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 42 U. S. C. § 2000e–5(k).

be relieved of a burden. With this condition taken as a benchmark, inquiry may turn to whether as a quite practical matter the outcome . . . is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.'" 651 F. 2d 214, 217 (CA4 1981), quoting *Bonnes* v. *Long*, 599 F. 2d 1316, 1319 (CA4 1979).

This test, which focuses only on the factual question of whether the lawsuit *caused* a change favorable to the plaintiff, apparently is well established in the Fourth Circuit, for it was followed by the Court of Appeals in another case denied review today, *Young* v. *Kenley*, 641 F. 2d 192 (CA4 1981). The effect of the *Bonnes* test is best demonstrated by the facts of *Young*.

Willie E. Young, a black woman, was hired in 1973 as a public health nurse by the Virginia State Department of Health. Because Young had graduated from a school that was not accredited by the National League of Nursing, she was assigned a category "A" position, the lowest salary level for public health nurses in Virginia. Although she was promoted to level "B" after complaining to the State's Equal Opportunity Coordinator, she was denied further promotion for lack of an accredited degree.

In February 1977, the Health Department eliminated the regulation which barred Young from further promotion, and on June 23, 1978, the Deputy State Health Commissioner invited Young to apply for advancement. Two days later, the change in policy notwithstanding, Young filed a complaint in federal court alleging that the State's promotion policy violated 42 U. S. C. § 1981 and § 1983. Although the complaint was dismissed for failure to obtain a right-to-sue letter from the Equal Employment Opportunity Commission (to which she had complained about the State's policy in 1976), and although she qualified for promotion in September 1978 by taking and passing the State's merit examination, Young filed an

amended complaint in October 1978. A hearing was held on November 2, 1978, and the parties reached a settlement two weeks later. The settlement granted Young a promotion to public health nurse level "C" retroactive to March 1977 with $992 in backpay, and upgraded her current position from level "B" to level "C" so that she would not have to relocate within the State.

The United States District Court for the Eastern District of Virginia twice denied Young's request for § 1988 attorney's fees, once after the settlement and once after a remand from the Court of Appeals. The District Court found that her "suit was wholly ineffective to remove [the regulatory] bar to promotion since the bar had been removed by a voluntary, unrelated act of the defendant well before [Young's] suit was instituted." *Young* v. *Kenley*, 485 F. Supp. 365, 368 (1980). The District Court also found that the objectives of the Act would not be furthered by the award of attorney's fees in this case: "While actions by 'private attorneys general' are to be rewarded under the attorney's fees provision, it could not be intended that a party be encouraged to file a suit where litigation would be superfluous. A benefit which can be obtained by an informal request need not be the subject of a formal demand." *Id.*, at 370.

Applying the standard set forth in *Bonnes*, the Court of Appeals for the Fourth Circuit reversed the denial of attorney's fees. In a brief *per curiam* the court stated:

> "The district court properly noted that a plaintiff whose case ends in settlement may be considered a 'prevailing party' under the civil rights attorney's fees provisions. In making its determination whether the plaintiff was in fact the 'prevailing party,' the court applied the test set forth in *Nadeau* v. *Helgemoe*, 581 F. 2d 275 (1st Cir., 1978). After the district court rendered its opinion, this court issued its decision in *Bonnes* [v. *Long*, 599 F. 2d 1316 (1979)]. *Bonnes* establishes the test to be applied in this circuit for the consideration whether a

party to a case which ends in settlement is a 'prevailing party' within the meaning of 42 U. S. C. §§ 1988 and 2000e–5(k).

"Accordingly, the order of the district court is vacated and the case remanded for further proceedings consistent with this opinion." *Young* v. *Henley*, 614 F. 2d 373, 374 (1979).

It would thus seem that the Court of Appeals for the Fourth Circuit implicitly recognized that its so-called *Bonnes* test conflicted with that followed by the Court of Appeals for the First Circuit in *Nadeau* v. *Helgemoe*, 581 F. 2d 275 (1978). The District Court on remand certainly treated the Court of Appeals' brief *per curiam* as having this effect: "[I]t is apparent from the language of the unreported per curiam memorandum vacating and remanding this case, that a *Nadeau* analysis is inappropriate in this Circuit. A *Bonnes* analysis is required." 485 F. Supp., at 366.

The District Court, attempting to follow the "*Bonnes* analysis," again declined to award attorney's fees. Upon a second appeal, the Fourth Circuit reversed outright the denial of attorney's fees. It found that Young had obtained discernible benefits which she did not have before the suit was initiated: backpay and reclassification of her position to level "C." 641 F. 2d, at 195. That the receipt of these benefits was "caused" by the suit was evident to the Court of Appeals from the fact of settlement: "[S]ettlement in the midst of trial demonstrates [that] the lawsuit and the benefits obtained are causally related." *Ibid.* Thus, by filing a lawsuit to change a regulation which had already been changed, to obtain a promotion for which she had already qualified at the invitation of the State, and to receive other benefits which the District Court found were available upon informal request, Young became entitled to attorney's fees as a prevailing party under the standard adopted by the Court of Appeals for the Fourth Circuit.

A different approach to § 1988, and one which demonstrates the divergence of views among the Courts of Appeals, is that set forth by the Court of Appeals for the First Circuit in *Nadeau* v. *Helgemoe*, *supra*. Like the *Bonnes* test, the *Nadeau* test requires that the lawsuit result in some discernible benefit to the plaintiff. Unlike the *Bonnes* test, the *Nadeau* test also requires that the benefit have some basis in law:

> "Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." 581 F. 2d, at 281.

Under this second requirement of the *Nadeau* test, it is doubtful that Young would have prevailed in her request for attorney's fees. Because the law already entitled her to every benefit she was seeking by litigation, it cannot be said that the benefits received in settlement were legally caused by her lawsuit.[3]

In my view, the standard adopted by the Court of Appeals for the First Circuit in *Nadeau* more closely approaches the

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[3] The *Nadeau* test does not require a finding that the plaintiff would have prevailed on the merits, nor does it require the trial court to hold the very trial which the settlement was intended to avoid. As the Court of Appeals explained, at the time of settlement the trial court in most cases will have had "sufficient exposure to the facts and law . . . to determine, whether if the plaintiffs had continued to press their claims . . . , their action could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' If the court reaches that conclusion, we think it should deny plaintiffs' attorney's fees on those issues regardless of the impact of their suit on defendants' willingness to improve the conditions of . . . the plaintiff class." 581 F. 2d, at 281 (citation omitted), quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978).

intent of Congress in amending § 1988 than does the *Bonnes* standard of the Court of Appeals for the Fourth Circuit. When it passed the Act, Congress was aware that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens," H. R. Rep. No. 94–1558, p. 1 (1976), and that "a vast majority of the victims of civil rights violations cannot afford legal counsel [and] are unable to present their cases to the courts." *Ibid.* Accordingly, the Act was passed to encourage the "vigorous enforcement of modern civil rights legislation," S. Rep. No. 94–1011, p. 4 (1976), by "'private attorney[s] general' advancing the rights of the public at large, and not merely some narrow parochial interest." 122 Cong. Rec. 35122 (1976) (remarks of Rep. Drinan, sponsor).

It is clear beyond peradventure that unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have "enforced" the civil rights laws or to have promoted their policies for the benefit of the public at large. The *Bonnes* standard, at least as applied in *Kenley* v. *Young*, seems largely to disregard this central purpose of § 1988, awarding attorney's fees even if the discernible benefit was conferred gratuitously by the defendant or was undertaken simply to avoid further litigation expenses. I would grant certiorari in one or both of these cases to resolve the conflict among the Circuits and to establish a standard consistent with the purposes of the Act.

No. 81–189. ISRAEL ET AL. *v.* MCMORRIS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 643 F. 2d 458.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

Before September 1, 1981, polygraph evidence was admissible in a criminal trial in Wisconsin if the prosecutor and the defendant stipulated in writing both to the administration of

the test itself and to the subsequent admission into evidence of the test results. Notwithstanding the stipulation, the trial court, in its discretion, could refuse to admit the test results into evidence if it determined that the examiner was not qualified or if the test was not conducted under proper conditions. The opposing party was provided with the opportunity to cross-examine the examiner. Finally, the trial judge was required to instruct the jury that the test tends only to indicate whether at the time of the test the defendant was telling the truth and that the test results may not be used to prove or disprove any element of the crime. See *State* v. *Stanislawski*, 62 Wis. 2d 730, 742–743, 216 N.W. 2d 8, 14 (1976).[1]

Because the Wisconsin procedure permitted the prosecutor to refuse, "without articulating his reasons," a defendant's offer to stipulate to the admission of polygraph evidence, the Court of Appeals for the Seventh Circuit held that respondent's due process rights may have been violated. It directed that a writ of habeas corpus issue unless the "prosecutor had valid reasons for refusing to enter into the stipulation offered by the defendant." 643 F. 2d 458, 466 (1981). According to the Court of Appeals, "the prosecutor's refusal to enter into a stipulation must be for justifiable reasons. Justifiable reasons in this context are reasons which go to the reliability of the test or to the integrity of the trial process, not reasons which consider merely the relative tactical advantages from the use of the evidence to the prosecution and the defense." *Id.*, at 464. In order for a court to review the prosecutor's refusal to stipulate to the admission of otherwise inadmissible evidence, the Court of Appeals reasoned that the prosecutor must articulate his reasons.[2]

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[1] The Wisconsin Supreme Court has recently overruled *Stanislawski*, holding it error to admit polygraph evidence in a criminal proceeding unless the stipulation was executed prior to September 1, 1981. *State* v. *Dean*, 103 Wis. 2d 228, 279, 307 N.W. 2d 628, 653 (1981).

[2] The Court of Appeals apparently based its conclusion on *Washington* v. *Texas*, 388 U. S. 14 (1967), and *Chambers* v. *Mississippi*, 410 U. S. 284 (1973).

In my view, this Court should grant the petition for certiorari in this case. Although the case involves a state rule of evidence, the Court of Appeals' decision did not rest on the trial court's exclusion of evidence necessary for the defendant to mount a defense, but on the *prosecutor's* refusal to stipulate to the admission of otherwise inadmissible evidence. In this case, the Court of Appeals has found federal constitutional issues lurking, not in a state court's refusal to admit exculpatory evidence proffered by the defendant, but in the prosecutor's reasons for refusing to stipulate to the admission of otherwise inadmissible evidence. In a given case, this Court's decisions may require that exculpatory evidence be admitted into evidence despite state evidentiary rules to the contrary, but these cases do not suggest any limitation upon the reasons that may permissibly motivate the prosecutor's objection to the admission of inadmissible evidence.

Because the Wisconsin polygraph rule was based on principles of consent and waiver,[3] I do not see how the Court of Appeals' reasoning would not apply to *any* objection by a prosecutor to the introduction of otherwise inadmissible evidence. Though the Court of Appeals attempted to limit its decision to cases involving the polygraph, it seems to me that its reasoning necessarily sweeps a good deal beyond just that type of evidence. In our adversarial system of criminal procedure, testimony from witnesses and documentary exhibits are generally admitted into evidence unless the opposing party objects. In a sense, any such objection by the prosecution is a "refusal" to consent or to stipulate to the admissibility of the evidence. Such an objection, in the words of the Court of Appeals, enables the prosecutor "to veto" the admission of inadmissible evidence. But, according to the Court of Appeals, the defendant's right to a fair trial may be denied because the prosecutor has merely objected on the grounds

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[3] The Wisconsin Supreme Court has expressly stated that its stipulation rule was based on principles of consent and waiver. *State* v. *Dean*, *supra*, at 257, 307 N.W. 2d, at 642.

that the State's evidentiary rules require that the evidence be excluded. The Court of Appeals expressed concern at the inability of courts to review this exercise of prosecutorial authority; but I have thought the common premise of the constitutional limitations on a State's administration of criminal justice was that either party to a criminal trial could "veto" the admission of otherwise inadmissible evidence through the simple expedient of objecting to its admission.

True, we have held that a defendant's rights under the Sixth and Fourteenth Amendments may be implicated when a trial *court* mechanically applies state evidentiary rules to preclude a defendant from introducing exculpatory evidence necessary to his defense. See, *e. g.*, *Green* v. *Georgia*, 442 U. S. 95 (1979) (capital case); *Chambers* v. *Mississippi*, 410 U. S. 284 (1973); *Washington* v. *Texas*, 388 U. S. 14 (1967). But here the Court of Appeals did not find that the exclusion of the polygraph testimony by the trial court was in itself error of constitutional magnitude; it was at pains to point out that Wisconsin was free to wholly exclude polygraph evidence if it chose to follow that policy. The fault the Court of Appeals found with respondent's state-court trial was not the ultimate exclusion of the polygraph evidence, but the fact that the prosecutor failed to articulate any reason for refusing to consent to its admission. I think that this is a dubious constitutional holding with considerable implications beyond the facts of the case—indeed, beyond polygraph tests—which warrants plenary consideration by this Court.

Although Wisconsin has recently abandoned its stipulation rule in favor of a rule that forbids the admission of polygraph evidence under any circumstances, this is hardly a reason to deny review in this case. In light of the Court of Appeals' decision, habeas corpus relief is apparently available to all Wisconsin prisoners who were precluded by the stipulation rule from introducing polygraph test results into evidence. Because as many as 23 States will admit polygraph evidence

upon stipulation,[4] the Court of Appeals' decision calls into question the constitutionality of almost half the States' evidentiary rules regarding the admissibility of polygraph test results. The Court of Appeals for the Eighth Circuit has held that polygraph evidence may be admitted upon stipulation into evidence in a criminal trial. *United States* v. *Oliver*, 525 F. 2d 731, 736–737 (1975), cert. denied, 424 U. S. 973 (1976). Finally, two Courts of Appeals have held that a defendant's constitutional right to a fair trial is not infringed when the prosecutor refuses to stipulate to the admissibility of polygraph test results. *Milano* v. *Garrison*, 677 F. 2d 374, 375 (CA4 1981); *Jackson* v. *Garrison*, 677 F. 2d 371, 373 (CA4 1981); *Conner* v. *Auger*, 595 F. 2d 407, 411 (CA8), cert. denied, 444 U. S. 851 (1979); *United States* v. *Bohr*, 581 F. 2d 1294, 1303 (CA8), cert. denied, 439 U. S. 958 (1978).

Because of this apparent conflict among the Courts of Appeals on this issue, and because of doubt as to the correctness of the Court of Appeals' decision in this case, I would grant the writ of certiorari.

No. 81–353. SPRADLING *v.* TEXAS; and DUNN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

On September 4, 1980, two women, Vicki Rash Norvell and Bobby Folks Rash, while walking together, were killed by the driver of a hit-and-run automobile. Petitioner Spradling later identified himself as the driver and two indictments were presented against him on October 1, 1980. The first charged Spradling with failing to stop and render aid to Vicki Rash Norvell, a felony under Texas law. The second indictment, in identical language, charged Spradling with failing to stop and render aid to Bobby Folks Rash. Spradling was

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[4] Pet. for Cert. 25.

convicted by a jury under the first indictment. The jury assessed as punishment a 5-year prison sentence and a fine of $5,000, and recommended that, in light of the fact that petitioner had never before been convicted of a felony, his prison sentence be suspended. Now the State seeks to prosecute Spradling under the second indictment.

Petitioner moved to dismiss this second indictment claiming former jeopardy. The trial court denied the motion and the Texas Court of Criminal Appeals denied leave to file an application for a writ of prohibition.

Petitioner presents two questions for review. First, he argues that the failure of the State of Texas to afford him review of the trial court's denial of his motion to dismiss for reason of former jeopardy violates the due process and equal protection guarantees of the Fourteenth Amendment. Second, petitioner argues the "merits" of his double jeopardy claim were improperly rejected by the trial court. In my view both questions are substantial and merit review by this Court.

I

Texas procedure provides no mechanism for interlocutory review in criminal cases;[1] petitioner was therefore unable to appeal the denial of his motion to dismiss on the ground of double jeopardy. It is clear that in most applications the Texas procedural rule barring interlocutory review raises no federal constitutional issue. But as applied to claims of former jeopardy, this procedural rule, in combination with a denial by the Texas Court of Criminal Appeals of leave to file an application for a writ of prohibition, denies criminal defendants the opportunity to protect, through the state appellate system, their constitutional rights. I believe this raises an issue worthy of our consideration.

We held in *Abney* v. *United States*, 431 U. S. 651 (1977), that a double jeopardy claim is by its very nature collateral

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[1] See, *e. g.*, *Williams* v. *State*, 464 S. W. 2d 842, 844 (Tex. Crim. App. 1971).

to, and separable from, the guilt of the accused, and that when a trial court rejects a motion to dismiss on the grounds of former jeopardy this order is final and appealable under 28 U. S. C. § 1291. The rationale for our decision in *Abney* was, in part, that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660. This is because the Clause stands, in part, as "a guarantee against being twice put to *trial* for the same offense." *Id.*, at 661 (footnote omitted).

Respondent argues that in *Abney* the Court merely exercised its supervisory powers over federal criminal prosecutions, and that there is no constitutional right to pretrial review of a claim that a second trial will violate the Double Jeopardy Clause. It is true that the Court had no need to reach the constitutional question presented in the instant case when it decided *Abney*, but the Court's recognition in *Abney* that double jeopardy claims not considered prior to trial are rendered, in significant part, moot surely has significant constitutional overtones. We have never held that the Federal Constitution requires that a State provide appellate review. But once such review is provided, it may not be denied arbitrarily without violating the Equal Protection Clause. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353 (1963). See also *Monger* v. *Florida*, 405 U. S. 958, 959–960 (1972) (Douglas, J., dissenting). Fundamental precepts of due process require a right to be heard "at a meaningful time" before suffering a grievous loss. *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). Accord, *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976). Thus, there is surely a good deal of force to petitioner's argument that, if the State provides for appeals to protect other constitutional rights, it runs afoul of the Federal Constitution when it fails to give the same meaningful consideration to a defendant asserting his right not to be subjected to a second trial for the same offense. See Alexander, Interlocutory Appellate Review of

Double Jeopardy Claims: A Method for Testing Evidentiary Sufficiency After a Non-Final Criminal Proceeding, 44 Tex. Bar J. 11, 15 (1981).[2]

II

Even if the Court declined to review the constitutionality of the Texas Court of Criminal Appeals' failure to provide review, it is clear to me that the trial court's order denying petitioner's motion to dismiss on the ground of former jeopardy is reviewable by this Court under 28 U. S. C. § 1257(3).[3] Under this Court's precedents, the refusal to dismiss a criminal indictment prior to trial when the indictment is challenged on the grounds of former jeopardy is a final judgment under 28 U. S. C. § 1257. "Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U. S. § 1257." *Harris* v. *Washington*, 404 U. S. 55, 56 (1971). Cf. *Abney*, *supra*. Where, as here, the trial court's judgment is not reviewable by any state appellate court the judgment has been rendered by "the highest state court in which a decision may be had" within the meaning of § 1257. *Grovey* v. *Townsend*, 295 U. S. 45, 47

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[2] Of course, the Texas Court of Criminal Appeals' rejection of petitioner's double jeopardy claim does not rest on an adequate state ground if, as petitioner contends, the Texas procedure is incompatible with the Federal Constitution.

[3] The fact that petitioner seeks a writ of certiorari to the Texas Court of Criminal Appeals is, of course, no bar to our treating the papers as a petition for a writ of certiorari to the Texas trial court. See, *e. g.*, *Callender* v. *Florida*, 383 U. S. 270 (1966) (*per curiam*). The petition was not filed within 60 days of the entry of the trial court's order but in view of the fact that petitioner understandably attempted to obtain review, prior to seeking review in this Court, in the state courts through the only route available—an extraordinary writ, I would waive the nonjurisdictional time limits for filing petitions in criminal cases set by Supreme Court Rule 20.

(1935). See, *e. g.*, *Thompson* v. *Louisville*, 362 U. S. 199, 202–203 (1960).[4]

In my view, the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires that, except in extremely limited circumstances, not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in a single proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454, and n. 7 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein. Spradling's striking and failing to render aid to the two women was but a single act—the accident and its aftermath a single occurrence. I would therefore reverse the judgment of the Texas trial court.

Accordingly, I respectfully dissent from the denial of the petition for certiorari and would set the case for oral argument.[5]

No. 81–749. CALIFORNIA *v.* WINSON. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 29 Cal. 3d 711, 631 P. 2d 55.

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[4] If we treat the papers as a petition for a writ to the trial court, there would be no need to even consider whether the state appellate court's refusal to consider the merits of petitioner's federal claim because of a rule of state procedure is a bar to review by this Court. Compare *Henry* v. *Mississippi*, 379 U. S. 443 (1965). Cf. n. 2, *supra*.

[5] The petition for certiorari was filed jointly on behalf of Spradling and a second petitioner, Dunn, who was tried on drug charges in an unrelated trial. Following his acquittal, Dunn was tried on a different charge arising from the "same transaction." Dunn also unsuccessfully sought leave to file an application for a writ of prohibition in the Texas Court of Criminal Appeals to obtain review of his double jeopardy claim prior to a second trial. But the record in this case indicates that Dunn was convicted on the second charge on November 16, 1981, after this petition was filed. Record 42. Thus, it appears that the Texas appellate courts would now review Dunn's double jeopardy claim and should do so in the first instance.

No. 81-1195. MICHIGAN *v.* HURD. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 81-795. J. S. ALBERICI CONSTRUCTION CO., INC. *v.* SISCO; and

No. 81-1005. SISCO *v.* J. S. ALBERICI CONSTRUCTION CO., INC. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 655 F. 2d 146.

No. 81-850. ST. LOUIS COUNTY, MISSOURI, ET AL. *v.* SIMON. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 656 F. 2d 316.

No. 81-851. COX *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction. Reported below: 619 S. W. 2d 794.

No. 81-933. GREEN *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied. JUSTICE BRENNAN would set the case for oral argument.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

Because there is no jurisdictional bar to considering this case, and because the decision below fails to give due regard to our cases, I dissent from the denial of certiorari.

I

Petitioner, an attorney, was indicted in 1978 on two counts of grand theft. The first count charged him with obtaining or exerting control over a bank account by deception in that he led the executrix of an estate to believe that the account was a probate asset of the estate rather than a survivorship account. The second count of the indictment charged petitioner with obtaining or exerting control over the account be-

yond the scope of the owner's consent by writing $9,000 in checks payable to himself on the account. The trial court sustained petitioner's pretrial motion to dismiss the first count of the indictment on the ground that it failed to state an offense under the Ohio statute. He was acquitted following a bench trial on the second count, the trial judge finding that the State had "failed to establish all of [the] elements" of the crime charged in the second count. App. to Pet. for Cert. 13a. The State appealed the pretrial dismissal of the first count and on January 30, 1980 the Court of Appeals for the First Appellate District of Ohio reversed the dismissal of the first count and remanded to the trial court for further proceedings. Petitioner then filed a motion to dismiss on the ground that a trial on the first count would violate the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. Citing *Ashe* v. *Swenson*, 397 U. S. 436 (1970), petitioner argued that the principle of collateral estoppel is part of the Fifth Amendment guarantee against double jeopardy and that his acquittal on the second count prevented the State from again attempting to prove one or more of the elements of the crime charged in the first count. The trial court denied the motion and petitioner appealed.

The Court of Appeals for the Twelfth Appellate District of Ohio affirmed the denial of the motion. Relying principally on *Blockburger* v. *United States*, 284 U. S. 299 (1932), the court said that the test for determining whether the trial on the second count bars a subsequent trial on the first count is whether each count requires proof of an additional fact which the other does not. The court observed that in order to obtain a conviction on the second count, the State was required to prove that petitioner knowingly obtained or exerted control over the property of another, with purpose to deprive the owner of that property, and that he acted beyond the scope of the owner's express or implied consent. To success-

fully prosecute on the first count, the State must prove that petitioner obtained or exerted control over property of another by deception with the purpose of depriving the owner of the property. The court held that the evidence necessary to sustain the conviction on the first count was not sufficient to sustain a conviction on the second count and therefore acquittal of the charges contained in the second count is not a bar to prosecution of the charges contained in the first count. The court went on to state that even if petitioner were correct that the two counts set forth allied offenses with a common animus, he could not avoid a trial on the first count because he filed a motion to dismiss the first count. Therefore, as in *Jeffers* v. *United States*, 432 U. S. 137, 154 (1977), where the defendant had been granted separate trials on separate counts of the indictment at his own request, petitioner's own actions "deprived him of any right he might have had against consecutive trials." The Supreme Court of Ohio denied petitioner's motion for leave to appeal, and he sought a writ of certiorari from this Court.

II

Petitioner has not yet been tried on the first count of the indictment, and therefore this case lacks the finality ordinarily necessary for our consideration of cases arising from state courts. See 28 U. S. C. § 1257. However, in *Abney* v. *United States*, 431 U. S. 651 (1977), in a case coming to us from a federal court, the Court held that double jeopardy claims are immediately appealable. "[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660. It was emphasized that the Double Jeopardy Clause protects against more than being twice convicted and punished for the same crime: "It is a guarantee against being twice put to *trial* for the same offense." *Id.*, at 661 (footnote omitted). See also *United States* v. *Jorn*, 400

U. S. 470, 479 (1971); *Price* v. *Georgia*, 398 U. S. 323, 326 (1970); *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); *United States* v. *Ball*, 163 U. S. 662, 669 (1896); *Ex Parte Lange*, 18 Wall. 163, 169 (1874). *Abney* was not, by its terms, limited to federal cases, and we have recognized a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . . ." *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n. 11 (1976). If the finality requirement of § 1257, which serves to avoid piecemeal review of state-court decisions and to minimize federal intrusion into state affairs, *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 159 (1973), barred our review of this case, petitioner would, in my view, be "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney* v. *United States*, *supra*, at 662 (footnote omitted). The interests served by the finality requirement, though important, do not outweigh petitioner's interest in receiving the full protection afforded by the Double Jeopardy Clause and avoiding the irreparable injury of a second trial.

Nor did petitioner waive his Fifth Amendment right to double jeopardy protection by moving to dismiss the first count of the indictment. In *Green* v. *United States*, *supra*, it was held that a defendant does not forfeit a double jeopardy defense by appealing a conviction, and under the logic of that case, petitioner did not forfeit a constitutional protection by invoking his right to seek dismissal of a count of the indictment. See also *Burks* v. *United States*, 437 U. S. 1 (1978). *Jeffers* v. *United States*, *supra*, relied upon by the lower court, is inapplicable. There the defendant was charged under two separate indictments. The first indictment charged a crime which was a lesser-included offense to the crime charged in the second indictment. The defendant was granted separate trials and *convicted* on the lesser-included offense. We held that petitioner's opposition to consolidat-

ing the indictments for trial deprived him of his right against successive trials. *Id.*, at 152. There is no doubt that had the defendant in *Jeffers* been acquitted at the first trial, the collateral-estoppel provisions embodied in the Double Jeopardy Clause would have barred a second trial on the greater offense.

III

The Court of Appeals apparently thought that since *Blockburger* would not bar successive convictions on counts one and two, a trial on count one after acquittal on count two is permissible. It did not respond to, or make any mention of, petitioner's argument that collateral estoppel precludes a second trial. However, our cases plainly establish that a second trial may sometimes be allowed under *Blockburger* but barred by the application of collateral estoppel, which constitutes an independent safeguard protecting one "who has been acquitted from having to 'run the gauntlet' a second time." *Ashe* v. *Swenson*, *supra*, at 446. The doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U. S., at 443. *Ashe* held that the doctrine of collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.*, at 445. Thus, as we observed in *Brown* v. *Ohio*, 432 U. S. 161, 166–167, n. 6 (1977):

> "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."

The Court of Appeals thus erred in assuming that its *Blockburger* analysis sufficiently addressed the collateral-estoppel issues petitioner submitted. Two of the three elements in each of the counts were identical. If the acquittal on the second count was based on the failure of the State to prove either of the two identical elements, it is clear that collateral estoppel would bar a trial on the first count. Yet neither the trial nor the appellate court indicated which elements of the crime charged in count two the State had failed to prove, and surely the trial court entering the acquittal would have been well aware of that fact. It may be that the State's proof fell short on each of the three elements required to prove the charge in count two. Petitioner also argues that if his acquittal on the second count was based on the failure of proof that petitioner acted beyond the scope of the owner's consent, then he cannot be found to have acted by deception as required for conviction on the first count.

In any event, the collateral-estoppel submission was not adequately disposed of by the *Blockburger* analysis, and I would grant certiorari, vacate the judgment, and remand the case for further consideration. The case does not warrant plenary consideration, however.

No. 81-1241. GOLDSTEIN *v.* CITY OF NORFOLK. Cir. Ct., City of Norfolk, Va. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction.

No. 81-964. MARSHALL & ILSLEY CORP. ET AL. *v.* CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 652 F. 2d 685.

No. 81-1135. HESTER *v.* MARTINDALE-HUBBELL, INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 433.

No. 81-1022. PRESS-ENTERPRISE CO. ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR would grant certiorari.

No. 81-1033. ST. JOE PAPER CO. *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (ESPRIT DE CORP., REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 120 Cal. App. 3d 991, 175 Cal. Rptr. 94.

No. 81-1052. WILLIAMS *v.* SHIPPING CORPORATION OF INDIA. C. A. 4th Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 653 F. 2d 875.

No. 81-1213. MOBIL CORP. ET AL. *v.* MARATHON OIL CO. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 669 F. 2d 378.

No. 81-5834. SOULE *v.* RAINES. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 661 F. 2d 942.

No. 81-1229. PAXTON NATIONAL INSURANCE CO. *v.* TRANSPORT INDEMNITY CO. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari to resolve the conflict between the decision of the Court of Appeals in this case and the decisions of the Court of Appeals for the Tenth Circuit in *Argonaut Insurance Co.* v. *National Indemnity Co.*, 435 F. 2d 718 (1971), and *Hagans* v. *Glens Falls Insurance Co.*, 465 F. 2d 1249 (1972). Reported below: 657 F. 2d 657.

No. 81-5786. STROUTH *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 81-5840. DAVIS *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81-5844. BOWEN *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County;

No. 81-5872. JUSTUS *v.* VIRGINIA. Sup. Ct. Va.;

No. 81-5919. SCHAD *v.* ARIZONA. Sup. Ct. Ariz.;

No. 81-5935. GREEN *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81-5937. COLEMAN *v.* MONTANA. Sup. Ct. Mont.; and

No. 81-5970. TAFERO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81-5786, 620 S. W. 2d 467; No. 81-5872, 222 Va. 667, 283 S. E. 2d 905; No. 81-5919, 129 Ariz. 557, 633 P. 2d 366; No. 81-5937, —— Mont. ——, 633 P. 2d 624; No. 81-5970, 403 So. 2d 355.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80-1396. BRANDON ET AL. *v.* BOARD OF EDUCATION OF GUILDERLAND SCHOOL DISTRICT ET AL., 454 U. S. 1123;

No. 81-222. VALERO ENERGY CORP. *v.* SOHYDE DRILLING & WORKOVER, INC., ET AL., 454 U. S. 1081;

No. 81-256. MOORE *v.* SCURR, WARDEN, ET AL., 454 U. S. 1098; and

No. 81-747. PATTERSON ET AL. *v.* YOUNGSTOWN SHEET & TUBE CO. ET AL., 454 U. S. 1100. Petitions for rehearing denied.

No. 81–5060. JOHNSON *v.* LOUISIANA, 454 U. S. 1100;

No. 81–5454. ANTHON *v.* UNITED STATES, 454 U. S. 1164;

No. 81–5586. DAVIS *v.* COMMISSIONER OF PATENTS AND TRADEMARKS, 454 U. S. 1090;

No. 81–5611. FOWLER *v.* GARRAHY, GOVERNOR OF RHODE ISLAND, ET AL., 454 U. S. 1102;

No. 81–5666. HEGWOOD *v.* BLACKBURN, WARDEN, 454 U. S. 1153;

No. 81–5712. HOLLOWAY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 454 U. S. 1154;

No. 81–5818. SHABAZZ *v.* MAYNARD, WARDEN, ET AL., *ante*, p. 925; and

No. 81–5819. PENOYER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, *ante*, p. 925. Petitions for rehearing denied.

No. 81–700. LOESCH ET AL. *v.* UNITED STATES, 454 U. S. 1099. Motion of petitioners to defer consideration of petition for rehearing denied. Petition for rehearing denied.

FEBRUARY 23, 1982

Dismissal Under Rule 53

No. 81–822. LEVISON *v.* LEVISON, 454 U. S. 1147. Petition for rehearing dismissed under this Court's Rule 53.

FEBRUARY 24, 1982

Certiorari Dismissed. (See No. 78–1549, *ante*, at 392, n. 5.)

MARCH 1, 1982

Affirmed on Appeal

No. 81–1161. HIGHTOWER ET AL. *v.* SEARCY ET AL. Affirmed on appeal from C. A. 11th Cir. Reported below: 656 F. 2d 1003.

Appeals Dismissed

No. 81-960. LOCKE ET AL. *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of substantial federal question. Reported below: 402 So. 2d 618.

No. 81-1035. LAIRD, AKA HORNE, ET AL. *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 80-629. MAREN ENGINEERING CORP. *v.* VELMOHOS. Appeal from Sup. Ct. N. J. Judgment vacated and case remanded for further consideration in light of *G. D. Searle & Co.* v. *Cohn, ante,* p. 404. JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR would dismiss the appeal for want of jurisdiction. Reported below: 83 N. J. 282, 416 A. 2d 372.

Certiorari Granted—Vacated and Remanded

No. 80-663. KELSEY-HAYES, INC. *v.* HOPKINS. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *G. D. Searle & Co.* v. *Cohn, ante,* p. 404. Reported below: 628 F. 2d 801.

Miscellaneous Orders

No. A-672. ERNEST *v.* COHEN, UNITED STATES ATTORNEY FOR THE DISTRICT OF MAINE, ET AL. Application for injunction, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 80-1121. UNITED STATES *v.* CLARK ET AL., 454 U. S. 555. Motion of respondents not to tax costs denied.

No. 80-2100. ROGERS ET AL. *v.* LODGE ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 454 U. S. 811.] Motion of appellants for leave to file a delayed reply brief granted.

No. 80–1305. ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. QUIROS, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of Migrant Legal Action Program, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 80–2146. FLORIDA *v.* ROYER. Dist. Ct. App. Fla., 3d Dist. [Certiorari granted, 454 U. S. 1079.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument granted, and five additional minutes allotted for that purpose. Respondent also allotted an additional five minutes for oral argument.

No. 81–184. UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL. C. A. 10th Cir. [Probable jurisdiction noted, 454 U. S. 1122.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81–334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–411. JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL–CIO–CLC. C. A. 6th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of Railway Labor Executives' Association for leave to file a brief as *amicus curiae* granted.

No. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Motion of petitioner for leave to amend or enlarge question presented for review denied.

No. 81–485. HILLSBORO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. [Certiorari granted, *ante*, p. 906.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81-525. BOWEN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1097.] Motion of the Solicitor General for divided argument granted. Request for additional time for oral argument denied.

No. 81-876. ST. LUKE'S FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER; BETH ISRAEL FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* BETH ISRAEL HOSPITAL AND GERIATRIC CENTER; and ST. ANTHONY FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* ST. ANTHONY HOSPITAL SYSTEMS. C. A. 10th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari granted.

No. 81-912. CLICK ET AL. *v.* IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. Sup. Ct. Idaho;

No. 81-1020. EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL. Sup. Ct. Ala.; and

No. 81-1268. EXCHANGE OIL & GAS CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA. Sup. Ct. Ala. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 81-930. UNITED STATES *v.* BLISS DAIRY, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 906.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81-6020. IN RE MA. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81-773. NORTH DAKOTA *v.* UNITED STATES. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 650 F. 2d 911.

No. 81-802. CITY OF LOCKHART *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: —— F. Supp. ——.

Certiorari Granted

No. 81-1008. BURLINGTON NORTHERN INC. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 211 U. S. App. D. C. 111, 655 F. 2d 1341.

No. 81-1222. UNITED STATES *v.* GENERIX DRUG CORP. ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 654 F. 2d 1114.

No. 81-1244. HENSLEY ET AL. *v.* ECKERHART ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 664 F. 2d 294.

No. 81-1271. FALLS CITY INDUSTRIES, INC. *v.* VANCO BEVERAGE, INC. C. A. 7th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 654 F. 2d 1224.

Certiorari Denied. (See also No. 81-1035, *supra.*)

No. 80-1527. LUMMIS, TEMPORARY ADMINISTRATOR, ET AL. *v.* LOS ANGELES AIRWAYS, INC. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 603 S. W. 2d 246.

No. 81-152. WEIT ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 641 F. 2d 457.

No. 81-373. BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., ET AL. *v.* ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ET AL.; and

No. 81-374. CITY OF BRIDGEPORT ET AL. *v.* ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 256.

No. 81-789. RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* TAYLOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81-836. LEICHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 1153.

No. 81-926. CONNECTICUT *v.* GORDON. Sup. Ct. Conn. Certiorari denied. Reported below: —— Conn. ——, 441 A. 2d 119.

No. 81-942. MONTANA WILDERNESS ASSN. ET AL. *v.* UNITED STATES FOREST SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 951.

No. 81-987. WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 662 F. 2d 899.

No. 81-1046. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 68.

No. 81-1060. SIEGEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 2d 279.

No. 81-1081. BRUSCHI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 915.

No. 81-1123. CATALINA *v.* CITY OF COLUMBUS, OHIO, ET AL.; and OHIO EX REL. CATALINA *v.* MOODY, MAYOR OF COLUMBUS, ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 81-1126. TRUCK DRIVERS & HELPERS LOCAL UNION NO. 728 ET AL. *v.* ALLEN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 653 F. 2d 1016.

No. 81-1127. F. W. WOOLWORTH CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 655 F. 2d 151.

No. 81-1228. WATKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 1090.

No. 81-1247. SPIELER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 646 F. 2d 955.

No. 81-1248. DENNINGHAM *v.* DENNINGHAM. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 328, 431 A. 2d 755.

No. 81-1252. BOGGS *v.* MCDONALD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1306.

No. 81-1258. SHAHEEN ET AL. *v.* CLARKSON COMPANY LTD., TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 506.

No. 81-1266. IVIE ET AL. *v.* BROWN. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 62.

No. 81-1276. MCLISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-1277. MCGUINN *v.* CRIST, WARDEN, MONTANA STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 657 F. 2d 1107.

No. 81-1279. BROWN ET AL., DBA THUNDERGUARDS MOTORCYCLE CLUB *v.* COUNTY COMMISSIONERS OF KENT COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 729.

No. 81-1280. DUMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 411.

No. 81-1286. CALIFORNIA ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 2d 1355.

No. 81-1342. COWETTA NEWS, INC., DBA PLAYMATE VISUAL CENTER *v.* CITY OF MEMPHIS. Ct. App. Tenn. Certiorari denied. Reported below: —— S. W. 2d ——.

No. 81-1364. EATON *v.* DRAKE UNIVERSITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 703.

No. 81-1398. SKRUZNY *v.* MYERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81-1401. SCHMIDT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 914.

No. 81-1403. TAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 105.

No. 81-1412. CONNOR *v.* PHILLIPS, ADMINISTRATOR, ET AL. Sup. Ct. N. J. Certiorari denied.

No. 81-1424. CARNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 348.

No. 81-1429. LONGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81-1440. RHODES ET AL. *v.* STEWART ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 656 F. 2d 1216.

No. 81-1443. DRESSEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-1451. MAYNARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1181.

No. 81-5635. COATS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1076.

No. 81-5802. TSUI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 365.

No. 81-5828. SHEIKH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 1057.

No. 81-5852. SANFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 2d 342.

No. 81-6002. FIORINI *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81-6006. AHMED ET UX. *v.* KUNKLE ET UX. Ct. App. Ariz. Certiorari denied.

No. 81-6013. HICKS *v.* ROSE, WARDEN, TENNESSEE STATE PENITENTIARY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81-6017. CURTIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1201, 426 N. E. 2d 1288.

No. 81-6018. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 486, 442 N. Y. S. 2d 300.

No. 81-6031. SMITH *v.* RABALAIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 539.

No. 81-6037. WILLIAMS *v.* WYRICK, WARDEN, MISSOURI PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 193.

No. 81-6040. TOWNSEND *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 418 N. E. 2d 554.

No. 81-6041. ADAMSON *v.* HILL, SHERIFF OF MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81-6080. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 894.

No. 81-6096. SUTTERER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1077.

No. 81-6099. WILLIAMS *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81-6117. WATKINS *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042.

No. 81-6125. IN RE NEARIS. C. A. 1st Cir. Certiorari denied.

No. 81-6141. RODRIGUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1032.

No. 81-6149. GARZA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 664 F. 2d 135.

No. 81-6154. IN RE RANDOLPH T. Ct. App. Md. Certiorari denied. Reported below: 292 Md. 97, 437 A. 2d 230.

No. 81-6155. ANTONELLI *v.* LIPPMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 81-868. DEVITO, DIRECTOR OF THE ILLINOIS DEPARTMENT OF MENTAL HEALTH *v.* HARRINGTON ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 656 F. 2d 264.

No. 81-1133. MISSOURI BOARD OF PROBATION AND PAROLE ET AL. *v.* WILLIAMS ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 697.

No. 81-1470. MEYER, WARDEN *v.* WILSON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 665 F. 2d 118.

No. 81-900. NUCLEAR ENGINEERING CO., INC. *v.* FAHNER, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 660 F. 2d 241.

No. 81-1263. DEVON CORP. ET AL. *v.* MILLER, DIRECTOR, WEST VIRGINIA DEPARTMENT OF MINES, ET AL. Sup. Ct. App. W. Va. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: —— W. Va. ——, 280 S. E. 2d 108.

No. 81-1154. COX ENTERPRISES, INC., DBA LUFKIN NEWS, ET AL. *v.* VASCOCU, JUDGE, DISTRICT COURT OF ANGELINA COUNTY, TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 81-1270. LOCKHEED CORP. *v.* SCHNEIDER ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 212 U. S. App. D. C. 87, 658 F. 2d 835.

No. 81-1307. CHELSEA HOUSE PUBLISHERS, A DIVISION OF CHELSEA HOUSE EDUCATIONAL COMMUNICATIONS, INC., ET AL. *v.* NICHOLSTONE BOOK BINDERY, INC. Sup. Ct. Tenn. Certiorari denied. Reported below: 621 S. W. 2d 560.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

As I stated in dissenting from the denial of a writ of certiorari in *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U. S. 907 (1980), "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts." *Id.*, at 909. I cited 22 cases in which lower courts had split 14–8 on the question and stressed the "considerable importance [of the issue] to contractual dealings between purchasers and sellers located in different States." *Id.*, at 909–910. This case presents the same issue as *Lakeside*, and the disarray among federal and state courts noted in *Lakeside* has continued. Compare *Taubler* v. *Giraud*, 655 F. 2d 991 (CA9 1981), with *Nu-Way Systems of Indianapolis, Inc.* v. *Belmont Marketing, Inc.*, 635 F. 2d 617 (CA7 1980). For the reasons stated in *Lakeside*, I would grant the petition and set the case for oral argument.

Rehearing Denied

No. 81-743. COWGILL ET AL. *v.* FLORIDA, 454 U. S. 1134;

No. 81-833. ROSS *v.* BIRD, CHIEF JUSTICE, CALIFORNIA SUPREME COURT, ET AL.; and ROSS *v.* SAN DIEGO COUNTY SUPERIOR COURT ET AL., 454 U. S. 1147;

No. 81-5612. IN RE BEACH, *ante*, p. 906;

No. 81-5641. FISCHETTI *v.* ASCIONE, 454 U. S. 1135;

No. 81-5648. WARD *v.* UNITED STATES, *ante*, p. 922;

No. 81-5675. CARABALLO *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, 454 U. S. 1153;

No. 81-5676. BAILEY *v.* REDMAN, WARDEN, DELAWARE CORRECTIONAL CENTER, ET AL., 454 U. S. 1153;

No. 81-5739. GALLO *v.* MASSACHUSETTS, 454 U. S. 1155; and

No. 81-5860. CRENSHAW *v.* UNITED STATES ET AL., *ante*, p. 912. Petitions for rehearing denied.

☆ U.S. GOVERNMENT PRINTING OFFICE : 1982 O—379-668

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 455 U. S., Part 3)

ANTIFRAUD PROVISIONS OF SECURITIES EXCHANGE ACT OF 1934. See Securities Regulation.

APPORTIONMENT OF ELECTION DISTRICTS. See Stays.

ASSISTANCE OF COUNSEL. See Constitutional Law.

CALIFORNIA. See Habeas Corpus; Stays.

CERTIFICATE OF DEPOSIT AS "SECURITY." See Securities Regulation.

CERTIFICATION OF QUESTIONS. See Federal Election Campaign Act of 1971.

CERTIORARI. See Constitutional Law.

CHILDREN. See Constitutional Law.

COAL MINERS. See Labor Management Relations Act.

COLLECTIVE-BARGAINING AGREEMENTS. See Labor Management Relations Act.

COMMERCIAL SPEECH. See Constitutional Law.

COMPENSABLE "INJURY." See Longshoremen's and Harbor Workers' Compensation Act.

CONGRESSIONAL DISTRICTS. See Stays.

CONSTITUTIONAL LAW. See also Federal-State Relations; Mootness; Stays.

Due process—Defendant's postarrest silence—Use for impeachment purposes.—In state-court trial resulting in manslaughter conviction, due process was not denied by prosecutor's use of defendant's postarrest silence for impeachment purposes after defendant testified—asserting self-defense and accidental stabbing for first time—where record did not indicate that defendant had been given *Miranda* warnings during period in which he remained silent immediately after his arrest. Fletcher v. Weir, p. 603.

Due process—Termination of parental rights—Standard of proof.—Under Fourteenth Amendment, a State must provide natural parents fundamentally fair procedures at state-initiated neglect proceedings to terminate parental rights in their natural child, and due process requires that

CONSTITUTIONAL LAW—Continued.

State support its allegations by at least clear and convincing evidence, not just a fair preponderance of evidence. Santosky v. Kramer, p. 745.

Freedom of speech—License to sell drug paraphernalia—Validity of ordinance.—A village ordinance requiring a business to obtain a license to sell items that are "designed or marketed for use with illegal cannabis or drugs" does not violate First Amendment and is not facially overbroad or vague. Hoffman Estates v. Flipside, Hoffman Estates, Inc., p. 489.

Full Faith and Credit Clause—Rehabilitation proceedings—Indiana court judgments—Effect in North Carolina courts.—Where Indiana state court, in rehabilitation proceedings against petitioner Indiana insurance company, entered judgments holding that it had jurisdiction over parties and over funds deposited by petitioner with North Carolina Commissioner of Insurance for protection of petitioner's North Carolina policyholders, and that all claims to North Carolina deposit were compromised and settled by court's adoption of a rehabilitation plan, and where in meantime respondent North Carolina association—to which petitioner was required to belong and which under North Carolina law was responsible for fulfilling insolvent members' policy obligations—sought a declaratory judgment in a North Carolina state court to establish that it was entitled to use North Carolina deposit to fulfill prerehabilitation obligations to North Carolina policyholders, North Carolina courts violated Full Faith and Credit Clause by refusing to treat Indiana court's judgments as res judicata. Underwriters National Assur. Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., p. 691.

Right to counsel—Effective assistance—Failure to file timely application for certiorari in state court.—State criminal defendant was not deprived of effective assistance of counsel by latter's filing of an untimely application for certiorari in Florida Supreme Court to review Florida Court of Appeal's affirmance of conviction where review by Florida Supreme Court was discretionary. Wainwright v. Torna, p. 586.

States' powers—Operation of railroad—Applicability of Railway Labor Act.—Where New York State acquired an interstate railroad from private owners, application to railroad of Railway Labor Act's provisions regulating labor relations in railroad industry does not so impair State's ability to carry out its constitutionally preserved sovereign function as to conflict with Tenth Amendment, and labor dispute between union and railroad was not covered by state law prohibiting strikes by public employees. Transportation Union v. Long Island R. Co., p. 678.

CONTRIBUTIONS TO TRADE ASSOCIATIONS AND POLITICAL ACTION COMMITTEES. See **Federal Election Campaign Act of 1971.**

CRIMINAL LAW. See also **Constitutional Law; Habeas Corpus; Mootness.**

Forged securities—Transportation in "interstate" commerce.—Title 18 U. S. C. § 2314, which makes it a crime to transport "in interstate or foreign commerce any . . . forged . . . securities . . . , knowing the same to have been . . . forged," does not require proof that securities were forged before being taken across state lines. McElroy v. United States, p. 642.

CUSTODY OF CHILDREN. See **Constitutional Law.**

DISABILITY BENEFITS. See **Longshoremen's and Harbor Workers' Compensation Act.**

DUE PROCESS. See **Constitutional Law; Mootness.**

EFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law.**

ELECTIONS. See **Stays.**

EMPLOYER AND EMPLOYEES. See **Constitutional Law; Labor Management Relations Act.**

EVIDENCE. See **Constitutional Law; Criminal Law.**

EXHAUSTION OF STATE REMEDIES. See **Habeas Corpus.**

EXPEDITING ACTIONS. See **Federal Election Campaign Act of 1971.**

FEDERAL ELECTION CAMPAIGN ACT OF 1971.

Limitations on soliciting funds—Validity—Expediting action.—In an action brought by appellant trade associations and political action committees challenging validity of Act's provisions limiting extent to which such types of organizations may solicit funds for political purposes, appellants were not within categories of plaintiffs listed in § 310(a) of Act and thus could not invoke Act's expedited procedures requiring District Court to certify constitutional questions to Court of Appeals. Bread Political Action Committee v. FEC, p. 577.

FEDERAL GOVERNMENT CONTRACTORS AS INDEPENDENT TAXABLE ENTITIES. See **Federal-State Relations.**

FEDERAL-STATE RELATIONS. See also **Constitutional Law; Habeas Corpus; Stays.**

Government contractors—State's power to tax.—As independent taxable entities, contractors engaged to construct, repair, or manage Federal Government facilities in New Mexico under contracts whereby they may use "advanced" Government funds to pay creditors and employees, are not protected by Constitution's guarantee of federal supremacy and thus are subject to New Mexico's gross receipts tax, which operates as a tax on sales of goods and services, and its compensating use tax on property used within State but acquired out of State. United States v. New Mexico, p. 720.

FIRST AMENDMENT. See **Constitutional Law.**

FLORIDA. See **Constitutional Law.**

FORGED SECURITIES. See **Criminal Law.**

FOURTEENTH AMENDMENT. See **Constitutional Law.**

FRAUD. See **Securities Regulation.**

FREEDOM OF SPEECH. See **Constitutional Law.**

FULL FAITH AND CREDIT CLAUSE. See **Constitutional Law.**

GOVERNMENT CONTRACTORS AS INDEPENDENT TAXABLE ENTITIES. See **Federal-State Relations.**

GOVERNMENT EMPLOYEES. See **Constitutional Law.**

GROSS RECEIPTS TAXES. See **Federal-State Relations.**

GUILTY PLEAS. See **Mootness.**

HABEAS CORPUS. See also **Mootness.**

Federal relief—Exhaustion of state remedies.—Under 28 U. S. C. § 2254, which provides that a state prisoner's application for habeas corpus in a federal district court based on an alleged federal constitutional violation will not be granted unless prisoner has exhausted remedies available in state courts, a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. Rose v. Lundy, p. 509.

Federal relief—State-court findings of fact—Presumption of correctness.—In federal habeas corpus proceedings challenging state conviction, constitutionality of pretrial photographic identification procedures is a mixed question of law and fact that is not governed by 28 U. S. C. § 2254, which requires federal habeas courts to presume correctness of state-court findings of fact unless specified factors are present, but questions of fact that underlie ultimate conclusion are governed by statutory presumption. Sumner v. Mata, p. 591.

HEALTH BENEFITS. See **Labor Management Relations Act.**

HOFFMAN ESTATES, ILL. See **Constitutional Law.**

ILLINOIS. See **Mootness.**

IMMUNITY OF FEDERAL GOVERNMENT CONTRACTORS FROM STATE TAXATION. See **Federal-State Relations.**

IMPEACHING CREDIBILITY. See **Constitutional Law.**

INDIANA. See **Constitutional Law.**

IN PERSONAM JURISDICTION. See **Constitutional Law.**

INSURANCE COMPANIES. See **Constitutional Law.**

INTERSTATE COMMERCE. See **Criminal Law.**

JURISDICTION. See **Constitutional Law.**

KENTUCKY. See **Constitutional Law.**

LABOR MANAGEMENT RELATIONS ACT.

Collective-bargaining agreements—Provisions allocating health benefits.—Section 302(c)(5) of Act, which requires jointly administered pension trusts to be maintained for sole benefit of employees and their families and dependents, does not authorize federal courts to review for reasonableness provisions of a collective-bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund—such as provisions of bargaining agreement increasing health benefits for widows of employee coal miners who were receiving pensions at time of their death but not increasing health benefits for widows of employees who, though eligible for pensions, were still working at time of their death. UMWA Health & Retirement Funds v. Robinson, p. 562.

LABOR UNIONS. See **Constitutional Law; Labor Management Relations Act.**

LIBERTY INTERESTS. See **Constitutional Law.**

LICENSES TO SELL DRUG PARAPHERNALIA. See **Constitutional Law.**

LOAN GUARANTEE AGREEMENT AS "SECURITY." See **Securities Regulation.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Compensable "injury"—Presumption.—Where Administrative Law Judge found that accident which allegedly happened during course of respondent's employment had not in fact occurred, Court of Appeals erred (1) in presuming under § 20(a) of Act that claim fell within Act's provisions on theory that injury occurred on morning after alleged accident when respondent awoke with pain, and (2) in its use of term "injury" as including such attack of pain. U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, p. 608.

MANDATORY PAROLE TERMS. See **Mootness.**

MARKETING OF DRUG PARAPHERNALIA. See **Constitutional Law.**

MIRANDA WARNINGS. See **Constitutional Law.**

MOOTNESS.

Mandatory parole term—Expiration as affecting constitutional challenge.—Respondents' claims, asserted in federal habeas corpus proceedings, that they were denied due process when, in their guilty plea acceptance hearings in Illinois burglary prosecutions, neither was informed that his negotiated sentence included a mandatory 3-year parole term, were

MOOTNESS—Continued.

moot where (1) their habeas corpus petitions were filed after they had completed their prison terms and after they had been reincarcerated for parole violation, (2) District Court ultimately declared their mandatory parole terms void, respondents having already been discharged from custody since their parole terms had expired, and (3) respondents had not sought to have their convictions set aside and to plead anew, but instead elected to attack only their sentences. Lane v. Williams, p. 624.

NEGLECT OF CHILDREN. See Constitutional Law.

NEW JERSEY. See Stays.

NEW MEXICO. See Federal-State Relations.

NEW YORK. See Constitutional Law.

NORTH CAROLINA. See Constitutional Law.

ORDINANCES REGULATING SALE OF DRUG PARAPHERNALIA. See Constitutional Law.

PARAPHERNALIA USED WITH ILLEGAL DRUGS. See Constitutional Law.

PARENT AND CHILD. See Constitutional Law.

PAROLE. See Mootness.

PENSIONS. See Labor Management Relations Act.

PHOTOGRAPHIC IDENTIFICATION. See Habeas Corpus.

PLEA BARGAINING. See Mootness.

POLITICAL ACTION COMMITTEES. See Federal Election Campaign Act of 1971.

POLITICAL CONTRIBUTIONS TO TRADE ASSOCIATIONS AND POLITICAL ACTION COMMITTEES. See Federal Election Campaign Act of 1971.

POPULATION VARIANCES. See Stays.

POSTARREST SILENCE AS ADMISSIBLE FOR IMPEACHMENT PURPOSES. See Constitutional Law.

PRESUMPTIONS. See Habeas Corpus; Longshoremen's and Harbor Workers' Compensation Act.

PRETRIAL IDENTIFICATION. See Habeas Corpus.

PRIMARY ELECTIONS. See Stays.

PRISONERS. See Habeas Corpus.

PUBLIC EMPLOYEES. See Constitutional Law.

RAILROADS. See Constitutional Law.

RAILWAY LABOR ACT. See **Constitutional Law.**

REAPPORTIONMENT. See **Stays.**

REFERENDUMS. See **Stays.**

REHABILITATION PROCEEDINGS. See **Constitutional Law.**

RES JUDICATA. See **Constitutional Law.**

RIGHT TO COUNSEL. See **Constitutional Law.**

SALE OF DRUG PARAPHERNALIA. See **Constitutional Law.**

SECURITIES EXCHANGE ACT OF 1934. See **Securities Regulation.**

SECURITIES REGULATION.

Securities Exchange Act of 1934—Antifraud provisions—What constitutes a "security."—Where respondents (1) purchased a certificate of deposit from petitioner bank and pledged it to bank to guarantee loan by bank to a company that already owed bank on earlier debts, and (2) entered into agreement with debtor company entitling respondents to a share of company's profits in consideration for guaranteeing new loan, and where bank officers had told respondents that debtor company would use new loan as working capital but loan was instead applied to pay company's overdue obligations to bank, neither certificate of deposit nor agreement between respondents and debtor company was a "security" within meaning of antifraud provisions of § 10(b) of Securities Exchange Act of 1934. Marine Bank v. Weaver, p. 551.

SOLICITATION OF POLITICAL CONTRIBUTIONS. See **Federal Election Campaign Act of 1971.**

SOVEREIGN FUNCTIONS OF STATES. See **Constitutional Law.**

STANDARD OF PROOF. See **Constitutional Law.**

STATE EMPLOYEES. See **Constitutional Law.**

STATE GROSS RECEIPTS TAXES. See **Federal-State Relations.**

STATE-OWNED RAILROADS. See **Constitutional Law.**

STATE USE TAXES. See **Federal-State Relations.**

STAYS.

California Supreme Court judgment—Redistricting congressional districts.—Application to stay California Supreme Court's judgment, holding that a statewide referendum petition effectively suspended operation of state statutes redistricting congressional districts but that upcoming primary election should be conducted in accordance with districts established by such statutes, is denied. Republican National Committee v. Burton (REHNQUIST, J., in chambers), p. 1301.

District Court judgment—Redistricting congressional districts.—Application to stay District Court's judgment declaring unconstitutional, be-

STAYS—Continued.

cause of population variances, a New Jersey statute creating new congressional districts and enjoining any primary or general elections under statute, is granted. Karcher v. Daggett (BRENNAN, J., in chambers), p. 1303.

STRIKES BY PUBLIC EMPLOYEES. See Constitutional Law.

SUBJECT-MATTER JURISDICTION. See Constitutional Law.

TAXES. See Federal-State Relations.

TENTH AMENDMENT. See Constitutional Law.

TERMINATION OF PARENTAL RIGHTS. See Constitutional Law.

TRADE ASSOCIATIONS. See Federal Election Campaign Act of 1971.

TRANSPORTATION OF FORGED SECURITIES IN INTERSTATE COMMERCE. See Criminal Law.

UNIONS. See Constitutional Law; Labor Management Relations Act.

USE TAXES. See Federal-State Relations.

VAGUENESS. See Constitutional Law.

WIDOWS' HEALTH BENEFITS. See Labor Management Relations Act.

WITNESSES. See Constitutional Law.

WORDS AND PHRASES.

1. "*Injury.*" § 2(2), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902(2). U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, p. 608.

2. "*Interstate . . . commerce.*" 18 U. S. C. § 2314. McElroy v. United States, p. 642.

3. "*Security.*" § 10(b), Securities Exchange Act of 1934, 15 U. S. C. § 78j(b). Marine Bank v. Weaver, p. 551.

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 455 U. S., Parts 1, 2, and 3)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Abbott & Associates, Inc.; Illinois *v.*	998, 1015
Abbott Laboratories; Jefferson County Pharmaceutical Assn. *v.*	999
Abrams; Esposito *v.*	996
Abrams; Pierce *v.*	1010
Abrams; Reno *v.*	1016
Abshire; Fiorini *v.*	991
Abu-Bakr *v.* Koon	1024
Ackerman *v.* National Bureau of Standards	929
Adams; Murphy *v.*	920
Adamson *v.* Hill	992
Aetna Casualty & Surety Co. *v.* Keene Corp.	1007
Aetna Casualty & Surety Co. *v.* Porter	1009
Aetna Casualty & Surety Co. of Hartford; Johnson *v.*	1039
Ahmed *v.* Kunkle	991
Aikens; U. S. Postal Service Bd. of Governors *v.*	1015
Aircraft Workers; Falls Stamping & Welding Co. *v.*	1019
Akers *v.* United States	941
Akron; Hybud Equipment Corp. *v.*	931
Alabama; Palmer *v.*	922
Alabama; Suggs *v.*	938
Alabama; Taylor *v.*	1014
Alabama Dept. of Public Safety; Jackson *v.*	956

Page
Aladdin's Castle, Inc.; Mesquite *v.* 283
Alander *v.* Florida 919
Alaska *v.* Heffle 1000
Alaska; Ivey *v.* 1010
Alaska Dept. of Labor; Dresser Industries, Inc. *v.* 1019
Alaska Railroad; Sea-Land Service, Inc. *v.* 919
Alberici Construction Co. *v.* Sisco 976
Alberici Construction Co.; Sisco *v.* 976
Alberto-Culver Co.; Webb *v.* 929
Alderson *v.* United States 965
Alexander *v.* Texas 954
Alford; American Bridge Division, United States Steel Corp. *v.* 927
Alford *v.* Garrison 925
Alfred L. Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Quiros 933, 986
Alioto's Fish Co. *v.* Human Rights Comm'n of San Francisco 944
Allen; Truck Drivers *v.* 989
Allstate Ins. Co.; Quality Auto Body, Inc. *v.* 1020
Aman Collection Service, Inc.; Juras *v.* 1024
Amax, Inc.; Montreal Trading Ltd. *v.* 1001
American Bridge Division, United States Steel Corp. *v.* Alford 927
American Medical Assn. *v.* Federal Trade Comm'n 676
American Petroleum Institute *v.* Gorsuch 1034
American Pharmaceutical Assn.; Federal Prescription Service *v.* 928
Americans for Change; Federal Election Comm'n *v.* 129
American Tel. & Tel. Co.; Northeastern Telephone Co. *v.* 948
Amir *v.* Sacred Heart Hospital 923
Amis *v.* United States 915
Amoco Production Co. *v.* Jicarilla Apache Tribe 130
Anderson *v.* Baird 951
Anderson; Blackwell *v.* 947
Anderson *v.* Fuller 1028
Anderson; Mattheis *v.* 1027
Andrews *v.* United States 919
Angelilli *v.* United States 945
Anthon *v.* United States 984
Antonelli *v.* Drug Enforcement Administration 955
Antonelli *v.* Lippman 993
Antonelli *v.* Old Republic Ins. Co. 923
Antwine *v.* Estelle 955
Archie *v.* United States 951
Arizona; Gates *v.* 928
Arizona; Mincey *v.* 1003
Arizona; Schad *v.* 983
Arkansas; Thorne *v.* 1024

Page
Arkansas Electric Cooperative Corp. *v.* Ark. Pub. Serv. Comm'n 998
Arkansas Gazette Co.; Southern State College *v.* 931
Arkansas Public Serv. Comm'n; Arkansas Electric Coop. Corp. *v.* 998
Armand; Robinson *v.* 931
Arnold *v.* Marshall 922, 1008
Arrington *v.* Associated General Contractors of America 913
Ascione; Fischetti *v.* 995
Associated General Contractors of America; Arrington *v.* 913
Associated Gen. Contractors of Cal. *v.* Cal. Council of Carptrs. . 986, 1013
Associated Gen. Contractors of Cal.; Teamsters *v.* 1021
Association Against Discrimination in Employment; Bridgeport *v.* 988
Association Against Discrimination in Employment; Firefighters *v.* 988
Attorney General of Ill.; Nuclear Engineering Co. *v.* 993
Attorney General of Neb.; Sporhase *v.* 935
Attorney General of N. Y.; Esposito *v.* 996
Attorney General of R. I. *v.* New Hampshire 331
Auburn News Co. *v.* Providence Journal Co. 921
Austin; Coggins *v.* 1004
Austin *v.* Osborne 1025
Austin; Ruffin *v.* 1038
Avagliano *v.* Sumitomo Shoji America, Inc. 933
Avagliano; Sumitomo Shoji America, Inc. *v.* 933
Avedisian *v.* Hubbard 949
Ayers *v.* Collins 922
B.; Treen *v.* 913
Bache, Halsey, Stuart, Shields, Inc.; Gitre *v.* 997
Bacon *v.* United States 1003
Badgett *v.* Erspan 945
Bailey *v.* Redman 995
Baird; Anderson *v.* 951
Bakewell; Rucker *v.* 956
Baldrige; Carey *v.* 999
Baldrige; McNichols *v.* 345
Baldrige *v.* Shapiro 345
Baldrige; Young *v.* 939
Balla, *In re* 936
Ballet *v.* Pence 957
Banco Nacional de Cuba; First National Bank of Boston (Int'l) *v.* . 936
Banco para el Comercio Exterior de Cuba; First Nat. City Bank *v.* . 936
Bankers Trust Co.; BP Oil, Inc. *v.* 942
Bankers Trust Co. *v.* Villaneuva Compania Naviera, S.A. 942
Bankers Trust Co.; Villaneuva Compania Naviera, S.A. *v.* 942
Bank of America; Johnson *v.* 921, 1038
Bank of Miami *v.* Meason 939

Page
Bankston; Crown Paint Co. *v.* 936
Barber *v.* New York 1025
Barnes *v.* Carden 921
Barnes; McColpin *v.* 1004
Barnes; Moye *v.* 925
Barnes Group, Inc.; Harper *v.* 921
Barrett *v.* Bureau of Customs 950
Barry; Madison *v.* 1020
Baszner *v.* United States 945
Bates; Yapalater *v.* 908
Baxter *v.* Mouzavires 1006
Beach, *In re* 906, 995
Beach *v.* Lebel 1026
Beans; Piscanio *v.* 958
Bearden *v.* White 1026
Bechtel Power Corp. *v.* Pennsylvania 905, 1013
Be-Down Home Designs *v.* Musidor, B.V. 944
Begay *v.* United States 1027
Behlin *v.* New York 1025
Bell *v.* United States 1005
Benham-Blair & Affiliates, Inc. *v.* Broken Arrow 1020
Bennett; Capitol Industries-EMI, Inc. *v.* 943
Bennett; EMI Ltd. *v.* 943
Bennett *v.* Ford Motor Co. 923
Benslimane *v.* United States 949
Bernotas *v.* South Carolina 1017
Best *v.* New York 926
Bethea *v.* Hanberry 912
Beth Israel Hospital and Geriatric Center; Nurses *v.* 987
Bethlehem Steel Corp.; Goins *v.* 940
Betts *v.* Keebler Co. 1004
B. F. Goodrich Co.; Worrell *v.* 913
Bibby *v.* United States 1002
Bickel; Craig *v.* 901
Bird; Ross *v.* 995
Bixby *v.* Ross 931
Black; Stephens *v.* 1008
Blackburn; Bornes *v.* 954
Blackburn; Hegwood *v.* 984
Blackburn; Johnson *v.* 1025
Blackburn; Passman *v.* 1022
Blackie's House of Beef, Inc. *v.* Castillo 940
Blackwell *v.* Anderson 947
Blechman *v.* Federal Communications Comm'n 954

Page
Bliss Dairy, Inc.; United States *v.* 906, 987
Bloch *v.* Veteran Corps of Artillery 943
Block; Minnesota *v.* 1007
Blue Shield of Virginia *v.* McCready 916
Blum *v.* Stenson 1014
Blum *v.* Yaretsky 933
Boag *v.* California 910
Board of Ed., Island Trees Union School Dist. No. 26 *v.* Pico 903
Board of Ed. of Chicago; Johnson *v.* 936
Board of Ed. of Guilderland School Dist.; Brandon *v.* 983
Board of Ed. of Hendrick Hudson School Dist. *v.* Rowley 932
Board of Ed. of Los Angeles; Crawford *v.* 904
Board of Govs. of Reg. Dentists of Okla.; Cryan *v.* 907
Board of Govs. of Reg. Dentists of Okla.; Denturist-Denture Lab *v.* 907
Board of Trustees of Univ. of N. Y.; Pauk *v.* 1000
Bochniak; Illinois *v.* 938
Boeing Co.; Miskow *v.* 1020
Boggs *v.* McDonald 990
Bohemian Distributing Co. *v.* Norman Williams Co. 933
Bolger; Poston *v.* 1002
Bollotin *v.* Schwartz 1001
Bollow *v.* Federal Reserve Bank of San Francisco 948
Bolton; Mitchell *v.* 953
Bonnes; Long *v.* 961
Bonnette *v.* United States 951
Bordenkircher; Huff *v.* 1025
Bornes *v.* Blackburn 954
Bosch *v.* Spalding 955
Boulder; Community Communications Co. *v.* 40
Bowen *v.* U. S. Postal Service 987
Bowen *v.* Zant 983
Bowers; Weaver *v.* 942
Bowine, *In re* 998
Bowling *v.* United States 960
Bozeman *v.* Perini 1004
BP Oil, Inc. *v.* Bankers Trust Co. 942
Brache *v.* Westchester County 1005
Brady; Florida *v.* 1011
Brandon *v.* Board of Ed. of Guilderland School Dist. 983
Brannon *v.* Kentucky 911
Bray *v.* Estelle 1026
Bread Political Action Committee *v.* Federal Election Comm'n ... 577
Bridgeport *v.* Association Against Discrimination in Employment 988
Bridgeport Firefighters for Merit Emp. *v.* Assn. Against Discrim. 988

Page
Briscoe *v.* Lahue 1016
Brody *v.* President and Fellows of Harvard College 1027
Broken Arrow; Benham-Blair & Affiliates, Inc. *v.* 1020
Broken Arrow; W. R. Holway & Associates *v.* 1020
Bromwell *v.* Delaware 924
Brown *v.* Commissioners of Kent County 990
Brown; Ivie *v.* 990
Brown *v.* New York 929
Browning Contracting Co. *v.* National Stabilization Agreement of Sheet Metal Industry Trust Fund 909
Bruce *v.* Duckworth 955
Bruschi *v.* United States 989
Bryant *v.* DeFrancis 911
Bucyrus-Erie Co.; Messenger *v.* 944
Bulger; Denman *v.* 946
Bullock; Enserch Exploration, Inc. *v.* 946
Bunnell; New England Teamsters Pension Fund *v.* 908
Bureau of Customs; Barrett *v.* 950
Bureau of Revenue of N. M.; Ramah Navajo School Bd. *v.* 934
Burgess; Sullivan *v.* 1026
Burlington Northern Inc. *v.* United States 907, 988
Burton *v.* Jackson 913
Burton; Republican National Committee *v.* 1015, 1301
Busbee *v.* Texas 929
Busbee; Watson *v.* 925
Bush *v.* Muncy 910
Bussey, *In re* 1012
Butler *v.* United States 945, 1027
Butterworth *v.* Seminole Tribe of Florida 1020
Bynum *v.* United States 960
Byrne; Reese *v.* 953
C.; Catholic Social Services of Tucson *v.* 1007
Cady *v.* United States 919
Caggiano *v.* United States 945
Caldwell, *In re* 1012
Caldwell *v.* Missouri 929
California; Boag *v.* 910
California; Ford *v.* 1003
California *v.* Grace Brethren Church 904
California; Hein *v.* 931
California; Kulik *v.* 907
California; Lewis *v.* 1021
California; Mueller *v.* 1019
California; Murtishaw *v.* 922

Page
California *v.* Ramos 1011
California; Russell *v.* 954
California *v.* Standard Oil Co. of California 990
California; Stephens *v.* 910
California; Talamantez *v.* 954
California *v.* Winson 975
California Council of Carpenters; Assoc. Gen. Contractors *v.* ... 986, 1013
California *ex rel.* State Lands Comm'n *v.* United States 997
Cameron *v.* United States 1005
Campagno *v.* Florida 912
Cannon; Joseph *v.* 999
Capitol Industries-EMI, Inc. *v.* Bennett 943
Caraballo *v.* Secretary of Health and Human Services 995
Carden; Barnes *v.* 921
Carey *v.* Baldrige 999
Cargo Gasoline Co. *v.* United States 1017
Carlsen *v.* Utah 958
Carmen *v.* Idaho 918
Carmen; Williams *v.* 992
Carney *v.* United States 991
Carter *v.* Garrison 952
Carter *v.* United States 926, 955
Cartwright *v.* Cupp 1023
Casbah, Inc. *v.* Thone 1005
Castillo; Blackie's House of Beef, Inc. *v.* 940
Castro *v.* United States 960
Catalina *v.* Columbus 989
Catalina *v.* Moody 989
Caterpillar Tractor Co.; Chicago Bridge & Iron Co. *v.* 905, 917
Caterpillar Tractor Co.; Industrial Workers *v.* 915
Catholic Social Services of Tucson *v.* P. C. 1007
Cattanach; Schneider Transport, Inc. *v.* 909
Celestine *v.* Municipal Correction Institution 1024
Central Bank of Nigeria; Verlinden B. V. *v.* 936
Central Intelligence Agency *v.* Holy Spirit Assn. 906, 997
Cepulonis *v.* Massachusetts 931
Certain-Teed Piping Materials, Inc. *v.* Hydroaire, Inc. 946
Chadha; Immigration and Naturalization Service *v.* 903
Chagra *v.* United States 907
Charlton *v.* Cortez Development Corp. 920
Chelsea House Publishers *v.* Nicholstone Book Bindery, Inc. 994
Cheng *v.* GAF Corp. 909
Cherokee Homes Apartments *v.* United States 913
Chiazor *v.* Transworld Drilling Co. 1019

Page
Chicago; Fire Fighters *v.* 1010
Chicago; Westphalen *v.* 996
Chicago Bd. of Ed.; McCutcheon *v.* 946, 1018
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 905, 917
Chicago, M., St. P. & P. R. Co. *v.* Leer 939
Chicco *v.* New Bedford 924, 1009
Chicco *v.* Peck 923
Chief Justice, Cal. Supreme Court; Ross *v.* 95
Childers *v.* Illinois 947
Ching Yee, *In re* 1015
Ching Yee *v.* Shintaku 916
Chrisman; Washington *v.* 1
Christian; LeBright *v.* 1023
Circuit Court of Gasconade County; Veneri *v.* 1025
Citizens Against UFO Secrecy *v.* National Security Agency 1002
City. See name of city.
Civil Service Comm'n of New York City; Guardians Assn. *v.* 935
Claiborne Hardware Co.; NAACP *v.* 904, 934
Clark *v.* Maggio 1024
Clark *v.* Municipal Employees Credit Union of Baltimore 951
Clark; United States *v.* 985
Clarke *v.* Florida 1016
Clarkson Co.; Shaheen *v.* 990
Clay *v.* Texas 954
Clayborne, *In re* 906
Clements *v.* Logan 942
Cleveland *v.* Palmby 941
Cleveland Elec. Illuminating Co. *v.* Office of Consumers' Counsel 914
Click *v.* Idaho *ex rel.* Evans 987
Coats *v.* United States 991
Cody *v.* Union Electric Co. 1003
Coen *v.* Harrison County School Bd. 938
Coggins *v.* Austin 1004
Cohen *v.* Disciplinary Bd. of Supreme Court of Pa. 914
Cohen; Ernest *v.* 985
Cohn; G. D. Searle & Co. *v.* 404, 932
Colacurcio *v.* United States 1002
Coleman; Havens Realty Corp. *v.* 363
Coleman *v.* Montana 983
College Exxon Service Station *v.* Donovan 920
Colling; Friendly Retirement Center, Inc. *v.* 940
Collins; Ayers *v.* 922
Collins *v.* Housewright 1004
Collins; Hunt *v.* 998

Page
Collins *v.* Ohio 956
Collins *v.* United States 906
Colorado; Gomez *v.* 943
Colorado *v.* New Mexico 932
Colorado; Razatos *v.* 930
Colorado Spanish Peaks Ranch, Inc. *v.* Travelers Ins. Co. 1021
Columbus; Catalina *v.* 989
Columbus; Nellie-Jeanne Corp. *v.* 946
Comay *v.* Illinois 944
Commissioner *v.* Delta Metalforming Co. 906
Commissioner; Hillsboro National Bank *v.* 906, 986
Commissioner; Jewett *v.* 305
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents and Trademarks; Davis *v.* 984
Commissioners Court; Montana *v.* 1026
Commodore Business Machines, Inc. *v.* McDonnell Douglas Corp. 920
Common Cause *v.* Schmitt 129
Commonwealth. See name of Commonwealth.
Community Communications Co. *v.* Boulder 40
Community Television of Southern California *v.* Gottfried 935
Comptroller of Public Accounts of Tex.; Enserch Exploration *v.* .. 946
Conboy; Pillsbury Co. *v.* 1014
Concerned Democrats of Florida; Reno *v.* 938
Connecticut *v.* Gordon 989
Connecticut *v.* Johnson 937
Connecticut *v.* Smith 945
Connecticut *v.* Teal 903
Connick *v.* Myers 999
Connor *v.* Phillips 991
Conover; Marshall & Ilsley Corp. *v.* 981
Consolidated Edison Co. of New York; Jones *v.* 952
Consolidated Freightways Corp. of Delaware *v.* Kassel 329
Continental Illinois National Bank & Trust Co.; Weit *v.* 988
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania... 905, 1013
Contreras *v.* Los Angeles 1021
Cook; Watts *v.* 921
Cooks *v.* Spalding 1026
Coons; Honda Motor Co. *v.* 996
Cooper *v.* Estelle 953
Cooper *v.* Illinois 945
Cooper *v.* Sowders 957
Coopers & Lybrand *v.* Sharp 938
Coppola *v.* Warden 927
Corbitt *v.* United States 908

Page
Cordle *v.* Virginia 951
Corrections Commissioner. See name of commissioner.
Cortez *v.* United States 923, 1008
Cortez Development Corp.; Charlton *v.* 920
Cortez-Espinoza *v.* United States 923, 1008
Costello, *In re* 1011
Cotten; Witco Chemical Corp. *v.* 909
Couf *v.* DeBlaker 921
County. See name of county.
County Comm'rs of Kent Cty.; Brown *v.* 990
County Comm'rs of Kent Cty.; Thunderguards Motorcycle Club *v.* 990
Coven, *In re* 1012
Cowell; Duckworth *v.* 996
Coweta News, Inc. *v.* Memphis 990
Cowgill *v.* Florida 995
Cox *v.* Missouri 976
Cox Enterprises, Inc. *v.* Vascocu 994
Craig *v.* Bickel 901
Crater *v.* Illinois 1027
Crawford *v.* Board of Ed. of Los Angeles 904
Creasy *v.* Virginia 957
Crenshaw *v.* United States 912, 995
Crick *v.* Smith 922
Crist; McGuinn *v.* 990
Crown Paint Co. *v.* Bankston 946
Crude Co. *v.* United States 908
Cryan *v.* Board of Governors of Registered Dentists of Okla. 907
Cucchiara *v.* Secretary of Treasury 948
Cumberland, Md., Area Teamsters Pension Fund; Kagarise *v.* 947
Cunningham *v.* Georgia 1038
Cunningham *v.* Perini 924
Cupp; Cartwright *v.* 1023
Currier *v.* United States 1004
Curtis *v.* Illinois 992
Cuyler; Pennsylvania *ex rel.* Zapata *v.* 911
Daggett; Karcher *v.* 1303
Dahlstrum; United States *v.* 928
Dalsheim; Donaldson *v.* 951
D'Angelo *v.* United States 906
Darnell; Rehberger *v.* 1020
Davidson *v.* Roadway Express, Inc. 947
Davis *v.* Commissioner of Patents and Trademarks 984
Davis *v.* District Director, INS 929
Davis; Holifield *v.* 1026

Page
Davis; Hutto *v.* 1038
Davis *v.* United States 919
Davis *v.* Zant 983
Dearmas *v.* United States 922
DeBlaker; Couf *v.* 921
Deer Park Medical Gp., Money Purchase Pension Plan *v.* Winchell 908
DeFrancis, *In re* 902
DeFrancis; Bryant *v.* 911
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 917, 1014
Delaware; Bromwell *v.* 924
Delaware; Ellison *v.* 1026
Delaware; Whalen *v.* 910
Dellway Villa of Tennessee, Ltd. *v.* Jordan 1008
Del Rio Land, Inc. *v.* Phoenix 1034
Delta Metalforming Co.; Commissioner *v.* 906
Deltona Corp. *v.* United States 1017
Dema *v.* Internal Revenue Service 941
Denardo *v.* Murphy 1038
Denman *v.* Bulger 946
Denningham *v.* Denningham 990
Dennis; Saxton *v.* 1034
Denturist-Denture Lab *v.* Board of Govs. of Reg. Dentists of Okla. 907
Department of Justice; Doyle *v.* 1002
Department of Labor and Human Resources; Hernandez *v.* 996
Department of State *v.* Washington Post Co. 936
Department of Transportation of Cal. *v.* San Diego Port Dist. 1000
Department of Treasury; Tabcor Sales Clearing, Inc. *v.* 941
Devine; Giesey *v.* 908, 1008
DeVito *v.* Harrington 993
Devon Corp. *v.* Miller 993
Diamond; Peters *v.* 1002
Diamond M Co. *v.* Raines 938
Diaz *v.* New York 957
Diaz *v.* United States 910
Dickerson *v.* New Banner Institute, Inc. 1015
DiLapi *v.* United States 938
Dillard *v.* Martin 912
Director, OWCP *v.* Perini North River Associates 937
Director, OWCP; U. S. Industries/Federal Sheet Metal, Inc. *v.* 608
Director of Institutions, N. D. State Prisons; Green *v.* 957
Director of penal or correctional institution. See also name or title of director.
DiSalvatore; United States *v.* 1001
Disciplinary Bd. of Supreme Court of Pa.; Cohen *v.* 914

Page
Disney Productions, Inc.; Nordstrom *v.* 1025
District Court. See U. S. District Court.
District Director, INS; Davis *v.* 929
District Judge, Fourth Judicial Dist. of Neb. *v.* Hunt 478
Dixon *v.* MacDougall 955
Doe *v.* United States 1000
Donaldson *v.* Dalsheim 951
Donovan; College Exxon Service Station *v.* 920
Donovan; J. P. Stevens Employees Education Committee *v.* 930
Donovan; Ramsey *v.* 940
Donovan; Scoles *v.* 920
Dotson; Indianola *v.* 936
Douglas; Sporhase *v.* 935
Downing *v.* United States 950
Downs, *In re* 1008
Doyle *v.* Department of Justice 1002
Drake Univ.; Eaton *v.* 990
Dressel *v.* United States 991
Dresser Industries, Inc. *v.* Alaska Dept. of Labor 1019
Drug Enforcement Administration; Antonelli *v.* 955
Duckworth; Bruce *v.* 955
Duckworth *v.* Cowell 996
Dugan; Michigan *v.* 927
Dumas *v.* United States 990
Dunbar *v.* Louisiana 911
Duncan; Poythress *v.* 937, 998
Dunn *v.* Texas 971
Duty; East Coast Tender Service, Inc. *v.* 945
D. W. Browning Contracting Co. *v.* National Stabilization Agreement of Sheet Metal Industry Trust Fund 909
Eagerton; Exchange Oil & Gas Corp. *v.* 987
Eagerton; Exxon Corp. *v.* 987
East Coast Tender Service, Inc. *v.* Duty 945
Eaton *v.* Drake Univ. 990
Eckerhart; Hensley *v.* 988
Eddings *v.* Oklahoma 104
Eden *v.* United States 949
Edwards *v.* United States 1022
Eggleston; Joint Apprenticeship Committee Local No. 130 *v.* 1017
Ehl *v.* Estelle 953
Eicher *v.* Florida Dept. of Corrections 954
Eight Thousand Eight Hundred & Fifty Dollars; United States *v.* 1015
Elder-Beerman Stores Corp.; Moyer *v.* 942
Ellis, *In re* 937

Page
Ellis *v.* United States 960
Ellison *v.* Delaware 1026
E. L. Wiegand Division, Emerson Electric Co. *v.* NLRB 939
EMI Ltd. *v.* Bennett 943
Endeco, Inc.; Herzog *v.* 943
Engle; Mack *v.* 954
Englemen *v.* Englemen 956
Enmund *v.* Florida 937, 1015
Enserch Exploration, Inc. *v.* Bullock 946
Environmental Protection Agency; Potomac Electric Power Co. *v.* 1016
Equal Employment Opportunity Comm'n *v.* Wyoming 935
Ernest *v.* Cohen 985
Erspan; Badgett *v.* 945
Espinoza-Fernandez *v.* United States 1027
Esposito *v.* Abrams 996
Esprit de Corp.; St. Joe Paper Co. *v.* 982
Estelle; Antwine *v.* 955
Estelle; Bray *v.* 1026
Estelle; Cooper *v.* 953
Estelle; Ehl *v.* 953
Estelle; Grant *v.* 911
Estelle *v.* Granviel 1007
Estelle; Granviel *v.* 1003
Estelle; Hernandez *v.* 952
Estelle; Holloway *v.* 984
Estelle; Johnson *v.* 924
Estelle; Madison *v.* 953
Estelle; Martin *v.* 1003
Estelle; Nyman *v.* 1004
Estelle; Rumph *v.* 956
Estelle *v.* Sellers 927
Estelle; Skinner *v.* 1024
Estelle; Smith *v.* 958
Estes *v.* United States 919
Eubank *v.* Virginia 943
Evans; Click *v.* 987
Evans *v.* Reed 924
Evans *v.* Virginia 1038
Evans; Watson *v.* 925
Exchange Oil & Gas Corp. *v.* Eagerton 987
Exxon Corp. *v.* Eagerton 987
Fagrey *v.* United States 1022
Fahner; Nuclear Engineering Co. *v.* 993
Falls City Industries, Inc. *v.* Vanco Beverage, Inc. 988

Page
Falls Stamping & Welding Co. *v.* Aircraft Workers 1019
Falsetta; Regira *v.* 914
Farace *v.* New York 949
Fare; Manney *v.* 1000
Farmer *v.* Strickland 944
Fasick *v.* Hilton 1022
Faulkner; Morris *v.* 1004
F. D. Rich Housing of Virgin Islands, Inc. *v.* Virgin Islands 1018
Federal Communications Comm'n; Blechman *v.* 954
Federal Communications Comm'n *v.* Gottfried 935
Federal Election Comm'n *v.* Americans for Change 129
Federal Election Comm'n; Bread Political Action Committee *v.* 577
Federal Labor Relations Authority; Government Employees *v.* 945
Federal Prescription Service, Inc. *v.* American Pharm. Assn. 928
Federal Reserve Bank of St. L.; Metrocentre Imp. Dist. No. 1 *v.* 995
Federal Reserve Bank of San Francisco; Bollow *v.* 948
Federal Trade Comm'n; American Medical Assn. *v.* 676
Fed Sea/Fed Pac Line; North River Ins. Co. *v.* 948
Fenner *v.* General Motors Corp. 942
Ferber; New York *v.* 904, 916, 934
Ferro Corp.; O. Hommel Co. *v.* 1017
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 917, 1014
Fillyaw *v.* Wisconsin 1026
Finley *v.* Murray 1012
Finnegan *v.* Leu 903
Fiorini *v.* Abshire 991
Fire Fighters *v.* Chicago 1010
First National Bank of Alabama-Huntsville *v.* Haile 949
First National Bank of Boston (Int'l) *v.* Banco Nacional de Cuba 936
First Nat. City Bank *v.* Banco para el Comercio Exterior de Cuba 936
First Pentecostal Church *v.* United States 920
Fischetti *v.* Ascione 995
Fisher *v.* United States 908
Fleer Corp. *v.* Topps Chewing Gum, Inc. 1019
Fleming *v.* United States 950, 959
Flenner *v.* Pontifex 954
Fletcher *v.* Weir 603
Flight Attendants *v.* Trans World Airlines 385, 915, 932
Flipside, Hoffman Estates, Inc.; Hoffman Estates *v.* 489
Florida; Alander *v.* 919
Florida *v.* Brady 1011
Florida; Campagno *v.* 912
Florida; Clarke *v.* 1016
Florida; Cowgill *v.* 995

Page
Florida; Enmund *v.* 937, 1015
Florida; Katz *v.* 938
Florida; Leicht *v.* 989
Florida; Locke *v.* 985
Florida *v.* Royer 986
Florida; Tafero *v.* 983
Florida; Zeigler *v.* 1035
Florida Dept. of Corrections; Eicher *v.* 954
Florida Dept. of Revenue; Stan Musial & Biggies, Inc. 931
Fluker *v.* Georgia 1009
Foddrell *v.* United States 925
Foley; Schnapper *v.* 948
Fontana *v.* United States 957
Ford *v.* California 1003
Ford Motor Co.; Bennett *v.* 923
Forty-eight Insulations, Inc.; Insurance Co. of North America *v.* 1009
400 E. Baltimore Street, Inc. *v.* Maryland 940
Four Winds Travel, Inc.; Klinski *v.* 1021
Fowler *v.* Garrahy 984
Franks *v.* Oklahoma 1026
Franzen; United States *ex rel.* Fulton *v.* 1023
Franzen; United States *ex rel.* Tolbert *v.* 955
Frazier *v.* S/S Delta Mar 952
Friendly Retirement Center, Inc. *v.* Colling 940
Frierson *v.* Kentucky 1019
Fuller; Anderson *v.* 1028
Fulton *v.* Franzen 1923
Futuronics Corp.; Israel & Raley *v.* 941
F. W. Woolworth Co. *v.* National Labor Relations Bd. 989
GAF Corp.; Cheng *v.* 909
Gaines, *In re* 1027
Galis *v.* Wainwright 929
Gallo *v.* Massachusetts 995
Galvan *v.* United States 1028
Ganley *v.* Maryland 942
Garcia *v.* Illinois 953
Garden State Bar Assn.; Middlesex County Ethics Committee *v.* 936
Garrahy; Fowler *v.* 984
Garrett *v.* United States 924
Garrison; Alford *v.* 925
Garrison; Carter *v.* 952
Garrison; Watkins *v.* 992
Garza *v.* United States 993
Gaspard; Taylor Diving & Salvage Co. *v.* 907

Page
Gaston *v.* New York 911
Gates *v.* Arizona 928
Gates; Illinois *v.* 986
Gaylor *v.* United States 926, 950
G. D. Searle & Co. *v.* Cohn 494, 932
Geller *v.* Merit Systems Protection Bd. 901, 1038
General Accounting Office; Quarry *v.* 912
General Atomic Co. *v.* United Nuclear Corp. 948
General Building Contractors Assn. *v.* Pennsylvania 905, 1013
General Motors Corp.; Fenner *v.* 942
General Motors Corp.; Williams *v.* 943
General Services Administration; Mercado *v.* 1004
Generix Drug Corp.; United States *v.* 988
Georgia; Cunningham *v.* 1038
Georgia; Fluker *v.* 1009
Georgia; Hardy *v.* 929
Georgia; High *v.* 927, 1038
Georgia; Sliger *v.* 945
Georgia; Speight *v.* 947
Georgia; Spradlin *v.* 925
Georgia; Tookes *v.* 945
Georgia; Wallace *v.* 927, 1038
Georgia Kraft Co.; McDonald *v.* 1024
Gerard *v.* Louisiana 939
Getch *v.* Hammock 954
Gholston *v.* United States 1027
Gibbons *v.* Railway Labor Executives' Assn. 999
Gibbons; Railway Labor Executives' Assn. *v.* 457
Gibbs *v.* United States 960
Giesey *v.* Devine 908, 1008
Gillespie; Turner *v.* 959
Gitre *v.* Bache, Halsey, Stuart, Shields, Inc. 997
Glasgow, Inc. *v.* Pennsylvania 905, 1013
Glitsch, Inc. *v.* Jones 920
Goetz *v.* North Dakota 924
Goins *v.* Bethlehem Steel Corp. 940
Gold, *In re* 1011
Goldfield Deep Mines Co. of Nevada *v.* United States 907
Goldstein *v.* Norfolk 981
Goldstein *v.* Nunez 949
Gomez *v.* Colorado 943
Gomez *v.* United States 922, 989
Gonzalez *v.* Hilton 952
Goodhead *v.* United States 912

Page
Goodrich Co.; Worrell *v.* 913
Gordon; Connecticut *v.* 989
Gorsuch; American Petroleum Institute *v.* 1034
Gorsuch; Houston *v.* 1034
Goss *v.* United States 908
Goss, Inc. *v.* Pennsylvania Dept. of Agriculture 930
Gotkin, *In re* 1012
Gottfried; Community Television of Southern California *v.* 935
Gottfried; Federal Communications Comm'n *v.* 935
Government Employees *v.* Federal Labor Relations Authority ... 945
Government of Virgin Islands; F. D. Rich Housing of V. I. *v.* 1018
Governor of Ark.; Bearden *v.* 1026
Governor of Idaho; Click *v.* 987
Governor of Ill.; Sullivan *v.* 1026
Governor of Iowa; Herweg *v.* 265
Governor of Neb.; Casbah, Inc. *v.* 1005
Governor of N. Y. *v.* Baldrige 999
Governor of R. I.; Fowler *v.* 984
Grace Brethren Church; California *v.* 904
Grace Brethren Church *v.* United States 904
Grace Brethren Church; United States *v.* 904
Graham *v.* Kentucky 1001
Granato *v.* New York 949
Grant *v.* Estelle 911
Granviel *v.* Estelle 1003
Granviel; Estelle *v.* 1007
Gray *v.* Van Ooteghem 909
Great American Federal Savings & Loan Assn. *v.* Nalore 1021
Great American Screen *v.* Musidor, B.V. 944
Greathouse *v.* United States 926
Green *v.* Director of Institutions, N. D. State Prisons 957
Green *v.* Ohio 976
Green *v.* Zant 983
Greene *v.* Grievance Committee for Ninth Judicial Dist. 1035
Greene *v.* Lindsey 916
Greer *v.* Seguin 1017
Grieg *v.* United States 907
Grievance Committee for Ninth Judicial Dist.; Greene *v.* 1035
Griffin *v.* United States 960
Grim *v.* Ohio 1025
Guardians Assn. *v.* Civil Service Comm'n of New York City 935
Guinasso; Pacific First Federal Savings & Loan Assn. *v.* 1020
Gutter *v.* Merrill Lynch, Pierce, Fenner & Smith, Inc. 909, 1008
Haile; First National Bank of Alabama-Huntsville *v.* 949

Page
Haldeman *v.* United States Railway Assn. 930
Hale *v.* Illinois 953
Hale *v.* Kansas 1004
Haley *v.* United States 949
Hall *v.* Oklahoma 951
Hall *v.* Thomas 1026
Hall *v.* United States 1027
Hamilton *v.* Mays 1025
Hamlen *v.* United States 960
Hamlin *v.* Warren 911
Hammock; Getch *v.* 954
Hampton *v.* Pennsylvania 1025
Hanberry; Bethea *v.* 912
Haner *v.* United States 960
Hardy *v.* Georgia 929
Harper *v.* Barnes Group, Inc. 921
Harrington; DeVito *v.* 993
Harris; Lee *v.* 910
Harris; Rodriquez *v.* 997
Harris *v.* United States 959
Harris; Washington *v.* 951
Harris County Hospital Dist.; Schwanecke *v.* 1019
Harrison County School Bd.; Coen *v.* 938
Hartford Accident & Indemnity Co. *v.* Keene Corp. 1007
Hartford Textile Corp.; Shuffman *v.* 1018
Hartzell Propeller, Inc. *v.* Reyno 928
Haskon, Inc. *v.* LeSueur Creamery, Inc. 1019
Hatch *v.* Idaho 1003
Hathorn *v.* Lovorn 916, 935
Havens Realty Corp. *v.* Coleman 363
Hawg-N-Action *v.* Trustees, Teamsters Health & Welf. Tr. Fund 941
Hawk *v.* Schweiker 1028
Hawkins *v.* West Virginia 925
Haydel *v.* United States 1022
H & D, Inc.; National Labor Relations Bd. *v.* 902
Heffle; Alaska *v.* 1000
Hegewald; St. Martin *v.* 944
Hegwood *v.* Blackburn 984
Hein *v.* California 931
Helms; Hewitt *v.* 999
Helms; McDaniel *v.* 946
Henderson; McMichael *v.* 950
Hendrix *v.* United States 1005
Henrique *v.* U. S. Marshal 950

Page
Henry *v.* United States 992
Hensley *v.* Eckerhart 988
Hepke *v.* Schweiker 948
Hermann *v.* United States 1000
Hernandez *v.* Department of Labor and Human Resources 996
Hernandez *v.* Estelle 952
Hernandez *v.* Lafayette 901
Hernandez; Lafayette *v.* 907
Herrera *v.* White 959
Herweg *v.* Ray 265
Herzog *v.* Endeco, Inc. 943
Hester *v.* Martindale-Hubbell, Inc. 981
Hewitt *v.* Helms 999
Hicks *v.* Rose 992
High *v.* Georgia 927, 1038
High's Dairy Stores; Levy *v.* 1003
Hightower *v.* Searcy 984
Hill; Adamson *v.* 992
Hilliard *v.* Simpson 912
Hillsboro National Bank *v.* Commissioner 906, 986
Hilton; Fasick *v.* 1022
Hilton; Gonzalez *v.* 952
Hilton; Simmons *v.* 958
Hinds *v.* United States 1022
Hoagland *v.* Lumbermens Mutual Casualty Co. 946
Hoehn, *In re* 937
Hoffman Estates *v.* The Flipside, Hoffman Estates, Inc. 489
Hogan; Mississippi Univ. for Women *v.* 935, 1014
Hogan; Schweiker *v.* 1013
Holifield *v.* Davis 1026
Holland *v.* Sea-Land Service, Inc. 919
Hollingshead *v.* United States 926
Holloway *v.* Estelle 984
Holman, *In re* 902
Holmes; Theatres West, Inc. *v.* 913
Holmes; Westworld Cinema *v.* 913
Holt Marine Terminal, Inc. *v.* Transport International Pool, Inc. 1001
Holway & Associates *v.* Broken Arrow 1020
Holy Spirit Assn.; Central Intelligence Agency *v.* 906, 997
Home State Savings Assn.; Zan-Car Enterprises, Inc. *v.* 947
Hommel Co. *v.* Ferro Corp. 1017
Honda Motor Co. *v.* Coons 996
Hoopa Valley Tribe of Indians *v.* Short 1034
Hooton *v.* United States 1004

Page
Hopkins; Kelsey-Hayes, Inc. *v.* 985
Hopkins *v.* United States 956
Hopkinson *v.* Wyoming 922
Horne *v.* South Carolina 985
Horton *v.* United States 960
House *v.* United States 956
Housewright; Collins *v.* 1004
Houston *v.* Gorsuch 1034
Howard *v.* United States 1028
Howell *v.* United States 1005
Hubbard; Avedisian *v.* 949
Huff *v.* Bordenkircher 1025
Hughes *v.* United States 922
Human Rights Comm'n of San Francisco; Alioto's Fish Co. *v.* 944
Hunt *v.* Collins 998
Hunt; Murphy *v.* 478
Hurd; Michigan *v.* 976
Hutto *v.* Davis 1038
Hybud Equipment Corp. *v.* Akron 931
Hydroaire, Inc.; Certain-Teed Piping Materials, Inc. *v.* 946
Idaho; Carmen *v.* 918
Idaho; Hatch *v.* 1003
Idaho; National Organization for Women, Inc. *v.* 901, 918
Idaho; U. S. Marketing, Inc. *v.* 1009
Idaho *ex rel.* Evans; Click *v.* 987
Illinois *v.* Abbott & Associates, Inc. 998, 1015
Illinois *v.* Bochniak 938
Illinois; Childers *v.* 947
Illinois; Comay *v.* 944
Illinois; Cooper *v.* 945
Illinois; Crater *v.* 1027
Illinois; Curtis *v.* 992
Illinois; Garcia *v.* 953
Illinois *v.* Gates 986
Illinois; Hale *v.* 953
Illinois *v.* Interstate Commerce Comm'n 1001
Illinois; Johnson *v.* 951
Illinois; Kincaid *v.* 1024
Illinois; Lee *v.* 955
Illinois; Mitchell *v.* 944
Illinois; Purrazzo *v.* 948
Illinois; Rosa *v.* 952
Illinois; Spann *v.* 954
Illinois *v.* United States 1000

Page
Illinois; Weaver *v.* 911
Illinois; Winters *v.* 923
Illinois; Yettke *v.* 1000
Immigration and Naturalization Service *v.* Chadha 903
Immigration and Naturalization Service; U. S. House of Reps. *v.* 903
Immigration and Naturalization Service; U. S. Senate *v.* 903
Indiana; Sacks *v.* 1001
Indiana; Sedelbauer *v.* 1035
Indiana; Townsend *v.* 992
Indianapolis; Richardson *v.* 945
Indianola *v.* Dotson 936
Industrial Workers *v.* Caterpillar Tractor Co. 915
In re. See name of party.
Insurance Co. of North America *v.* Forty-eight Insulations, Inc. . 1009
Insurance Co. of North America *v.* Keene Corp. 1007
Internal Revenue Service; Dema *v.* 941
International Medication Systems *v.* National Labor Relations Bd. 1017
Interstate Commerce Comm'n; Illinois *v.* 1001
Iowa Beef Processors, Inc.; Rufenacht *v.* 921
Irwin *v.* United States 1016
Israel *v.* McMorris 967
Israel & Raley *v.* Futuronics Corp. 941
Ivey *v.* Alaska 1010
Ivie *v.* Brown 990
Ivler, *In re* 1011
J., *In re* 191
Jackson *v.* Alabama Dept. of Public Safety 956
Jackson; Burton *v.* 913
Jackson *v.* United States 1003
Jackson Transit Authority *v.* Transit Union 917, 986
Jacob *v.* United States 942
Jacques Syl Knitwear, Inc. *v.* National Labor Relations Bd. 946
Jaffer *v.* Nuclear Regulatory Comm'n 1025
James *v.* South Carolina 1004
Jamieson-McKames Pharmaceuticals, Inc. *v.* United States 1016
Jefferson County Pharmaceutical Assn. *v.* Abbott Laboratories .. 999
Jentgen *v.* United States 1017
Jewett *v.* Commissioner 305
Jicarilla Apache Tribe; Amoco Production Co. *v.* 130
Jicarilla Apache Tribe; Merrion *v.* 130
Jicarilla Apache Tribe; Merrion & Bayless *v.* 130
Jiles *v.* United States 923
Jimenez; Lunz *v.* 913
Jimenez *v.* Montez 950

Page
Job *v.* United States 939
Johns; Margoles *v.* 909
Johns *v.* Ohio 944
Johnson *v.* Aetna Casualty & Surety Co. of Hartford 1039
Johnson *v.* Bank of America 921, 1038
Johnson *v.* Blackburn 1025
Johnson *v.* Board of Ed. of Chicago 936
Johnson; Connecticut *v.* 937
Johnson *v.* Estelle 924
Johnson *v.* Illinois 951
Johnson *v.* Johnson 952
Johnson *v.* Louisiana 984
Johnson *v.* Maryland 948
Johnson; Mayor and City Council of Baltimore *v.* 916, 944
Johnson *v.* Ohio 955
Johnson; Sullivan *v.* 1026
Johnson *v.* Superior Court of Cal., San Francisco 921, 1038
Johnston; Myers *v.* 925
Johnston *v.* United States 1023
Joint Apprenticeship Committee Local No. 130 *v.* Eggleston 1017
Jones *v.* Consolidated Edison Co. of New York 952
Jones; Glitsch, Inc. *v.* 920
Jones *v.* Morris 1009
Jones *v.* New Jersey 952
Jones *v.* United States 956, 957
Jordan; Dellway Villa of Tennessee, Ltd. *v.* 1008
Joseph *v.* Cannon 999
Jos. Schlitz Brewing Co.; McCluney *v.* 929
J. P. Stevens Employees Education Committee *v.* Donovan 930
J. Ray McDermott & Co. *v.* Signal Oil & Gas Co. 944
J. R. Simplot Co. *v.* Occupational Safety and Health Admin. 939
J. S. Alberici Construction Co. *v.* Sisco 976
J. S. Alberici Construction Co.; Sisco *v.* 976
Judge, District Court of Angelina County; Cox Enterprises, Inc. *v.* 994
Judge, District Court of Angelina County; Lufkin News *v.* 994
Juras *v.* Aman Collection Service, Inc. 1024
Justus *v.* Virginia 983
Kagarise *v.* Cumberland, Md., Area Teamsters Pension Fund 947
Kahn, *In re* 1011
Kaiser Steel Corp. *v.* Mullins 72
Kansas; Hale *v.* 1004
Kansas City Parks and Recreation Dept.; Reliford *v.* 958
Kansas Power & Light Co.; Mesa Petroleum Co. *v.* 928
Karcher *v.* Daggett 1303

Page
Karen B.; Treen *v.* 913
Karr *v.* Karr 1016
Kassel; Consolidated Freightways Corp. of Delaware *v.* 329
Katz *v.* Florida 938
Keebler Co.; Betts *v.* 1004
Keene Corp.; Aetna Casualty & Surety Co. *v.* 1007
Keene Corp.; Hartford Accident & Indemnity Co. *v.* 1007
Keene Corp.; Insurance Co. of North America *v.* 1007
Keene Corp.; Liberty Mutual Ins. Co. *v.* 1007
Kelly *v.* Oklahoma Pardon and Parole Bd. 923
Kelsey-Hayes, Inc. *v.* Hopkins 985
Kendall *v.* United States 941, 1021
Kendzia *v.* Wainwright 1023
Kenley *v.* Young 961
Kentucky; Brannon *v.* 911
Kentucky; Frierson *v.* 1019
Kentucky; Graham *v.* 1001
Kentucky; Kessinger *v.* 920
Kentucky; Langford *v.* 948
Kentucky; Yunker *v.* 946
Kentucky Bd. of Elections; Prime Movers, Inc. *v.* 909
Kerr-McGee Refining Corp. *v.* Thompson 1019
Kessinger *v.* Kentucky 920
Kester *v.* United States 941
Kimberlin *v.* United States 1002
Kincaid *v.* Illinois 1024
King, *In re* 906
Kinner *v.* United States 952
Kitchens *v.* United States 1028
Kleinschmidt *v.* Sun Bank of Miami 956
Klinski *v.* Four Winds Travel, Inc. 1021
Kolender *v.* Lawson 999
Koon; Abu-Bakr *v.* 1024
Kops *v.* Wisconsin 958
Krall *v.* Philadelphia 951
Kramer; Santosky *v.* 745
Kretchmar *v.* United States 910
Kriegel *v.* Van Ooteghem 909
Krupp *v.* New Jersey 925
Kulik *v.* California 907
Kunkle; Ahmed *v.* 991
Kutner; Stewart *v.* 945
Labor Union. See name of trade.
Ladmer *v.* United States 938

Page
Lafayette *v.* Hernandez 907
Lafayette; Hernandez *v.* 901
Lahue; Briscoe *v.* 1016
Laird *v.* South Carolina 985
Landhouise; Sullivan *v.* 1026
Lane; Sullivan *v.* 1026
Lane *v.* Williams 624
Langford *v.* Kentucky 948
Lappin; Von Ludwitz *v.* 1023
Larsen *v.* Van Sloctev 901
Lawson; Kolender *v.* 999
Leader *v.* United States 922
Lebel; Beach *v.* 1023
LeBright *v.* Christian 1023
Lee *v.* Harris 910
Lee *v.* Illinois 955
Lee; United States *v.* 252
Leer; Chicago, M., St. P. & P. R. Co. *v.* 939
Legare *v.* Zant 914
Leicht *v.* Florida 989
Lektro-Vend Corp. *v.* Vendo Co. 921
Leonard *v.* United States 910
Lerma *v.* United States 921
Lerner; Romano's Netcong, Inc. *v.* 1019
LeSueur Creamery, Inc.; Haskon, Inc. *v.* 1019
Leu; Finnegan *v.* 903
Leuschner *v.* Maryland 951, 1038
Levison *v.* Levison 984
Levy *v.* High's Dairy Stores 1003
Lewis *v.* California 1021
Lewis *v.* United States 955
Liberty Mutual Ins. Co. *v.* Keene Corp. 1007
Lindsey; Greene *v.* 916
Lippman; Antonelli *v.* 993
Local. For labor union, see name of trade.
Locke *v.* Florida 985
Lockhart *v.* United States 987
Lockheed Corp. *v.* Schneider 994
Lodge; Rogers *v.* 985
Loesch *v.* United States 984
Logan; Clements *v.* 942
Logan *v.* Zimmerman Brush Co. 422
Lonberger; Marshall *v.* 917
Long *v.* Bonnes 961

Page
Long *v.* Smith 1024
Long Island R. Co.; Transportation Union *v.* 678
Longo *v.* United States 991
Longshoremen *v.* Waterfront Comm'n of N. Y. Harbor 915
Lordeon *v.* Peters 998
Loretto *v.* Teleprompter Manhattan CATV Corp. 904
Los Angeles; Contreras *v.* 1021
Los Angeles *v.* Lyons 937
Los Angeles; Richards *v.* 1009
Los Angeles Airways; Lummis *v.* 988
Louisiana; Dunbar *v.* 911
Louisiana; Gerard *v.* 939
Louisiana; Johnson *v.* 984
Louisiana; Scott *v.* 924
Louisiana Power & Light Co.; Sessums *v.* 948
Lovett; Piatt *v.* 910
Lovorn; Hathorn *v.* 916, 935
Lowe *v.* New York City Dept. of Social Services 953
Lowe *v.* Ohio State Bar Assn. 920
L/P/G Benghazi *v.* Velibor 929
Lufkin News *v.* Vascocu 994
Lumbermens Mutual Casualty Co.; Hoagland *v.* 946
Lummis *v.* Los Angeles Airways 988
Lundy; Rose *v.* 509
Lunz *v.* Jimenez 913
Lyons; Los Angeles *v.* 937
Ma, *In re* 987
Mabry; West *v.* 911
MacArthur *v.* Philippine Air Lines 957
MacDougall; Dixon *v.* 955
Machinists *v.* National Labor Relations Bd. 1001
Mack *v.* Engle 954
Madison *v.* Barry 1020
Madison *v.* Estelle 953
Maggio; Clark *v.* 1024
Magill *v.* United States 1005
Maguire *v.* United States 949
Maine Caterers, Inc. *v.* National Labor Relations Bd. 940
Malone *v.* Richardson 1001
Mandelkorn *v.* Ward 907
Manney *v.* Fare 1000
Marathon Oil Co.; Mobil Corp. *v.* 982
Marathon Pipe Line Co.; Northern Pipeline Constr. Co. *v.* . 916, 934, 1013
Marathon Pipe Line Co.; United States *v.* 916, 934, 1013

Page
Marchese *v.* United States 949
Maren Engineering Corp. *v.* Velmohos 985
Margoles *v.* Johns 909
Marine Bank *v.* Weaver 551
Marsh; St. Peter *v.* 1016
Marsh; Woodard *v.* 1022
Marshall; Arnold *v.* 922, 1008
Marshall *v.* Lonberger 917
Marshall & Ilsley Corp. *v.* Conover 981
Martin; Dillard *v.* 912
Martin *v.* Estelle 1003
Martindale-Hubbell, Inc.; Hester *v.* 981
Martinez *v.* Ohio Bureau of Employment Services 911
Maryland; 400 E. Baltimore Street, Inc. *v.* 940
Maryland; Ganley *v.* 942
Maryland; Johnson *v.* 948
Maryland; Leuschner *v.* 951, 1038
Maryland; McMillion *v.* 956
Maryland; Mitchell *v.* 1004
Maryland; Simons *v.* 958
Massachusetts; Cepulonis *v.* 931
Massachusetts; Gallo *v.* 995
Massachusetts *v.* New Hampshire 331
Massachusetts Council of Construction Employers, Inc.; White *v.* 919
Mata; Sumner *v.* 591
Mathis *v.* Montgomery 1024
Mattheis *v.* Anderson 1027
Matthews *v.* United States 959
Matthews Bros., Inc. *v.* Pierce 947
Maynard; Shabazz *v.* 925, 984
Maynard; Stedman *v.* 999
Maynard *v.* United States 991
Mayor and City Council of Baltimore *v.* Johnson 916, 944
Mayor of Birmingham *v.* Associated Gen. Contractors of America 913
Mayor of Boston *v.* Massachusetts Council of Constr. Employers 919
Mayor of Columbus; Ohio *ex rel.* Catalina *v.* 989
Mayor of Denver *v.* Baldrige 345
Mayor of Detroit *v.* Baldrige 939
Mayor of District of Columbia; Madison *v.* 1020
Mays; Hamilton *v.* 1025
Mazaleski *v.* Schweiker 1022
Mazyak *v.* United States 922
McBroom *v.* McCarthy 911
McCarthy; McBroom *v.* 911

Page
McClendon *v.* United States 923
McCluney *v.* Jos. Schlitz Brewing Co. 929
McColpin *v.* Barnes 1004
McCready; Blue Shield of Virginia *v.* 916
McCutcheon *v.* Chicago Bd. of Ed. 946, 1018
McDaniel *v.* Helms 946
McDermott & Co. *v.* Signal Oil & Gas Co. 944
McDonald; Boggs *v.* 990
McDonald *v.* Georgia Kraft Co. 1024
McDonald *v.* Metropolitan Govt. of Nashville & Davidson County 957
McDonnell Douglas Corp.; Commodore Business Machines, Inc. *v.* 920
McDonnell Douglas Corp. *v.* National Labor Relations Bd. 1017
McElroy *v.* United States 642
McEwen; National Photo Services *v.* 942
McEwen; Wood *v.* 942
McGee; Missouri *v.* 930
McGuinn *v.* Crist 990
McIntosh *v.* United States 948
McIntyre *v.* Morris 923
McLaughlin *v.* United States 1022
McLemore's Wholesale & Retail Stores, Inc. *v.* Payne 1000
McLister *v.* United States 990
McMichael *v.* Henderson 950
McMillion *v.* Maryland 956
McMorris; Israel *v.* 967
McNeely *v.* United States 950
McNichols *v.* Baldrige 345
McQuade *v.* United States 958
Meason; Bank of Miami *v.* 939
Mefford *v.* United States 1003
Melia *v.* United States 902
Melnick *v.* Pueblo 1028
Memphis; Coweta News, Inc. *v.* 990
Memphis; Playmate Visual Center *v.* 990
Mercado *v.* General Services Administration 1004
Mercury Construction Corp.; Moses H. Cone Memorial Hospital *v.* 937
Merit Systems Protection Bd.; Geller *v.* 901, 1038
Merrill Lynch, Pierce, Fenner & Smith, Inc.; Gutter *v.* 909, 1008
Merrion *v.* Jicarilla Apache Tribe 130
Merrion & Bayless *v.* Jicarilla Apache Tribe 130
Merski *v.* New Hampshire 943
Mesa Petroleum Co. *v.* Kansas Power & Light Co. 928
Mescalero Apache Tribe *v.* O'Cheskey 929
Mesquite *v.* Aladdin's Castle, Inc. 283

Page
Messenger *v.* Bucyrus-Erie Co. 944
Metrocentre Improvement Dist. No. 1 *v.* Federal Reserve Bank 995
Metropolitan Govt. of Nashville & Davidson County; McDonald *v.* 957
Meyer *v.* Wilson 993
Meyers; Sherrod *v.* 943
Michigan *v.* Dugan 927
Michigan *v.* Hurd 976
Michigan; Simpson *v.* 1025
Middlebury Associates *v.* Pike Industries, Inc. 947
Middlesex County Ethics Committee *v.* Garden State Bar Assn... 936
Midwest Growers Cooperative *v.* United States 942
Miller; Devon Corp. *v.* 993
Minaya *v.* New York 1024
Mincey *v.* Arizona 1003
Minnesota *v.* Block 1007
Minton *v.* United States 950
Miskow *v.* Boeing Co. 1020
Mississippi Univ. for Women *v.* Hogan 935, 1014
Missouri; Caldwell *v.* 929
Missouri; Cox *v.* 976
Missouri *v.* McGee 930
Missouri Bd. of Probation and Parole *v.* Williams 993
Mitchell *v.* Bolton 953
Mitchell *v.* Illinois 844
Mitchell *v.* Maryland 1004
Mobil Corp. *v.* Marathon Oil Co. 982
Mobil Oil Corp.; Tully *v.* 245
Monroe *v.* New York 947
Montana; Coleman *v.* 983
Montana *v.* Commissioners Court 1026
Montana; Muina *v.* 1008
Montana Wilderness Assn. *v.* U. S. Forest Service 989
Montez; Jimenez *v.* 950
Montgomery; Mathis *v.* 1024
Montgomery; Morgan *v.* 927, 1008
Montreal Trading Ltd. *v.* Amax, Inc. 1001
Moody; Ohio *ex rel.* Catalina *v.* 989
Moore *v.* Scurr 983
Moore *v.* Wainwright 924
Moreau; Oppenheim *v.* 1011
Morgan *v.* Montgomery 927, 1008
Morgan *v.* United States 929
Morris *v.* Faulkner 1004
Morris; Jones *v.* 1009

Page
Morris; McIntyre *v.* 923
Morris *v.* Virginia 1003
Morrison *v.* United States 912
Morrone *v.* United States 941
Morter *v.* United States 942
Moses H. Cone Memorial Hospital *v.* Mercury Construction Corp. 937
Moss *v.* Polland 925, 1009
Moss *v.* Securities and Exchange Comm'n 1023
Mouzavires; Baxter *v.* 1006
Moye *v.* Barnes 925
Moyer *v.* Elder-Beerman Stores Corp. 942
Mueller *v.* California 1019
Mueller *v.* Superior Court of Cal., Orange County 1019
Muina *v.* Montana 1008
Mullins; Kaiser Steel Corp. *v.* 72
Muncy; Bush *v.* 910
Municipal Correction Institution; Celestine *v.* 1024
Municipal Employees Credit Union of Baltimore; Clark *v.* 951
Murphy *v.* Adams 920
Murphy; Denardo *v.* 1038
Murphy *v.* Hunt 478
Murphy *v.* United States 960
Murphy Tugboat Co. *v.* Shipowners & Merchants Towboat Co. 1018
Murray; Finley *v.* 1012
Murray; Wolfson *v.* 1010
Murtishaw *v.* California 922
Musial & Biggies, Inc. *v.* Florida Dept. of Revenue 931
Musidor, B.V.; Be-Down Home Designs *v.* 944
Musidor, B.V.; Great American Screen *v.* 944
Mutual of Omaha Ins. Co.; Wilson *v.* 1021
MWP Limited Partnership; Whitelaw *v.* 955
Myers; Connick *v.* 999
Myers *v.* Johnston 925
Myers; Skruzny *v.* 990
Myrick *v.* United States 926
Nalore; Great American Federal Savings & Loan Assn. *v.* 1021
NAACP *v.* Claiborne Hardware Co. 904, 934
National Bureau of Standards; Ackerman *v.* 929
National Health Agencies *v.* United Way of San Diego County 1001
National Labor Relations Bd.; E. L. Wiegand Div., Emerson Elec. *v.* 939
National Labor Relations Bd.; F. W. Woolworth Co. *v.* 989
National Labor Relations Bd. *v.* H & D, Inc. 902
National Labor Relations Bd.; International Medication Systems *v.* 1017
National Labor Relations Bd.; Jacques Syl Knitwear, Inc. *v.* 946

Page
National Labor Relations Bd.; Machinists *v.* 1001
National Labor Relations Bd.; Maine Caterers, Inc. *v.* 940
National Labor Relations Bd.; McDonnell Douglas Corp. *v.* 1017
National Labor Relations Bd.; Ortiz Funeral Home Corp. *v.* 946
National Labor Relations Bd.; Permanent Label Corp. *v.* 940
National Labor Relations Bd.; Thermofil Inc. *v.* 1016
National Labor Relations Bd.; Wright Line *v.* 989
National Organization for Women, Inc. *v.* Idaho 901, 918
National Photo Services *v.* McEwen 942
National Security Agency; Citizens Against UFO Secrecy *v.* 1002
National Stabilization Agreement of Sheet Metal Industry Trust Fund; D. W. Browning Contracting Co. *v.* 909
Natural Resources Defense Council, Inc. *v.* New York 1011
Nearis, *In re* 993
Nebraska *ex rel.* Douglas; Sporhase *v.* 935
Nekonly; Painter *v.* 1021
Nellie-Jeanne Corp. *v.* Columbus 946
Nelson; San Diego County *v.* 1018
Nettles Bey *v.* United States 1023
New Banner Institute, Inc.; Dickerson *v.* 1015
New Bedford; Chicco *v.* 924, 1009
New Body Boutique, Inc.; Vibrant Sales, Inc. *v.* 909
New England Power Co. *v.* New Hampshire 331
New England Teamsters Pension Fund *v.* Bunnell 908
New Hampshire; Massachusetts *v.* 331
New Hampshire; Merski *v.* 943
New Hampshire; New England Power Co. *v.* 331
New Hamphire; Roberts *v.* 331
New Hampshire Dept. of Employment Security; White *v.* 445
New Jersey; Jones *v.* 952
New Jersey; Krupp *v.* 925
New Jersey; Notaro *v.* 1003
New Mexico; Colorado *v.* 932
New Mexico; United States *v.* 720
New York; Barber *v.* 1025
New York; Behlin *v.* 1025
New York; Best *v.* 926
New York; Brown *v.* 929
New York; Diaz *v.* 957
New York; Farace *v.* 949
New York *v.* Ferber 904, 916, 934
New York; Gaston *v.* 911
New York; Granato *v.* 949
New York; Minaya *v.* 1024

Page
New York; Monroe *v.* 947
New York; Natural Resources Defense Council, Inc. *v.* 1011
New York; Pleasant *v.* 924
New York; Vasquez *v.* 953
New York; Williams *v.* 992
New York City Dept. of Social Services; Lowe *v.* 953
New York State Chiropractic Assn. *v.* Pireno 935, 1014
Nicholstone Book Bindery, Inc.; Chelsea House Publishers *v.* 994
Nordstrom *v.* Walt Disney Productions, Inc. 1025
Norfolk; Goldstein *v.* 981
Norman Williams Co.; Bohemian Distributing Co. *v.* 933
Norman Williams Co.; Rice *v.* 933
Norman Williams Co.; Wine & Spirits Wholesalers of Cal. *v.* 933
North Carolina; Rook *v.* 1038
North Carolina Ins. Guar. Assn.; Underwriters Nat. Assur. Co. *v.* 691
North Dakota; Goetz *v.* 924
North Dakota *v.* United States 987
Northeastern Telephone Co. *v.* American Tel. & Tel. Co. 943
Northern Pipeline Constr. Co. *v.* Marathon Pipe Line Co. 916, 934, 1013
North River Ins. Co. *v.* Fed Sea/Fed Pac Line 948
Northwest Excavating, Inc. *v.* Waggoner 931
Notaro *v.* New Jersey 1003
Nuclear Engineering Co. *v.* Fahner 993
Nuclear Regulatory Comm'n; Jaffer *v.* 1025
Nunez; Goldstein *v.* 949
Nurses *v.* Beth Israel Hospital and Geriatric Center 987
Nurses *v.* Presbyterian/St. Luke's Medical Center 987
Nurses *v.* St. Anthony Hospital Systems 987
Nyman *v.* Estelle 1004
Occupational Safety and Health Admin.; J. R. Simplot Co. *v.* 939
O'Cheskey; Mescalero Apache Tribe *v.* 929
Ochoa *v.* United States 959
Odom *v.* United States 960
Office of Consumers' Counsel; Cleveland Elec. Illuminating Co. *v.* 914
Ogilvie; Railway Labor Executives' Assn. *v.* 1000
Oglala Sioux Tribe of Pine Ridge *v.* United States 907
Ohio; Collins *v.* 956
Ohio; Green *v.* 976
Ohio; Grim *v.* 1025
Ohio; Johns *v.* 944
Ohio; Johnson *v.* 955
Ohio; Ruppert *v.* 941
Ohio Bureau of Employment Services; Martinez *v.* 911
Ohio *ex rel.* Catalina *v.* Moody 989

Page
Ohio State Bar Assn.; Lowe *v.* 920
Ohio State Bd. of Ed. *v.* Penick 1013
Ohio State Bd. of Ed. *v.* Reed 1018
O. Hommel Co. *v.* Ferro Corp. 1017
Oklahoma; Eddings *v.* 104
Oklahoma; Franks *v.* 1026
Oklahoma; Hall *v.* 951
Oklahoma; Sanders *v.* 1022
Oklahoma; Texas *v.* 932
Oklahoma; West *v.* 1022
Oklahoma Pardon and Parole Bd.; Kelly *v.* 923
Old Republic Ins. Co.; Antonelli *v.* 923
Oppenheim *v.* Moreau 1011
Ortiz Funeral Home Corp. *v.* National Labor Relations Bd. 946
Osborne; Austin *v.* 1025
Ostrer *v.* United States 940
Outler *v.* United States 950
Owens *v.* United States 958
Owens *v.* Zimmerman 953
Pacific First Federal Savings & Loan Assn. *v.* Guinasso 1020
Page *v.* United States 1018
Painter *v.* Nekolny 1021
Palamone *v.* United States 949
Palmby; Cleveland *v.* 941
Palmby; Zinser *v.* 941
Palmer *v.* Alabama 922
Pardue *v.* United States 957
Parratt; Reed *v.* 956
Passman *v.* Blackburn 1022
Patterson *v.* Youngstown Sheet & Tube Co. 983
Pauk *v.* Board of Trustees of Univ. of N. Y. 1000
Paul, *In re* 906
Paxton National Ins. Co. *v.* Transport Indemnity Co. 982
Payne; McLemore's Wholesale & Retail Stores, Inc. *v.* 1000
P. C.; Catholic Social Services of Tucson *v.* 1007
Peck; Chicco *v.* 923
Pence; Ballet *v.* 957
Penick; Ohio State Bd. of Ed. *v.* 1018
Pennsylvania; Bechtel Power Corp. *v.* 905, 1013
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 905, 1013
Pennsylvania; General Building Contractors Assn. *v.* 905, 1013
Pennsylvania; Glasgow, Inc. *v.* 905, 1013
Pennsylvania; Hampton *v.* 1025
Pennsylvania; United Engineers & Constructors, Inc. *v.* 905, 1013

Page
Pennsylvania; Upsher *v.* 959
Pennsylvania Dept. of Agriculture; S. H. Goss, Inc. *v.* 930
Pennsylvania Dept. of Labor and Industry *v.* Sullivan 1020
Pennsylvania Dept. of Transportation; Stainbrook *v.* 1008
Pennsylvania *ex rel.* Zapata *v.* Cuyler 911
Pennsylvania Higher Education Assistance Agency; Phillips *v.* ... 924
Penoyer *v.* Wainwright 925, 984
Perini; Bozeman *v.* 1004
Perini; Cunningham *v.* 924
Perini; Poole *v.* 910
Perini North River Associates; Director, OWCP *v.* 937
Permanent Label Corp. *v.* National Labor Relations Bd. 940
Perry *v.* United States 960
Personnel Bd. of Jefferson County; Still *v.* 1020
Peters *v.* Diamond 1002
Peters; Lordeon *v.* 998
Peters *v.* Sjoholm 914
Peterson *v.* United States 947
Philadelphia; Krall *v.* 951
Philippine Air Lines; MacArthur *v.* 957
Phillips; Connor *v.* 991
Phillips *v.* Pennsylvania Higher Education Assistance Agency 924
Phillips; Smith *v.* 209
Phillips *v.* United States 912
Phoenix; Del Rio Land, Inc. *v.* 1034
Piatt *v.* Lovett 910
Pico; Board of Ed., Island Trees Union School Dist. No. 26 *v.* 903
Pierce *v.* Abrams 1010
Pierce; Matthews Bros., Inc. 947
Pierce *v.* Ross 1010
Pike Industries, Inc.; Middlebury Associates *v.* 947
Pillsbury Co. *v.* Conboy 1014
Piper Aircraft Co. *v.* Reyno 928
Pireno; New York State Chiropractic Assn. *v.* 935, 1014
Pireno; Union Labor Life Ins. Co. *v.* 935, 1014
Pisani *v.* United States 959
Piscanio *v.* Beans 958
Pitoniak; Vigilant Ins. Co. *v.* 901
Playmate Visual Center *v.* Memphis 990
Pleasant *v.* New York 924
Plumbers *v.* Plummer 1017
Plumbing Contractors Assn. *v.* Plummer 1017
Plummer; Plumbers *v.* 1017
Plummer; Plumbing Contractors Assn. *v.* 1017

Page
Poe *v.* Tennessee 1003
Polland; Moss *v.* 925, 1009
Pontifex; Flenner *v.* 954
Pool *v.* United States 926
Poole *v.* Perini 910
Port Arthur *v.* United States 917
Porter; Aetna Casualty & Surety Co. *v.* 1009
Portland; Stanley *v.* 952
Posey *v.* United States 959
Postmaster General; Poston *v.* 1002
Poston *v.* Bolger 1002
Potomac Electric Power Co. *v.* Environmental Protection Agency 1016
Poythress *v.* Duncan 937, 998
Presbyterian/St. Luke's Medical Center; Nurses *v.* 987
President and Fellows of Harvard College; Brody *v.* 1027
President of Mass. Senate; Denman *v.* 946
Press-Enterprise Co. *v.* Superior Court of Cal., San Francisco ... 982
Pressman, *In re* 1011
Preston *v.* United States 1002
Prime Movers, Inc. *v.* Kentucky Bd. of Elections 909
Princeton Univ. *v.* Schmid 100
Pring *v.* United States 1002
Pring *v.* U. S. District Court 1002
Providence Journal Co.; Auburn News Co. *v.* 921
Pueblo; Melnick *v.* 1028
Puerto Rico; Thayer *v.* 958
Puerto Rico *ex rel.* Quiros; Alfred L. Snapp & Son, Inc. *v.* 933, 986
Pullman-Standard *v.* Swint 903
Purnell; Thomas *v.* 1002
Purrazzo *v.* Illinois 948
Quality Auto Body, Inc. *v.* Allstate Ins. Co. 1020
Quarry *v.* General Accounting Office 912
Quiros; Alfred L. Snapp & Son, Inc. *v.* 933, 986
Rabalais; Smith *v.* 992
Ragins *v.* United States 959
Railway Labor Executives' Assn. *v.* Gibbons 457, 999
Railway Labor Executives' Assn. *v.* Ogilvie 1000
Raines; Diamond M Co. *v.* 938
Raines; Soule *v.* 982
Rainier National Bank; Sabir *v.* 1038
Ralston *v.* Robinson 929
Ramah Navajo School Bd. *v.* Bureau of Revenue of N. M. 934
Ramos; California *v.* 1011
Ramsey *v.* Donovan 940

Page
Ramsey *v.* United States 1005
Randolph T., *In re* 993
Rapides Parish School Bd. *v.* Valley 939
Rawlins, *In re* 1011
Ray; Herweg *v.* 265
Ray *v.* United States 926
Razatos *v.* Colorado 930
Reader's Digest Assn. *v.* United States 908
Reddish *v.* Wainwright 925
Redman; Bailey *v.* 995
Reed; Evans *v.* 924
Reed *v.* Parratt 956
Reed; Ohio State Bd. of Ed. *v.* 1018
Reed *v.* United States 1002
Reese *v.* Byrne 953
Regira *v.* Falsetta 914
Rehberger *v.* Darnell 1020
Reinstein *v.* Superior Court Dept. of Trial Court of Mass. 995
Reliford *v.* Kansas City Parks and Recreation Dept. 958
Reneer *v.* Smith 924
Renner; Wilson *v.* 1021
Reno *v.* Abrams 1016
Reno *v.* Concerned Democrats of Florida 938
Republican National Committee *v.* Burton 1015, 1301
Reyno; Hartzell Propeller, Inc. *v.* 928
Reyno; Piper Aircraft Co. *v.* 928
Rhodes *v.* Stewart 991
Rhodes *v.* U. S. Navy 958
Ribotsky *v.* United States 910
Rice *v.* Norman Williams Co. 933
Richards *v.* Los Angeles 1009
Richardson *v.* Indianapolis 945
Richardson; Malone *v.* 1001
Rich Housing of Virgin Islands, Inc. *v.* Virgin Islands 1018
R. M. J., *In re* 191
Roach *v.* South Carolina 927
Roadway Express, Inc.; Davidson *v.* 947
Roberts *v.* New Hampshire 331
Roberts *v.* United States 929
Robinson *v.* Armand 931
Robinson; Ralston *v.* 929
Robinson; United Mine Workers Health & Retirement Funds *v.* 562
Rodrigues *v.* United States 993
Rodriquez *v.* Harris 997

Page
Rogers *v.* Lodge 985
Romano's Netcong, Inc. *v.* Lerner 1019
Romeo; Youngberg *v.* 915
Rook *v.* North Carolina 1038
Root, *In re* 1012
Rosa *v.* Illinois 952
Rose; Hicks *v.* 992
Rose *v.* Lundy 509
Rosenbaum *v.* Rosenbaum 1018
Ross *v.* Bird 995
Ross; Bixby *v.* 931
Ross; Pierce *v.* 1010
Ross *v.* San Diego County Superior Court 995
Ross *v.* United States 926
Rossi; Weinberger *v.* 915
Rowley; Board of Ed. of Hendrick Hudson School Dist. *v.* 932
Royal Netherlands S.S. Co. *v.* Singer 1001
Royer; Florida *v.* 986
Rucinski *v.* United States 939
Rucker *v.* Bakewell 956
Rufenacht *v.* Iowa Beef Processors, Inc. 921
Ruffin *v.* Austin 1038
Rumph *v.* Estelle 956
Ruppert *v.* Ohio 941
Rushen *v.* Taylor 988
Russell *v.* California 954
Ryndak *v.* United States 912
Sabir *v.* Rainier National Bank 1038
Sacks *v.* Indiana 1001
Sacred Heart Hospital; Amir *v.* 923
Sailors *v.* Schweiker 920
St. Anthony Hospital Systems; Nurses *v.* 987
St. Joe Paper Co. *v.* Superior Court of Cal., San Francisco 982
St. Louis County *v.* Simon 976
St. Louis-San Francisco R. Co. *v.* Vanskike 1000
St. Martin *v.* Hegewald 944
St. Peter *v.* Marsh 1016
Salama *v.* Virginia 928
Salkin *v.* United States 1018
Salpeter *v.* United States 1016
Sanders *v.* Oklahoma 1022
Sanders *v.* United States 959
San Diego County *v.* Nelson 1018
San Diego County Superior Court; Ross *v.* 995

Page
San Diego Unified Port Dist.; Dept. of Transportation of Cal. *v.* ... 1000
Sanford *v.* United States ... 991
Sangiacomo *v.* Zigas ... 943
Santosky *v.* Kramer ... 745
Sarcinelli *v.* United States ... 909
Saxton *v.* Dennis ... 1034
Schad *v.* Arizona ... 983
Schicker; Vorbeck *v.* ... 921
Schlitz Brewing Co.; McCluney *v.* ... 929
Schmid; Princeton Univ. *v.* ... 100
Schmidt *v.* United States ... 991
Schmitt; Common Cause *v.* ... 129
Schnapper *v.* Foley ... 948
Schneider; Lockheed Corp. *v.* ... 994
Schneider Transport, Inc. *v.* Cattanach ... 909
Schriever *v.* United States ... 919
Schwanecke *v.* Harris County Hospital Dist. ... 1019
Schwartz; Bollotin *v.* ... 1001
Schweiker; Hawk *v.* ... 1028
Schweiker; Hepke *v.* ... 948
Schweiker *v.* Hogan ... 1013
Schweiker; Mazaleski *v.* ... 1022
Schweiker; Sailors *v.* ... 920
Schweiker; Ware *v.* ... 912
SCM Corp. *v.* Xerox Corp. ... 1016
Scoles *v.* Donovan ... 920
Scott *v.* Louisiana ... 924
Scott *v.* United States ... 907
Scull *v.* United States ... 950
Scurr; Moore *v.* ... 983
Seafood Workers *v.* United States ... 941
Sea-Land Service, Inc. *v.* Alaska Railroad ... 919
Sea-Land Service, Inc.; Holland *v.* ... 919
Seamon; Upham *v.* ... 1039
Searcy; Hightower *v.* ... 984
Searle & Co. *v.* Cohn ... 404, 932
Seattle School Dist. No. 1; Washington *v.* ... 923
Secretary of Agriculture; Minnesota *v.* ... 1007
Secretary of Army; St. Peter *v.* ... 1016
Secretary of Army; Woodard *v.* ... 1022
Secretary of Commerce; Carey *v.* ... 999
Secretary of Commerce; McNichols *v.* ... 345
Secretary of Commerce *v.* Shapiro ... 345
Secretary of Commerce; Young *v.* ... 939

Page
Secretary of Defense *v.* Rossi 915
Secretary of Health and Human Services; Caraballo *v.* 995
Secretary of Health and Human Services; Hawk *v.* 1028
Secretary of Health and Human Services; Hepke *v.* 948
Secretary of Health and Human Services *v.* Hogan 1013
Secretary of Health and Human Services; Mazaleski *v.* 1022
Secretary of Health and Human Services; Sailors *v.* 920
Secretary of Health and Human Services; Ware *v.* 912
Secretary of Housing and Urban Development *v.* Abrams 1010
Secretary of Housing and Urban Development *v.* Ross 1010
Secretary of Interior; Teclaw *v.* 908
Secretary of Labor; College Exxon Service Station *v.* 920
Secretary of Labor; J. P. Stevens Employees Ed. Committee *v.* 930
Secretary of Labor; Ramsey *v.* 940
Secretary of Labor; Scoles *v.* 920
Secretary of State of Ga. *v.* Duncan 998
Secretary of State of Ga.; Poythress *v.* 937
Secretary of Treasury; Cucchiara *v.* 948
Securities and Exchange Comm'n; Moss *v.* 1023
Securities and Exchange Comm'n; Sprecher *v.* 908
Security Industrial Bank; United States *v.* 986
Sedelbauer *v.* Indiana 1035
Sedigh *v.* United States 921
Seguin; Greer *v.* 1017
Sellers; Estelle *v.* 927
Seminole Tribe of Florida; Butterworth *v.* 1020
Sere *v.* United States 1005
Sere *v.* Welsh 952
Seregos *v.* United States 940
Sessums *v.* Louisiana Power & Light Co. 948
Shabazz *v.* Maynard 925, 984
Shaheen *v.* Clarkson Co. 990
Shamy *v.* United States 939
Shapiro; Baldrige *v.* 345
Sharp; Coopers & Lybrand *v.* 938
Sheikh *v.* United States 991
Sheppard; Sumner *v.* 919
Sherrod *v.* Meyers 943
S. H. Goss, Inc. *v.* Pennsylvania Dept. of Agriculture 930
Shintaku; Ching Yee *v.* 916
Shipowners & Merchants Towboat Co.; Murphy Tugboat Co. *v.* 1018
Shipping Corp. of India; Williams *v.* 982
Shores; Sklar *v.* 936
Short; Hoopa Valley Tribe of Indians *v.* 1034

Page
Short *v.* United States 960
Short; United States *v.* 1034
Shuffman *v.* Hartford Textile Corp. 1018
Siegel *v.* United States 989
Signal Oil & Gas Co.; J. Ray McDermott & Co. *v.* 944
Signal Oil & Gas Co.; Sun Oil Co. *v.* 944
Simko *v.* United States 913
Simmons *v.* Hilton 958
Simmons *v.* Winsberg 954
Simon; St. Louis County *v.* 976
Simons *v.* Maryland 958
Simons *v.* South-Western Publishing Co. 1018
Simplot Co. *v.* Occupational Safety and Health Administration ... 939
Simpson; Hilliard *v.* 912
Simpson *v.* Michigan 1025
Singer; Royal Netherlands S.S. Co. *v.* 1001
Sisco *v.* J. S. Alberici Construction Co. 976
Sisco; J. S. Alberici Construction Co. *v.* 976
Sjoholm; Peters *v.* 914
Skinner *v.* Estelle 1024
Sklar *v.* Shores 936
Skruzny *v.* Myers 990
Sliger *v.* Georgia 945
Smiley, *In re* 998
Smith; Connecticut *v.* 945
Smith; Crick *v.* 922
Smith *v.* Estelle 958
Smith; Long *v.* 1024
Smith *v.* Phillips 209
Smith *v.* Rabalais 992
Smith; Reneer *v.* 924
Smith; Stinson *v.* 951
Smith *v.* United States 949, 950
Smith's Moving & Trucking Co. *v.* Svendsen 927
Smoke-Craft, Inc. *v.* Steel Workers 1021
Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Quiros 933, 986
Soares; Thomas *v.* 1002
Sohyde Drilling & Workover, Inc.; Valero Energy Corp. *v.* 983
Soule *v.* Raines 982
South Carolina; Bernotas *v.* 1017
South Carolina; Horne *v.* 985
South Carolina; James *v.* 1004
South Carolina; Laird *v.* 985
South Carolina; Roach *v.* 927

Page
Southern State College *v.* Arkansas Gazette Co. 931
Southern Union Exploration Co.; Wynn Oil Co. *v.* 920
South-Western Publishing Co.; Simons *v.* 1018
Sowders; Cooper *v.* 957
Spalding; Bosch *v.* 955
Spalding; Cooks *v.* 1026
Spann *v.* Illinois 954
Sparks *v.* United States 910
Speaker, N. J. Assembly *v.* Daggett 1303
Speight *v.* Georgia 947
Spieler *v.* United States 989
Spinney *v.* United States 1023
Sporhase *v.* Nebraska *ex rel.* Douglas 935
Spradlin *v.* Georgia 925
Spradling *v.* Texas 971
Sprecher *v.* Securities and Exchange Comm'n 908
Springer *v.* United States 1023
S/S Delta Mar; Frazier *v.* 952
Stainbrook *v.* Pennsylvania Dept. of Transportation 1008
Standard Oil Co. of California; California *v.* 990
Standard Oil Co. of California *v.* Wiltshire 1034
Stanley *v.* Portland 952
Stan Musial & Biggies, Inc. *v.* Florida Dept. of Revenue 931
State. See name of State.
State Lands Comm'n *v.* United States 997
Stedman *v.* Maynard 999
Steel Workers; Smoke-Craft, Inc. *v.* 1021
Steelworkers *v.* Swint 903
Stenson; Blum *v.* 1014
Stephens *v.* Black 1008
Stephens *v.* California 910
Stewart *v.* Kutner 945
Stewart; Rhodes *v.* 991
Still *v.* Personnel Bd. of Jefferson County 1020
Stinson *v.* Smith 951
Stoddard *v.* United States 938
Stone; Wichita Falls *v.* 905
Stoute *v.* United States 1027
Strickland; Farmer *v.* 944
Stroup *v.* Tucker 946
Strouth *v.* Tennessee 983
Strzelecki *v.* Sweatlock 908
Stuckey *v.* United States 1017
Suggs *v.* Alabama 938

Page
Sullivan *v.* Burgess 1026
Sullivan *v.* Johnson 1026
Sullivan *v.* Landhouise 1026
Sullivan *v.* Lane 1026
Sullivan; Pennsylvania Dept. of Labor & Industry *v.* 1020
Sullivan *v.* Thompson 1026
Sumitomo Shoji America, Inc. *v.* Avagliano 933
Sumitomo Shoji America, Inc.; Avagliano *v.* 933
Sumner *v.* Mata 591
Sumner *v.* Sheppard 919
Sun Bank of Miami; Kleinschmidt *v.* 956
Sun Oil Co. *v.* Signal Oil & Gas Co. 944
Super Duper Food Store *v.* United States 920
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court Dept. of Trial Court of Mass.; Reinstein *v.* 995
Superior Court of Cal., Orange County; Mueller *v.* 1019
Superior Court of Cal., San Diego County; Press-Enterprise Co. *v.* 982
Superior Court of Cal., San Francisco; Johnson *v.* 921, 1038
Superior Court of Cal., San Francisco; St. Joe Paper Co. *v.* 982
Sutherland *v.* United States 949
Sutterer *v.* United States 957, 992
Svendsen; Smith's Moving & Trucking Co. *v.* 927
Sweatlock; Strzelecki *v.* 908
Swint; Pullman-Standard *v.* 903
Swint; Steelworkers *v.* 903
Syl Knitwear, Inc. *v.* National Labor Relations Bd. 946
T., *In re* 993
Tabcor Sales Clearing, Inc. *v.* Department of Treasury 941
Tafero *v.* Florida 983
Tage *v.* United States 991
Talamantez *v.* California 954
Talbert *v.* United States 1027
Talley, *In re* 937
Tant *v.* United States 920
Tavelman *v.* United States 939
Taylor *v.* Alabama 1014
Taylor; Rushen *v.* 988
Taylor Diving & Salvage Co. *v.* Gaspard 907
Teal; Connecticut *v.* 903
Teamsters *v.* Associated General Contractors of California, Inc. .. 1021
Teclaw *v.* Watt 908
Teleprompter Manhattan CATV Corp.; Loretto *v.* 904
Tennessee; Poe *v.* 1003

Page
Tennessee; Strouth *v.* 983
Territory. See name of Territory.
Texas; Alexander *v.* 954
Texas; Busbee *v.* 929
Texas; Clay *v.* 954
Texas; Dunn *v.* 971
Texas *v.* Oklahoma 932
Texas; Spradling *v.* 971
Texas; Williams *v.* 1008
Thayer *v.* Puerto Rico 958
Theatres West, Inc. *v.* Holmes 913
The Flipside, Hoffman Estates, Inc.; Hoffman Estates *v.* 489
Thermofil Inc. *v.* National Labor Relations Bd. 1016
Thomas; Hall *v.* 1026
Thomas *v.* Purnell 1002
Thomas *v.* Soares 1002
Thomas; White *v.* 1027
Thompson; Kerr-McGee Refining Corp. *v.* 1019
Thompson; Sullivan *v.* 1026
Thompson *v.* United States 959
Thone; Casbah, Inc. *v.* 1005
Thoreen *v.* United States 938
Thorne *v.* Arkansas 1024
Thunderguards Motorcycle Club *v.* Commissioners of Kent County 990
Tinkle *v.* United States 924
Tinsley *v.* U. S. Air Force 1005
Todd *v.* United States 926
Todisco *v.* United States 906
Tolbert *v.* Franzen *v.* 955
Tookes *v.* Georgia 945
Topps Chewing Gum, Inc.; Fleer Corp. *v.* 1019
Torna; Wainwright *v.* 586
Torres *v.* United States 926
Touchard *v.* United States 1022
Toughill *v.* United States 953
Townsend *v.* Indiana 992
Towson *v.* United States 1006
Transit Union; Jackson Transit Authority *v.* 917, 986
Transportation Union *v.* Long Island R. Co. 678
Transport Indemnity Co.; Paxton National Ins. Co. *v.* 982
Transport International Pool, Inc.; Holt Marine Terminal, Inc. *v.* 1001
Trans World Airlines; Flight Attendants *v.* 385, 915, 932
Trans World Airlines; Zipes *v.* 385, 915, 932
Transworld Drilling Co.; Chiazor *v.* 1019

Page
Travelers Ins. Co.; Colorado Spanish Peaks Ranch, Inc. *v.* 1021
Treen *v.* Karen B. 913
Truck Drivers *v.* Allen 989
Trustees, Teamsters Health & Welf. Tr. Fund; Hawg-N-Action *v.* 941
Tsui *v.* United States 991
Tucker; Stroup *v.* 946
Tully *v.* Mobil Oil Corp. 245
Turchi *v.* United States 941
Turner, *In re* 1009
Turner *v.* Gillespie 959
Tyler *v.* Woodson 1025
Underwriters National Assur. Co. *v.* N. C. Ins. Guaranty Assn. 691
Undetermined Quantities of Articles of Drugs; United States *v.* .. 902
Union. For labor union, see name of trade.
Union Electric Co.; Cody *v.* 1003
Union Labor Life Ins. Co. *v.* Pireno 935, 1014
United. For labor union, see name of trade.
United Engineers & Constructors, Inc. *v.* Pennsylvania 905, 1013
United Mine Workers Health & Retirement Funds *v.* Robinson .. 562
United Nuclear Corp.; General Atomic Co. *v.* 948
United States. See name of other party.
U. S. Air Force; Tinsley *v.* 1005
U. S. District Court; Pring *v.* 1002
U. S. District Judge; LeBright *v.* 1023
U. S. District Judge; Wilson *v.* 1021
United States *ex rel.* Fulton *v.* Franzen 1023
U. S. Forest Service; Montana Wilderness Assn. *v.* 989
U. S. House of Representatives *v.* INS 903
U. S. Industries/Federal Sheet Metal, Inc. *v.* Director, OWCP ... 608
U. S. Marketing, Inc. *v.* Idaho 1009
U. S. Marshal; Henrique *v.* 950
U. S. Navy; Rhodes *v.* 958
U. S. Parole Comm'n; Warren *v.* 950
U. S. Postal Service; Bowen *v.* 987
U. S. Postal Service Bd. of Governors *v.* Aikens 1015
United States Railway Assn.; Haldeman *v.* 930
U. S. Senate *v.* Immigration and Naturalization Service 903
United Way of San Diego County; National Health Agencies *v.* .. 1001
Upham *v.* Seamon 1039
Upsher *v.* Pennsylvania 959
Utah; Carlsen *v.* 958
Valero Energy Corp. *v.* Sohyde Drilling & Workover, Inc. 983
Valley; Rapides Parish School Bd. *v.* 939
Vallone *v.* United States 906

Page
Vanco Beverage, Inc.; Falls City Industries, Inc. *v.* 988
Vander Pauwert *v.* United States 1005
Vandetti *v.* United States 912
Vannier *v.* United States 1000
Van Ooteghem; Gray *v.* 909
Van Ooteghem; Kriegel *v.* 909
Vanskike; St. Louis-San Francisco R. Co. *v.* 1000
Van Slooten; Larsen *v.* 901
Vargas *v.* United States 953
Vascocu; Cox Enterprises, Inc. *v.* 994
Vascocu; Lufkin News *v.* 994
Vasquez *v.* New York 953
Vasquez-Gonzalez *v.* United States 923
Velibor; L/P/G Benghazi *v.* 929
Velmohos; Maren Engineering Corp. *v.* 985
Vendo Co.; Lektro-Vend Corp. *v.* 921
Veneri *v.* Circuit Court of Gasconade County 1025
Verlinden B. V. *v.* Central Bank of Nigeria 936
Veteran Corps of Artillery; Bloch *v.* 943
Vibrant Sales, Inc. *v.* New Body Boutique, Inc. 909
Vigilant Ins. Co. *v.* Pitoniak 901
Village. See name of village.
Villaneuva Compania Naviera, S.A. *v.* Bankers Trust Co. 942
Villaneuva Compania Naviera, S.A.; Bankers Trust Co. *v.* 942
Virginia; Cordle *v.* 951
Virginia; Creasy *v.* 957
Virginia; Eubank *v.* 943
Virginia; Evans *v.* 1038
Virginia; Justus *v.* 983
Virginia; Morris *v.* 1003
Virginia; Salama *v.* 928
Virgin Islands; F. D. Rich Housing of Virgin Islands, Inc. *v.* 1018
Vite *v.* Wisconsin 955
Vogel Fertilizer Co.; United States *v.* 16
Von Ludwitz *v.* Lappin 1023
Von Ludwitz *v.* United States 1023
Vorbeck *v.* Schicker 921
VSL Corp. *v.* United States 998
Waggoner; Northwest Excavating, Inc. *v.* 931
Wainwright; Galis *v.* 929
Wainwright; Kendzia *v.* 1023
Wainwright; Moore *v.* 924
Wainwright; Penoyer *v.* 925, 984
Wainwright; Reddish *v.* 925

Page
Wainwright *v.* Torna 586
Wainwright; Walker *v.* 958
Walker *v.* United States 908, 949
Walker *v.* Wainwright 958
Wallace *v.* Georgia 927, 1038
Walt Disney Productions, Inc.; Nordstrom *v.* 1025
Ward; Mandelkorn *v.* 907
Ward *v.* United States 922, 995
Warden. See also name of warden.
Warden; Coppola *v.* 927
Ware *v.* Schweiker 912
Warren; Hamlin *v.* 911
Warren *v.* U. S. Parole Comm'n 950
Washburn *v.* Washburn 902
Washington *v.* Chrisman 1
Washington *v.* Harris 951
Washington *v.* Seattle School Dist. No. 1 934
Washington *v.* United States 936
Washington Post Co.; Department of State *v.* 936
Waterfront Comm'n of N. Y. Harbor; Longshoremen *v.* 915
Waters *v.* United States 947
Watkins *v.* Garrison 992
Watkins *v.* United States 989
Watson *v.* Busbee 925
Watson *v.* Evans 925
Watt; Teclaw *v.* 908
Watts *v.* Cook 921
Weaver *v.* Bowers 942
Weaver *v.* Illinois 911
Weaver; Marine Bank *v.* 551
Webb *v.* Alberto-Culver Co. 929
Weigand *v.* United States 940
Weinberger *v.* Rossi 915
Weinstein *v.* United States 942
Weir; Fletcher *v.* 603
Weit *v.* Continental Illinois National Bank & Trust Co. 988
Welsh; Sere *v.* 952
Werner *v.* United States 1027
West *v.* Mabry 911
West *v.* Oklahoma 1022
Westchester County; Brache *v.* 1005
Westphalen *v.* Chicago 996
West Virginia; Hawkins *v.* 925
Westworld Cinema *v.* Holmes 913

Page
Whalen *v.* Delaware 910
White; Bearden *v.* 1026
White; Herrera *v.* 959
White *v.* Massachusetts Council of Construction Employers, Inc. . 919
White *v.* New Hampshire Dept. of Employment Security 445
White *v.* Thomas 1027
White *v.* United States 940
Whitelaw *v.* MWP Limited Partnership 955
Wichita Falls *v.* Stone 905
Widemon, *In re* 905
Wiegand Division, Emerson Electric Co. *v.* NLRB 939
Williams *v.* Carmen 992
Williams *v.* General Motors Corp. 943
Williams; Lane *v.* 624
Williams; Missouri Bd. of Probation and Parole *v.* 993
Williams *v.* New York 992
Williams *v.* Shipping Corp. of India 982
Williams *v.* Texas 1008
Williams *v.* United States 913, 919, 933
Williams *v.* Williams 930
Williams *v.* Wyrick 992
Williams Co.; Bohemian Distributing Co. *v.* 933
Williams Co.; Rice *v.* 933
Williams Co.; Wine & Spirits Wholesalers of California *v.* 933
Willoughby *v.* United States 956
Wilson; Meyer *v.* 993
Wilson *v.* Mutual of Omaha Ins. Co. 1021
Wilson *v.* Renner 1021
Wilson *v.* United States 951, 1023
Wiltshire; Standard Oil Co. of California *v.* 1034
Winchell; Deer Park Medical Gp., Money Purchase Pension Plan *v.* 908
Wine & Spirits Wholesalers of California *v.* Norman Williams Co. 933
Winley *v.* United States 959
Winsberg; Simmons *v.* 954
Winson; California *v.* 975
Winter *v.* United States 912
Winters *v.* Illinois 923
Wisconsin; Fillyaw *v.* 1026
Wisconsin; Kops *v.* 958
Wisconsin; Vite *v.* 955
Witco Chemical Corp. *v.* Cotten 909
Wolf *v.* United States 960
Wolff *v.* United States 957
Wolfson *v.* Murray 1010

Page
Wood *v.* McEwen 942
Woodard *v.* Marsh 1022
Woodson; Tyler *v.* 1025
Woolworth Co. *v.* National Labor Relations Bd. 989
Worrell *v.* B. F. Goodrich Co. 913
Worrell *v.* United States 913
Wortley *v.* United States 1011
W. R. Holway & Associates *v.* Broken Arrow 1020
Wright Line *v.* National Labor Relations Bd. 989
Wynn Oil Co. *v.* Southern Union Exploration Co. 920
Wyoming; Equal Employment Opportunity Comm'n *v.* 935
Wyoming; Hopkinson *v.* 922
Wyrick; Williams *v.* 992
Xerox Corp.; SCM Corp. *v.* 1016
Yapalater *v.* Bates 908
Yaretsky; Blum *v.* 933
Yazzie *v.* United States 923
Yee, *In re* 1015
Yee *v.* Shintaku 916
Yettke *v.* Illinois 1000
Young *v.* Baldrige 939
Young; Kenley *v.* 961
Young *v.* United States 926
Youngberg *v.* Romeo 915
Youngstown Sheet & Tube Co.; Patterson *v.* 983
Yunker *v.* Kentucky 946
Zambuto *v.* United States 906
Zan-Car Enterprises, Inc. *v.* Home State Savings Assn. 947
Zant; Bowen *v.* 983
Zant; Davis *v.* 983
Zant; Green *v.* 983
Zant; Legare *v.* 914
Zapata *v.* Cuyler 911
Zavala-Pizano *v.* United States 929
Zeigler *v.* Florida 1035
Zia *v.* United States 959
Zigas; Sangiacomo *v.* 943
Zimmerman; Owens *v.* 953
Zimmerman Brush Co.; Logan *v.* 422
Zinser *v.* Palmby 941
Zipes *v.* Trans World Airlines 385, 915, 932
Zwego *v.* United States 919

VILLAGE OF HOFFMAN ESTATES ET AL. v. THE FLIPSIDE, HOFFMAN ESTATES, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1681. Argued December 9, 1981—Decided March 3, 1982

An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including "roach clips" and specially designed pipes used to smoke marihuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

Held: The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee. Pp. 494–505.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 494–495.

(b) The ordinance here does not violate appellee's First Amendment rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech. Pp. 495–497.

(c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed . . . for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. Thus, the "designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 499–503.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. Pp. 503–504.

639 F. 2d 373, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 507. STEVENS, J., took no part in the consideration or decision of the case.

Richard N. Williams argued the cause and filed briefs for appellants.

Michael L. Pritzker argued the cause and filed a brief for appellee.*

**Ronald A. Zumbrun* and *John H. Findley* filed a brief for Community Action Against Drug Abuse as *amicus curiae* urging reversal.

Charles A. Trost filed a brief for American Businesses for Constitutional Rights as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Arkansas et al. by *Steve Clark*, Attorney General of Arkansas, *J. D. MacFarlane*, Attorney General of Colorado, *Carl R. Ajello*, Attorney General of Connecticut, *Richard S. Gebelein*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, and *Mitchell D. Franks*, *David H. Leroy*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Robert T.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969–1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F. 2d 373 (1981). We noted probable jurisdiction, 452 U. S. 904 (1981), and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside), sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices, and jewelry, in its store located in the village of Hoffman Estates, Ill. (village).[1] On February

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Stephan, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, and *Paul F. Strain*, *Dennis M. Sweeney*, and *Linda H. Lamone*, Assistant Attorneys General, *Paul L. Douglas*, Attorney General of Nebraska, *Richard H. Bryan*, Attorney General of Nevada, *James R. Zazzali*, Attorney General of New Jersey, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, and *David S. Crump* and *James L. Wallace, Jr.*, Deputy Attorneys General, *Jan Eric Cartwright*, Attorney General of Oklahoma, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *Mark White*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, and *Kenneth O. Eikenberry*, Attorney General of Washington; and for the Village of Wilmette, Illinois, by *Robert J. Mangler*.

[1] More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette hold-

20, 1978, the village enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978.[2] The ordinance makes it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." The license fee is $150. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than $10 and not more than $500, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the Village Attorney define "Paper," "Roach Clips," "Pipes," and "Paraphernalia," the sale of which is required to be licensed.[3]

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ers, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff." 485 F. Supp. 400, 403 (ND Ill. 1980).

[2] The text of the ordinance is set forth in the Appendix to this opinion.

[3] The guidelines provide:

"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

"Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

"Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

"Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips,

After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation of the ordinance. The Village Attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the Village Attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances,[4] Flipside filed this lawsuit in the United States District Court for the Northern District of Illinois.

The complaint alleged, *inter alia*, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued

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or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

"Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered."

[4] Ordinance No. 932–1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate village committee for review. The Village Attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants. 485 F. Supp. 400 (1980).

The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." 639 F. 2d, at 382. It also suggested that the "subjective" nature of the "marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id.*, at 384. Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

II

In a facial challenge to the overbreadth and vagueness of a law,[5] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.[6] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates

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[5] A "facial" challenge, in this context, means a claim that the law is "invalid *in toto*—and therefore incapable of any valid application." *Steffel* v. *Thompson*, 415 U. S. 452, 474 (1974). In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972).

[6] In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964), quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958); see *Grayned*, *supra*, at 109; cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 58–61 (1976).

no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.[7] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in *some* of its applications to the conduct of Flipside and of other hypothetical parties. Under a proper analysis, however, the ordinance is not facially invalid.

III

We first examine whether the ordinance infringes Flipside's First Amendment rights or is overbroad because it inhibits the First Amendment rights of other parties. Flipside makes the exorbitant claim that the village has imposed a "prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or

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[7] "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975). See *United States* v. *Powell*, 423 U. S. 87, 92–93 (1975); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32–33, 36 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971). Such a provision simply has *no* core." *Smith* v. *Goguen*, 415 U. S. 566, 578 (1974).

drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," Guidelines, n. 3, *supra*, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

Second, insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information[8]—with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 563–564 (1980); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 388 (1973). Finally, it is irrelevant whether the ordinance has an

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[8] Flipside explained that it placed items that the village considers drug paraphernalia in locations near a checkout counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson, supra*, at 565, n. 8.[9]

IV

A

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

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[9] Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33–35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra*, at 497–504. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978).

The hostility of some lower courts to drug paraphernalia laws—and particularly to those regulating the sale of items that have many innocent uses, see, *e. g.*, 639 F. 2d 373, 381–383 (1981); *Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F. 2d 916, 928 (CA6 1980), vacated and remanded, 451 U. S. 1013 (1981)—may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity. In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

The standards for evaluating vagueness were enunciated in *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow,[10] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[11] Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.[12] The Court has also expressed greater tolerance of

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[10] *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162 (1972) (dictum; collecting cases).

[11] See, *e. g.*, *United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963). Cf. *Smith* v. *Goguen*, 415 U. S., at 574.

[12] See *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 49 (1966); *McGowan* v. *Maryland*, 366 U. S. 420, 428 (1961).

enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.[13] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.[14]

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.[15]

B

This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test.[16]

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[13] See *Barenblatt* v. *United States*, 360 U. S. 109, 137 (1959) (Black, J., with whom Warren, C. J., and Douglas, J., joined, dissenting); *Winters* v. *New York*, 333 U. S. 507, 515 (1948).

[14] See, *e. g.*, *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979); *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 342 (1952); *Screws* v. *United States*, 325 U. S. 91, 101–103 (1945) (plurality opinion). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 87, n. 98 (1960).

[15] See, *e. g.*, *Papachristou*, *supra*; *Grayned*, 408 U. S., at 109.

[16] The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police." 639 F. 2d, at 377. The proposed register is entitled, "Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Record, Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4–5.

Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, 485 F. Supp., at 406, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill. Rev. Stat., ch. 56½, ¶¶ 703 and 1102(g) (1980). On the other hand, the words "items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village desires to regulate.[17] Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the "designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

1. *"Designed for use"*

The Court of Appeals objected that "designed . . . for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." 639 F. 2d, at 380–381. For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "pa-

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[17] The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of "designed or marketed for use." 485 F. Supp., at 405–407. We agree with the Court of Appeals that a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated. 639 F. 2d, at 380.

per of colorful design" and to other specific items as conclusively "designed" or not "designed" for illegal use.[18] A principal meaning of "design" is "[t]o fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 454, n. 3 (1939). It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item.[19]

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[18] The guidelines explicitly provide that "white paper . . . may be displayed," and that "Roach Clips" are "designed for use with illegal cannabis or drugs *and therefore* covered" (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a "roach clip" is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1123 (1978) (defining "roach" as "[t]he butt of a marijuana cigarette"); R. Lingeman, Drugs from A to Z: A Dictionary 213–214 (1969) (defining "roach" and "roach holder"). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.

[19] "It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i. e. patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." Brief for Appellee 42–43. Moreover, the village President described drug paraphernalia as items "*[m]anufactured* for that purpose and marketed for that purpose." App. 82 (emphasis added).

The ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a "roach clip" used for any purpose other than to smoke cannabis. App. 52. The Chief also testified that a specially designed pipe that Flipside marketed is typically used to smoke marihuana. *Ibid.* Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

2. "Marketed for use"

Whatever ambiguities the "designed . . . for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine High Times and books entitled Marijuana Grower's Guide, Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the

same section of the store, Flipside had posted the sign, "You must be 18 or older to purchase any head supplies."[20] Tr. 30.

V

The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. 639 F. 2d, at 384. In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 168–171 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971).

We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the Village Attorney who drafted the ordinance, the village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the "judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance.[21]

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[20] The American Heritage Dictionary of the English Language 606 (1980) gives the following alternative definition of "head": "*Slang.* One who is a frequent user of drugs."

[21] The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine, 639 F. 2d, at

Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that the village, in testimony below, primarily relied on the "marketing" aspect of the standard, which does not require the more ambiguous item-by-item analysis of whether paraphernalia are "designed for" illegal drug use, and which therefore presents a lesser risk of discriminatory enforcement. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 52 (1966).[22]

VI

Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia.

382, is of no due process significance unless the possibility ripens into a prosecution.

[22] The Court of Appeals also referred to potential Fourth Amendment problems resulting from the recordkeeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." *Id.*, at 384. We will not address these Fourth Amendment issues here. In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a postenforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

Whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 728–730 (1963). We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Village of Hoffman Estates Ordinance No. 969–1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8–7–16, which additional section shall read as follows:

Sec. 8–7–16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8–1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8–7–16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8–2–1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

JUSTICE WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Ante,* at 495. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it

is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–615 (1973). Whether the appellee may make use of the overbreadth doctrine depends, in the first instance, on whether or not it has a colorable claim that the ordinance infringes on constitutionally protected, noncommercial speech of others. Although appellee claims that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

Syllabus

ROSE, WARDEN v. LUNDY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-846. Argued October 14, 1981—Decided March 3, 1982

Title 28 U. S. C. §§ 2254(b) and (c) provide that a state prisoner's application for a writ of habeas corpus in a federal district court based on an alleged federal constitutional violation will not be granted unless the applicant has exhausted the remedies available in the state courts. After respondent was convicted of certain charges in a Tennessee state court and his convictions were affirmed, he unsuccessfully sought postconviction relief in a state court. He then filed a petition in Federal District Court for a writ of habeas corpus under § 2254, alleging four specified grounds of relief. The District Court granted the writ, notwithstanding the petition included both claims that had not been exhausted in the state courts and those that had been. The Court of Appeals affirmed.

Held: The judgment is reversed and the case is remanded.

624 F. 2d 1100, reversed and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, and IV, concluding that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. A rule requiring exhaustion of all claims in state courts promotes comity and furthers the purposes underlying the exhaustion doctrine, as codified in §§ 2254(b) and (c), of protecting the state courts' role in the enforcement of federal law and preventing disruption of state judicial proceedings. Pp. 513–520.

JUSTICE O'CONNOR, joined by CHIEF JUSTICE BURGER, JUSTICE POWELL, and JUSTICE REHNQUIST, concluded in Part III-C that the total exhaustion rule will not impair the state prisoner's interest in obtaining speedy federal relief on his claims, since, rather than returning to state court to exhaust all of his claims, he can always amend the petition to delete the unexhausted claims, although by doing so he would risk dismissal of subsequent federal petitions. Pp. 520–521.

O'CONNOR, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, III-A, III-B, and IV, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part III-C, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 522. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J.,

joined, *post*, p. 532. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 538. STEVENS, J., filed a dissenting opinion, *post*, p. 538.

John C. Zimmermann, Assistant Attorney General of Tennessee argued the cause *pro hac vice* for petitioner. With him on the briefs was *William M. Leech, Jr.*, Attorney General.

D. Shannon Smith, by appointment of the Court, 451 U. S. 904, argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III–C.

In this case we consider whether the exhaustion rule in 28 U. S. C. §§ 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for postconviction relief in the Knox County Criminal Court.

**Solicitor General McCree, Assistant Attorney General Jensen, Deputy Solicitor General Frey*, and *George W. Jones* filed a brief for the United States as *amicus curiae* urging reversal.

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from 5 to 15 years on the crime against nature charge.

The respondent subsequently filed a petition in Federal District Court for a writ of habeas corpus under 28 U. S. C. § 2254, alleging four grounds for relief: (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. After reviewing the state-court records, however, the District Court concluded that it could not consider claims three and four "in the constitutional framework" because the respondent had not exhausted his state remedies for those grounds. The court nevertheless stated that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."[2]

Apparently in an effort to assess the "atmosphere" of the trial, the District Court reviewed the state trial transcript and identified 10 instances of prosecutorial misconduct, only 5 of which the respondent had raised before the state courts.[3]

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[2] The Tennessee Criminal Court of Appeals had ruled specifically on grounds one and two, holding that although the trial court erred in restricting cross-examination of the victim and the prosecuting attorney improperly alluded to the respondent's violent nature, the respondent was not prejudiced by these errors. *Lundy* v. *State*, 521 S. W. 2d 591, 595–596 (1974).

[3] In particular, the District Court found that the prosecutor improperly:

(1) misrepresented that the defense attorney was guilty of illegal and unethical misconduct in interviewing the victim before trial;

(2) "testified" that the victim was telling the truth on the stand;

(3) stated his view of the proper method for the defense attorney to interview the victim;

(4) misrepresented the law regarding interviewing government witnesses;

In addition, although purportedly not ruling on the respondent's fourth ground for relief—that the state trial judge improperly charged that "every witness is presumed to swear the truth"—the court nonetheless held that the jury instruction, coupled with both the restriction of counsel's cross-examination of the victim and the prosecutor's "personal testimony" on the weight of the State's evidence, see n. 3, *supra*, violated the respondent's right to a fair trial. In conclusion, the District Court stated:

> "Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.
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> . . . . .
>
> ". . . Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights

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(5) misrepresented that the victim had a right for both private counsel and the prosecutor to be present when interviewed by the defense counsel;

(6) represented that because an attorney was not present, the defense counsel's conduct was inexcusable;

(7) represented that he could validly file a grievance with the Bar Association on the basis of the defense counsel's conduct;

(8) objected to defense counsel's cross-examination of the victim;

(9) commented that the defendant had a violent nature;

(10) gave his personal evaluation of the State's proof.

The petitioner concedes that the state appellate court considered instances 1, 3, 4, 5, and 9, but states without contradiction that the respondent did not object to the prosecutor's statement that the victim was telling the truth (#2) or to any of the several instances where the prosecutor, in summation, gave his opinion on the weight of the evidence (#10). The petitioner also notes that the conduct identified in #6 and #7 did not occur in front of the jury, and that the conduct in #8, which was only an objection to cross-examination, can hardly be labeled as misconduct.

were violated and the jury poisoned by the prosecutorial misconduct."[4]

In short, the District Court considered several instances of prosecutorial misconduct never challenged in the state trial or appellate courts, or even raised in the respondent's habeas petition.

The Sixth Circuit affirmed the judgment of the District Court, 624 F. 2d 1100 (1980), concluding in an unreported order that the court properly found that the respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct." The court specifically rejected the State's argument that the District Court should have dismissed the petition because it included both exhausted and unexhausted claims.

II

The petitioner urges this Court to apply a "total exhaustion" rule requiring district courts to dismiss every habeas corpus petition that contains both exhausted and unexhausted claims.[5] The petitioner argues at length that such a

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[4] The court granted the writ and ordered the respondent discharged from custody unless within 90 days the State initiated steps to bring about a new trial.

[5] The Fifth and Ninth Circuits have adopted a "total exhaustion" rule. See *Galtieri* v. *Wainwright*, 582 F. 2d 348, 355–360 (CA5 1978) (en banc), and *Gonzales* v. *Stone*, 546 F. 2d 807, 808–810 (CA9 1976). A majority of the Courts of Appeals, however, have permitted the District Courts to review the exhausted claims in a mixed petition containing both exhausted and unexhausted claims. See, *e. g.*, *Katz* v. *King*, 627 F. 2d 568, 574 (CA1 1980); *Cameron* v. *Fastoff*, 543 F. 2d 971, 976 (CA2 1976); *United States ex rel. Trantino* v. *Hatrack*, 563 F. 2d 86, 91–95 (CA3 1977), cert. denied, 435 U. S. 928 (1978); *Hewett* v. *North Carolina*, 415 F. 2d 1316, 1320 (CA4 1969); *Meeks* v. *Jago*, 548 F. 2d 134, 137 (CA6 1976), cert. denied, 434 U. S. 844 (1977); *Brown* v. *Wisconsin State Dept. of Public Welfare*, 457 F. 2d 257, 259 (CA7), cert. denied, 409 U. S. 862 (1972); *Tyler* v. *Swenson*,

rule furthers the policy of comity underlying the exhaustion doctrine because it gives the state courts the first opportunity to correct federal constitutional errors and minimizes federal interference and disruption of state judicial proceedings. The petitioner also believes that uniform adherence to a total exhaustion rule reduces the amount of piecemeal habeas litigation.

Under the petitioner's approach, a district court would dismiss a petition containing both exhausted and unexhausted claims, giving the prisoner the choice of returning to state court to litigate his unexhausted claims, or of proceeding with only his exhausted claims in federal court. The petitioner believes that a prisoner would be reluctant to choose the latter route since a district court could, in appropriate circumstances under Habeas Corpus Rule 9(b), dismiss subsequent federal habeas petitions as an abuse of the writ.[6] In other words, if the prisoner amended the petition to delete the unexhausted claims or immediately refiled in federal court a petition alleging only his exhausted claims, he could lose the opportunity to litigate his presently unexhausted claims in federal court. This argument is addressed in Part III–C of this opinion.

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483 F. 2d 611, 614 (CA8 1973); *Whiteley* v. *Meacham*, 416 F. 2d 36, 39 (CA10 1969), rev'd on other grounds, 401 U. S. 560 (1971).

In *Gooding* v. *Wilson*, 405 U. S. 518 (1972), this Court reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his habeas petition. *Gooding* does not control the present case, however, since the question of total exhaustion was not before the Court. Two years later, in *Francisco* v. *Gathright*, 419 U. S. 59, 63–64 (1974) (*per curiam*), the Court expressly reserved the question of whether § 2254 requires total exhaustion of claims.

[6] Rule 9(b) provides that

"[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In order to evaluate the merits of the petitioner's arguments, we turn to the habeas statute, its legislative history, and the policies underlying the exhaustion doctrine.

III

A

The exhaustion doctrine existed long before its codification by Congress in 1948. In *Ex parte Royall*, 117 U. S. 241, 251 (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act:

> "The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances. See, *e. g.*, *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17–19 (1925) (holding that the lower court should have dismissed the petition because none of the questions had been raised in the state courts. "In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted"). In *Ex parte Hawk*, 321 U. S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to

exist.'"[7] None of these cases, however, specifically applied the exhaustion doctrine to habeas petitions containing both exhausted and unexhausted claims.

In 1948, Congress codified the exhaustion doctrine in 28 U. S. C. § 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion.[8] Section 2254,[9] however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise "the question presented," but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of § 2254, as well as the pre-1948 cases, contains

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[7] The Court also made clear, however, that the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised." 321 U. S., at 118.

[8] The Reviser's Notes in the appendix of the House Report state: "This new section [§ 2254] is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, . . . 321 U. S. 114 . . .)." H. R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947); Historical and Revision Notes following 28 U. S. C. § 2254. See also *Darr* v. *Burford*, 339 U. S. 200, 210 (1950) ("In § 2254 of the 1948 recodification of the Judicial Code, Congress gave legislative recognition to the *Hawk* rule for the exhaustion of remedies in the state courts and this Court"); *Brown* v. *Allen*, 344 U. S. 443, 447–450 (1953); *Fay* v. *Noia*, 372 U. S. 391, 434 (1963).

[9] Section 2254 in part provides:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

no reference to the problem of mixed petitions,[10] in all likelihood Congress never thought of the problem.[11] Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope. *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975) ("'In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy'" (citations omitted)); *United States* v. *Bacto-Unidisk*, 394 U. S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'" (citation omitted)); *United States* v. *Sisson*, 399 U. S. 267, 297–298 (1970) ("The axiom that courts should endeavor to give statutory language that meaning that nurtures the poli-

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[10] Section 2254 was one small part of a comprehensive revision of the Judicial Code. The original version of § 2254, as passed by the House, provided that

"[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court or authority of a State officer shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is no adequate remedy available in such courts or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and laws of the United States." H. R. 3214, 80th Cong., 1st Sess. (1947).

The Senate amended the House bill, changing the House version of § 2254 to its present form. The Senate Report accompanying the bill states that one purpose of the amendment was "to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment." S. Rep. No. 1559, 80th Cong., 2d Sess., 10 (1948). The House accepted the Senate version of the Judicial Code without further amendment.

In 1966, Congress amended § 2254 to add subsection (a) and redesignate the existing paragraphs as subsections (b) and (c). See Pub. L. 89–711, § 2 (c), 80 Stat. 1105.

[11] See Note, Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency, 57 B. U. L. Rev. 864, 867, n. 30 (1977) (suggesting that before 1948 habeas petitions did not contain multiple claims).

cies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed"); *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 64 (1953) ("Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved").

B

The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484, 490–491 (1973).[12] Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U. S., at 251. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr* v. *Burford*, 339 U. S. 200, 204 (1950). See *Duckworth* v. *Serrano*, 454 U. S. 1, 2 (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all

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[12] See also Developments, Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970) (cited favorably in *Braden*).

claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, *supra*, at 490. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review. Cf. 28 U. S. C. § 2254 (d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).

The facts of the present case underscore the need for a rule encouraging exhaustion of all federal claims. In his opinion, the District Court Judge wrote that "there is such mixture of violations that one cannot be separated from and considered independently of the others." Because the two unexhausted claims for relief were intertwined with the exhausted ones, the judge apparently considered all of the claims in ruling on the petition. Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

In his dissent, JUSTICE STEVENS suggests that the District Court properly evaluated the respondent's two exhausted claims "in the context of the entire trial." *Post*, at 541. Unquestionably, however, the District Court erred in considering unexhausted claims, for § 2254(b) expressly requires the prisoner to exhaust "the remedies available in the courts of the State." See n. 9, *supra*. Moreover, to the extent that exhausted and unexhausted claims are interrelated, the general rule among the Courts of Appeals is to dismiss mixed habeas petitions for exhaustion of all such claims. See, *e. g.*, *Triplett* v. *Wyrick*, 549 F. 2d 57 (CA8 1977); *Miller* v. *Hall*, 536 F. 2d 967 (CA1 1976); *Hewett* v. *North Carolina*, 415 F. 2d 1316 (CA4 1969).

Rather than an "adventure in unnecessary lawmaking" (STEVENS, J., *post*, at 539), our holdings today reflect our in-

terpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions (STEVENS, J., *post*, at 550), or will serve to "trap the unwary *pro se* prisoner." (BLACKMUN, J., *post*, at 530.) On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement. Those prisoners who misunderstand this requirement and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims.

Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

C

The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, *supra*, at 490. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U. S. C. § 2254 Rule 9(b), a district court

may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ." See n. 6, *supra*. The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders* v. *United States*, 373 U. S. 1, 18 (1963), where this Court stated:

> "[I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."[13]

See Advisory Committee Note to Habeas Corpus Rule 9(b), 28 U. S. C., p. 273. Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.

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[13] In *Wong Doo* v. *United States*, 265 U. S. 239 (1924), the petitioner brought two habeas corpus petitions to obtain release from the custody of a deportation order. The ground for relief contained in the second petition was also contained in the first petition, but had not been pursued in the first habeas proceeding. The Court held that because the petitioner "had full opportunity to offer proof" in the first hearing, the lower court should not consider the second petition. *Id.*, at 241. The present case, of course, is not controlled by *Wong Doo* because the respondent could not have litigated his unexhausted claims in federal court. Nonetheless, the case provides some guidance for the situation in which a prisoner deliberately decides not to exhaust his claims in state court before filing a habeas corpus petition.

IV

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.[14] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

The important issue before the Court in this case is whether the conservative "total exhaustion" rule espoused now by two Courts of Appeals, the Fifth and the Ninth Circuits, see *ante*, at 513, n. 5, is required by 28 U. S. C. §§ 2254(b) and (c), or whether the approach adopted by eight other Courts of Appeals—that a district court may review the *exhausted* claims of a mixed petition—is the proper interpretation of the statute. On this basic issue, I firmly agree with the majority of the Courts of Appeals.

I do not dispute the value of comity when it is applicable and productive of harmony between state and federal courts, nor do I deny the principle of exhaustion that §§ 2254(b) and (c) so clearly embrace. What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute, as the Court concedes, *ante*, at 516–517, only by sheer force; that it operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts. To use the old expression, the Court's ruling seems to me to "throw the baby out with the bath water."

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[14] Because of our disposition of this case, we do not reach the petitioner's claims that the grounds offered by the respondent do not merit habeas relief.

Although purporting to rely on the policies upon which the exhaustion requirement is based, the Court uses that doctrine as "a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 490 (1973). Those purposes do not require the result the Court reaches; in fact, they support the approach taken by the Court of Appeals in this case and call for dismissal of only the unexhausted claims of a mixed habeas petition. Moreover, to the extent that the Court's ruling today has any impact whatsoever on the workings of federal habeas, it will alter, I fear, the litigation techniques of very few habeas petitioners.

I

A

The Court correctly observes, *ante*, at 516–517, that neither the language nor the legislative history of the exhaustion provisions of §§ 2254(b) and (c) mandates dismissal of a habeas petition containing both exhausted and unexhausted claims. Nor does precedent dictate the result reached here. In *Picard* v. *Connor*, 404 U. S. 270 (1971), for example, the Court ruled that "once the federal *claim* has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Id.*, at 275 (emphasis supplied). Respondent complied with the direction in *Picard* with respect to his challenges to the trial court's limitation of cross-examination of the victim and to at least some of the prosecutor's allegedly improper comments.

The Court fails to note, moreover, that prisoners are not compelled to utilize every available state procedure in order to satisfy the exhaustion requirement. Although this Court's precedents do not address specifically the appropriate treatment of mixed habeas petitions, they plainly suggest that state courts need not inevitably be given every opportunity to safeguard a prisoner's constitutional rights and to pro-

vide him relief before a federal court may entertain his habeas petition.[1]

B

In reversing the judgment of the Sixth Circuit, the Court focuses, as it must, on the purposes the exhaustion doctrine is intended to serve. I do not dispute the importance of the exhaustion requirement or the validity of the policies on which it is based. But I cannot agree that those concerns will be sacrificed by permitting district courts to consider *exhausted* habeas claims.

The first interest relied on by the Court involves an offshoot of the doctrine of federal-state comity. The Court hopes to preserve the state courts' role in protecting constitutional rights, as well as to afford those courts an opportunity to correct constitutional errors and—somewhat patronizingly—to "become increasingly familiar with and hospitable toward federal constitutional issues." *Ante*, at 519. My proposal, however, is not inconsistent with the Court's concern for comity: indeed, the state courts have occasion to rule first on every constitutional challenge, and

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[1] In *Brown* v. *Allen*, 344 U. S. 443, 447 (1953), the Court made clear that the exhaustion doctrine does not foreclose federal habeas relief whenever a state remedy is available; once a prisoner has presented his claim to the highest state court on direct appeal, he need not seek collateral relief from the State. Additionally, in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973), the Court permitted consideration of a § 2254 petition seeking to force the State to afford the prisoner a speedy trial. Although the defendant had not yet been convicted, and therefore obviously had not utilized all available state procedures, and although he could have raised his Sixth Amendment claim as a defense at trial, the Court found the interests underlying the exhaustion doctrine satisfied because the petitioner had presented his existing constitutional claim to the state courts and because he was not attempting to abort a state proceeding or disrupt the State's judicial process. See *id.*, at 491. Finally, in *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), the Court held that an intervening change in the relevant state law, which had occurred subsequent to the prisoner's exhaustion of state remedies and which suggested that the state courts would look favorably on the request for relief, did not necessitate a return to state court.

have ample opportunity to correct any such error, before it is considered by a federal court on habeas.

In some respects, the Court's ruling appears more destructive than solicitous of federal-state comity. Remitting a habeas petitioner to state court to exhaust a patently frivolous claim before the federal court may consider a serious, exhausted ground for relief hardly demonstrates respect for the state courts. The state judiciary's time and resources are then spent rejecting the obviously meritless unexhausted claim, which doubtless will receive little or no attention in the subsequent federal proceeding that focuses on the substantial exhausted claim. I can "conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles." *Roberts* v. *LaVallee*, 389 U. S. 40, 43 (1967).[2]

The second set of interests relied upon by the Court involves those of federal judicial administration—ensuring that a § 2254 petition is accompanied by a complete factual record to facilitate review and relieving the district courts of the responsibility for determining when exhausted and unex-

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[2] The Court fails to mention two related state interests relied upon by the petitioner warden—ensuring finality of convictions and avoiding the mooting of pending state proceedings. The finality of a conviction in no way depends, however, on a federal court's treatment of a mixed habeas petition. If a State is concerned with finality, it may adopt a rule directing defendants to present all their claims at one time; a prisoner's failure to adhere to that procedural requirement, absent cause and prejudice, would bar subsequent federal habeas relief on additional grounds. See *Wainwright* v. *Sykes*, 433 U. S. 72 (1977); *Murch* v. *Mottram*, 409 U. S. 41 (1972). As long as the State permits a prisoner to continue challenging his conviction on alternative grounds, a federal court's dismissal of a mixed habeas petition will provide no particular incentive for consolidation of all potential claims in a single state proceeding.

A pending state proceeding involving claims not included in the prisoner's federal habeas petition will be mooted only if the federal court grants the applicant relief. Even in those cases, though, the state courts will be saved the trouble of undertaking the useless exercise of ruling on unexhausted claims that are unnecessary to the disposition of the case.

hausted claims are interrelated. If a prisoner has presented a particular challenge in the state courts, however, the habeas court will have before it the complete factual record relating to that claim.[3] And the Court's Draconian approach is hardly necessary to relieve district courts of the obligation to consider exhausted grounds for relief when the prisoner also has advanced interrelated claims not yet reviewed by the state courts. When the district court believes, on the facts of the case before it, that the record is inadequate or that full consideration of the exhausted claims is impossible, it has always been free to dismiss the entire habeas petition pending resolution of unexhausted claims in the state courts. Certainly, it makes sense to commit these decisions to the discretion of the lower federal courts, which will be familiar with the specific factual context of each case.

The federal courts that have addressed the issue of interrelatedness have had no difficulty distinguishing related from unrelated habeas claims. Mixed habeas petitions have been dismissed *in toto* when "the issues before the federal court logically depend for their relevance upon resolution of an unexhausted issue," *Miller* v. *Hall*, 536 F. 2d 967, 969 (CA1 1976), or when consideration of the exhausted claim "would necessarily be affected . . ." by the unexhausted claim, *United States ex rel. McBride* v. *Fay*, 370 F. 2d 547, 548 (CA2 1966). Thus, some of the factors to be considered in determining whether a prisoner's grounds for collateral relief are interrelated are whether the claims are based on the same constitutional right or factual issue, and whether they require an understanding of the totality of the circumstances and therefore necessitate examination of the entire record. Compare *Johnson* v. *United States District Court*, 519 F. 2d 738, 740 (CA8 1975) (prisoner's challenge to the voluntariness of his guilty plea intertwined with his claims that at the time

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[3] The district court is free, of course, to order expansion of the record. See 28 U. S. C. § 2254 Rule 7.

of the plea he was mentally incompetent and without effective assistance of counsel); *United States ex rel. DeFlumer* v. *Mancusi*, 380 F. 2d 1018, 1019 (CA2 1967) (dispute regarding the voluntariness of the prisoner's guilty plea "would necessarily affect the consideration of the coerced confession claim, because a voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings"); *United States ex rel. McBride* v. *Fay*, 370 F. 2d, at 548; and *United States ex rel. Martin* v. *McMann*, 348 F. 2d 896, 898 (CA2 1965) (defendant's challenge to the voluntariness of his confession related to his claim that the confession was obtained in violation of his right to the assistance of counsel and without adequate warnings), with *Miller* v. *Hall*, 536 F. 2d, at 969 (no problem of interrelationship when exhausted claims involved allegations that the police lacked probable cause to search defendant's van and had no justification for failing to secure a search warrant, and unexhausted claim maintained that the arresting officer had committed perjury at the suppression hearing); and *United States ex rel. Levy* v. *McMann*, 394 F. 2d 402, 404 (CA2 1968).

The Court's interest in efficient administration of the federal courts therefore does not require dismissal of mixed habeas petitions. In fact, that concern militates *against* the approach taken by the Court today. In order to comply with the Court's ruling, a federal court now will have to review the record in a § 2254 proceeding at least summarily in order to determine whether all claims have been exhausted. In many cases a decision on the merits will involve only negligible additional effort. And in other cases the court may not realize that one of a number of claims is unexhausted until after substantial work has been done. If the district court must nevertheless dismiss the entire petition until all grounds for relief have been exhausted, the prisoner will likely return to federal court eventually, thereby necessitating duplicative examination of the record and consideration of the exhausted

claims—perhaps by another district judge. See JUSTICE STEVENS' dissenting opinion, *post*, at 545. Moreover, when the § 2254 petition does find its way back to federal court, the record on the exhausted grounds for relief may well be stale and resolution of the merits more difficult.[4]

The interest of the prisoner and of society in "preserv[ing] the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement,'" *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S., at 490, is the final policy consideration to be weighed in the balance. Compelling the habeas petitioner to repeat his journey through the entire state and federal legal process before receiving a ruling on his exhausted claims obviously entails substantial delay.[5] And if the prisoner must choose between undergoing that delay and forfeiting unexhausted claims, see *ante*, at 520–521, society is likewise forced to sacrifice either the swiftness of habeas or its availability to remedy all unconstitutional imprisonments.[6] Dismissing only unexhausted

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[4] A related federal interest mentioned by the Court is avoiding piecemeal litigation and encouraging a prisoner to bring all challenges to his state-court conviction in one § 2254 proceeding. As discussed in Part II, *infra*, however, the Court's approach cannot promote that interest because Congress has expressly permitted successive habeas petitions unless the subsequent petitions constitute "an abuse of the writ." 28 U. S. C. § 2254 Rule 9(b).

[5] In *United States ex rel. Irving* v. *Casscles*, 448 F. 2d 741, 742 (CA2 1971), cert. denied, 410 U. S. 925 (1973), and *United States ex rel. DeFlumer* v. *Mancusi*, 380 F. 2d 1018, 1019 (CA2 1967), for example, mixed habeas petitions were dismissed because the exhausted and unexhausted claims were interrelated. In each case, the prisoner was unable to obtain a federal-court judgment on the merits of his exhausted claims for years. See *United States ex rel. Irving* v. *Henderson*, 371 F. Supp. 1266 (SDNY 1974); *United States ex rel. DeFlumer* v. *Mancusi*, 443 F. 2d 940 (CA2), cert. denied, 404 U. S. 914 (1971).

[6] The petitioner warden insists, however, that improved judicial efficiency will benefit those prisoners with meritorious claims because their petitions will not be lost in the flood of frivolous § 2254 petitions. Even if the Court's approach were to contribute to the efficient administration of

grounds for habeas relief, while ruling on the merits of all unrelated exhausted claims, will diminish neither the promptness nor the efficacy of the remedy and, at the same time, will serve the state and federal interests described by the Court.[7]

II

The Court's misguided approach appears to be premised on the specter of "the sophisticated litigious prisoner intent upon a strategy of piecemeal litigation . . . ," whose aim is to have more than one day in court. *Galtieri* v. *Wainwright*, 582 F. 2d 348, 369 (CA5 1978) (en banc) (dissenting opinion). Even if it could be said that the Court's view accurately reflects reality, its ruling today will not frustrate the Perry Masons of the prison populations. To avoid dismissal, they will simply include only exhausted claims in each of many successive habeas petitions. Those subsequent petitions may be dismissed, as JUSTICE BRENNAN observes, only if the prisoner has "abused the writ" by deliberately choosing, for purposes of delay, not to include all his claims in one petition. See *post*, at 535–536 (opinion concurring in part and dissenting in part). And successive habeas petitions that meet the

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justice, the contours of the exhaustion doctrine have no relationship to the merits of a habeas petition: a prisoner with one substantial exhausted claim will be forced to return to state court to litigate his remaining challenges, whereas a petitioner with frivolous, but exhausted, claims will receive, it is to be hoped, a prompt ruling on the merits from the federal court. See STEVENS, J., dissenting, *post*, at 545.

[7] Even the Fifth and Ninth Circuits, which require dismissal of mixed habeas petitions in the typical case, do not follow the extreme position the Court takes today. The Ninth Circuit permits district courts to consider the exhausted grounds in a mixed petition if the prisoner has a reasonable explanation for failing to exhaust the other claims or if the state courts have delayed in ruling on those claims. See *Gonzales* v. *Stone*, 546 F. 2d 807, 810 (1976). The Fifth Circuit will review the merits of exhausted claims contained in a mixed petition if the District Court has considered those claims. See *Galtieri* v. *Wainwright*, 582 F. 2d 348, 361–362 (1978) (en banc).

"abuse of the writ" standard have always been subject to dismissal, irrespective of the Court's treatment of mixed petitions today. The Court's ruling in this case therefore provides no additional incentive whatsoever to consolidate all grounds for relief in one § 2254 petition.

Instead of deterring the sophisticated habeas petitioner who understands, and wishes to circumvent, the rules of exhaustion, the Court's ruling will serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison. He will consolidate all conceivable grounds for relief in an attempt to accelerate review and minimize costs. But, under the Court's approach, if he unwittingly includes in a § 2254 motion a claim not yet presented to the state courts, he risks dismissal of the entire petition and substantial delay before a ruling on the merits of his exhausted claims.

The Court suggests that a prisoner who files a mixed habeas petition will have the option of amending or resubmitting his complaint after deleting the unexhausted claims. See *ante*, at 510, 520. To the extent that prisoners are permitted simply to strike unexhausted claims from a § 2254 petition and then proceed as if those claims had never been presented, I fail to understand what all the fuss is about. In that event, the Court's approach is virtually indistinguishable from that of the Court of Appeals, which directs the district court itself to dismiss unexhausted grounds for relief.

I fear, however, that prisoners who mistakenly submit mixed petitions may not be treated uniformly. A prisoner's opportunity to amend a § 2254 petition may depend on his awareness of the existence of that alternative or on a sympathetic district judge who informs him of the option and permits the amendment. See Fed. Rule Civ. Proc. 15(a). If the prisoner is required to refile the petition after striking the unexhausted claims, he may have to begin the process anew and thus encounter substantial delay before his com-

plaint again comes to the district court's attention. See STEVENS, J., *post*, at 546, n. 15.

Adopting a rule that will afford knowledgeable prisoners more favorable treatment is, I believe, antithetical to the purposes of the habeas writ. Instead of requiring a habeas petitioner to be familiar with the nuances of the exhaustion doctrine and the process of amending a complaint, I would simply permit the district court to dismiss unexhausted grounds for relief and consider exhausted claims on the merits.

III

Although I would affirm the Court of Appeals' ruling that the exhaustion doctrine requires dismissal of only the unexhausted claims in a mixed habeas petition, I would remand the case for reconsideration of the merits of respondent's constitutional arguments. As the Court notes, the District Court erred in considering both exhausted and unexhausted claims when ruling on Lundy's § 2254 petition. See *ante*, at 511–513. The Court of Appeals attempted to recharacterize the District Court's grant of relief as premised on only the exhausted claims and ignored the District Court's conclusion that the exhausted and unexhausted claims were interrelated. See App. 95–96.[*]

Even were the Court of Appeals' recharacterization accurate, that court affirmed the District Court on the ground that respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial mis-

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[*]This Court implies approval of the District Court's finding of interrelatedness, see *ante*, at 519, but I am not convinced that the District Court's conclusion was compelled. Conceivably, habeas relief could be justified only on the basis of a determination that the cumulative impact of the four alleged errors so infected the trial as to violate respondent's due process rights. But Lundy's four claims, on their face, are distinct in terms of the factual allegations and legal conclusions on which they depend.

conduct." *Id.*, at 96. The court does not appear to have specified which allegations of prosecutorial misconduct it considered in reaching this conclusion, and the record does not reflect whether the court improperly took into account instances of purported misconduct that respondent has never challenged in state court. See *ante*, at 511–512, n. 3. This ambiguity is of some importance because the court's general statement does not indicate whether the court would have granted habeas relief on the confrontation claim alone, or whether its judgment is based on the combined effect of the limitation of cross-examination and the asserted prosecutorial misconduct.

I therefore would remand the case, directing that the courts below dismiss respondent's unexhausted claims and examine those that have been properly presented to the state courts in order to determine whether they are interrelated with the unexhausted grounds and, if not, whether they warrant collateral relief.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court (Parts I, II, III–A, III–B, and IV, *ante*), but I do not join in the opinion of the plurality (Part III–C, *ante*). I agree with the Court's holding that the exhaustion requirement of 28 U. S. C. §§ 2254(b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Ante*, at 510. But I disagree with the plurality's view, in Part III–C, that a habeas petitioner must "risk forfeiting consideration of his unexhausted claims in federal court" if he "decides to proceed only with his exhausted claims and deliberately sets aside his

unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition. *Ante*, at 520, 521. The issue of Rule 9(b)'s proper application to successive petitions brought as the result of our decision today is not before us—it was not among the questions presented by petitioner, nor was it briefed and argued by the parties. Therefore, the issue should not be addressed until we have a case presenting it. In any event, I disagree with the plurality's proposed disposition of the issue. In my view, Rule 9(b) cannot be read to permit dismissal of a subsequent petition under the circumstances described in the plurality's opinion.

I

The plurality recognizes, as it must, that in enacting Rule 9(b) Congress explicitly adopted the "abuse of the writ" standard announced in *Sanders* v. *United States*, 373 U. S. 1 (1963). *Ante*, at 521. The legislative history of Rule 9(b) illustrates the meaning of that standard. As transmitted by this Court to Congress, Rule 9(b) read as follows:

> "SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition is *not excusable*." H. R. Rep. No. 94–1471, p. 8 (1976) (emphasis added).

The interpretive gloss placed upon proposed Rule 9(b) by this Court's Advisory Committee on the Rules Governing § 2254 Cases in the United States District Courts was that:

> "With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:
>
> > [']In either case, full consideration of the merits of the new application can be avoided only if there has

> been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> [']Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.[']
>
> "373 U. S., at 17–18.

"Subdivision (b) [of Rule 9] has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be *inexcusable*." Advisory Committee Note to Rule 9(b), 28 U. S. C., p. 273 (emphasis added).

But Congress did not believe that this Court's transmitted language, and the Advisory Committee Note explaining it, went far enough in protecting a state prisoner's right to gain habeas relief. In its Report on proposed Rule 9(b), the House Judiciary Committee stated that, in its view, "the 'not excusable' language [of the proposed Rule] created a new and undefined standard *that gave a judge too broad a discretion to dismiss a second or successive petition*." H. R. Rep. No. 94–1471, *supra*, at 5 (emphasis added). The Judiciary Committee thus recommended that the words, "is not excusable," be replaced by the words, "constituted an abuse of the writ." *Id.*, at 5, 8. This change, the Committee believed, would bring Rule 9(b) "into conformity with existing law." *Id.*, at 5. It was in the Judiciary Committee's revised form—employing the "abusive" standard for dismissal—that Rule 9(b) became law.

II

It is plain that a proper construction of Rule 9(b) must be consistent with its legislative history. This necessarily entails an accurate interpretation of the *Sanders* standard, on which the Rule is based. It also requires consideration of

the explanatory language of the Advisory Committee, and Congress' subsequent strengthening amendment to the text of the Rule. But the plurality, entirely misreading *Sanders*, embraces an interpretation of the Rule 9(b) standard that is manifestly incorrect, and patently inconsistent with the Advisory Committee's exposition and Congress' expressed expectations.

The relevant language from *Sanders*, quoted by the plurality, *ante*, at 521, is as follows:

> "[I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 U. S., at 18.

From this language the plurality concludes: "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Ante*, at 521.

The plurality's conclusion simply distorts the meaning of the quoted language. *Sanders* was plainly concerned with "a prisoner *deliberately* withhold[ing] one of two grounds" for relief "in the hope of being granted two hearings rather than one or for some other such reason." *Sanders* also notes that waiver might be inferred where "the prisoner *deliberately abandons* one of his grounds at the first hearing." Finally, *Sanders* states that dismissal is appropriate either when the court is faced with "*needless* piecemeal litigation" or with

"collateral proceedings *whose only purpose is to vex, harass, or delay.*" Thus *Sanders* made it crystal clear that dismissal for "abuse of the writ" is *only* appropriate when a prisoner was free to include all of his claims in his first petition, but *knowingly* and *deliberately* chose not to do so in order to get more than "one bite at the apple." The plurality's interpretation obviously would allow dismissal in a much broader class of cases than *Sanders* permits.

This Court is free, of course, to overrule *Sanders*. But even that course would not support the plurality's conclusion. For Congress incorporated the "judge-made" *Sanders* principle into positive law when it enacted Rule 9(b). That principle, as explained by the Advisory Committee's Note, *at least* "requires that the [habeas] judge find petitioner's failure to have asserted the new grounds in the prior petition to be *inexcusable.*" Indeed, Congress went beyond the Advisory Committee's language, believing that the "inexcusable" standard made the dismissal of successive petitions too easy. Congress instead required the habeas court to find a successive petitioner's behavior "abusive" before the drastic remedy of dismissal could be employed. That is how Congress understood the *Sanders* principle, and the plurality is simply not free to ignore that understanding, because it is now embedded in the statutory language of Rule 9(b).

III

The plurality's attempt to apply its interpretation of *Sanders* only reinforces my conclusion that the plurality has misread that case. The plurality hypothesizes a prisoner who presents a "mixed" habeas petition that is dismissed without any examination of its claims on the merits, and who, after his exhausted claims are rejected, presents a second petition containing the previously unexhausted claims. The plurality then equates the position of such a prisoner with that of the "abusive" habeas petitioner discussed in the *Sanders* passage. But in my view, the position of the plurality's hypo-

thetical prisoner is obviously very different. If the habeas court refuses to entertain a "mixed" petition—as it must under the plurality's view—then the prisoner's "abandonment" of his unexhausted claims cannot in any meaningful sense be termed "deliberate," as that term was used in *Sanders*. There can be no "abandonment" when the prisoner *is not permitted to proceed* with his unexhausted claims. If he is to gain "speedy federal relief on his claims"—to which he is entitled, as the Court recognizes with its citation to *Braden*, *ante*, at 520—then the prisoner *must* proceed *only* with his exhausted claims. Thus the prisoner in such a case cannot be said to possess a "purpose to vex, harass, or delay," nor any "hope of being granted two hearings rather than one."

Moreover, the plurality's suggested treatment of its hypothetical prisoner flatly contradicts the Rule 9(b) standard as explained by the Advisory Committee, and *a fortiori* contradicts that standard as strengthened and extended by Congress. After the prisoner's first, "mixed" petition has been mandatorily dismissed without any scrutiny, after his exhausted claims have been rejected, and after he has then presented his previously unexhausted claims in a second petition, there is simply no way in which a habeas court could "find petitioner's failure to have asserted the new grounds in the prior petition to be *inexcusable*." On the contrary, petitioner's failure to have asserted the "new," previously unexhausted claims in the prior petition could only be found to have been *required by the habeas court itself*, as a condition for its consideration of the exhausted claims. If the plurality's interpretation of Rule 9(b) cannot satisfy the Advisory Committee's "inexcusable" standard, then it falls even further short of the higher, "abusive" standard eventually adopted by Congress.

IV

I conclude that when a prisoner's original, "mixed" habeas petition is dismissed without any examination of its claims on the merits, and when the prisoner later brings a second peti-

tion based on the previously unexhausted claims that had earlier been refused a hearing, then the remedy of dismissal for "abuse of the writ" cannot be employed against that second petition, absent unusual factual circumstances truly suggesting abuse. This conclusion is to my mind inescapably compelled not only by *Sanders*, but also by the Advisory Committee explanation of the Rule, and by Congress' subsequent incorporation of the higher, "abusive" standard into the Rule. The plurality's conclusion, in contrast, has no support whatever from any of these sources. Nor, of course, does it have the support of a majority of the Court.*

JUSTICE WHITE, concurring in part and dissenting in part.

I agree with most of JUSTICE BRENNAN's opinion; but like JUSTICE BLACKMUN, I would not require a "mixed" petition to be dismissed in its entirety, with leave to resubmit the exhausted claims. The trial judge cannot rule on the unexhausted issues and should dismiss them. But he should rule on the exhausted claims unless they are intertwined with those he must dismiss or unless the habeas petitioner prefers to have his entire petition dismissed. In any event, if the judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief.

JUSTICE STEVENS, dissenting.

This case raises important questions about the authority of federal judges. In my opinion the District Judge properly exercised his statutory duty to consider the merits of the claims advanced by respondent that previously had been rejected by the Tennessee courts. The District Judge ex-

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*JUSTICE WHITE rejects the plurality's conclusion in Part III–C, *ante*, see *post*, this page, as does JUSTICE BLACKMUN, see *ante*, at 529. JUSTICE STEVENS does not reach this issue.

ceeded, however, what I regard as proper restraints on the scope of collateral review of state-court judgments. Ironically, instead of correcting his error, the Court today fashions a new rule of law that will merely delay the final disposition of this case and, as JUSTICE BLACKMUN demonstrates, impose unnecessary burdens on both state and federal judges.

An adequate explanation of my disapproval of the Court's adventure in unnecessary lawmaking requires some reference to the facts of this case and to my conception of the proper role of the writ of habeas corpus in the administration of justice in the United States.

I

Respondent was convicted in state court of rape and a crime against nature. The testimony of the victim was corroborated by another eyewitness who was present during the entire sadistic episode. The evidence of guilt is not merely sufficient; it is convincing. As is often the case in emotional, controverted, adversary proceedings, trial error occurred. Two of those errors—a remark by the prosecutor[1] and a limitation on defense counsel's cross-examination

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[1] At trial, the prosecutor questioned the eyewitness concerning "difficulties" that her sister had encountered while dating the respondent. In response to an objection to the materiality of the inquiry, the prosecutor explained, in the presence of the jury, that "I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to." App. 17. The trial court excused the jury to determine the admissibility of the evidence; it ruled that the collateral inquiry was "too far removed to be material and relevant." *Id.*, at 22. After the jury had returned, the court instructed it to disregard the prosecutor's remarks.

Respondent objected to the prosecutor's statement on direct appeal. After reciting the challenged events, the Tennessee Court of Criminal Appeals recognized that "State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error." *Lundy*

of the victim[2]—were recognized by the Tennessee Court of Criminal Appeals, but held to be harmless in the context of the entire case. Because the state appellate court considered and rejected these two errors as a basis for setting aside his conviction, respondent has exhausted his state remedies with respect to these two claims.

In his application in federal court for a writ of habeas corpus, respondent alleged that these trial errors violated his constitutional rights to confront the witnesses against him and to obtain a fair trial. In his petition, respondent also al-

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v. *State*, 521 S. W. 2d 591, 595 (1974). The court ruled, however, that "in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt." *Ibid.*

[2] Defense counsel cross-examined the victim concerning her prior sexual activity. When the victim responded that she could not remember certain activity, counsel attempted to question her concerning statements that she apparently had made in an earlier interview with defense counsel. The prosecutor objected to this questioning on the ground that, during the interview, defense counsel had only disclosed that he was a lawyer involved in the case, and had not told the victim that he was counsel for the defendant. The trial court sustained the objection. The court permitted defense counsel to continue to question the victim concerning her prior sexual activity, but refused to permit him to refer to his earlier conversation with the victim. App. 13.

On appeal, respondent objected to the trial court's ruling, and also claimed that the prosecutor had prejudiced him by suggesting, before the jury, that defense counsel had acted unethically in not specifically identifying his involvement in the case. The state appellate court rejected respondent's claims, stating:

"We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case." 521 S. W. 2d, at 596.

leged that the prosecutor had impermissibly commented on his failure to testify[3] and that the trial judge had improperly instructed the jury that "every witness is presumed to swear the truth."[4] Because these two additional claims had not been presented to the Tennessee Court of Criminal Appeals, the Federal District Judge concluded that he could "not consider them in the constitutional framework." App. 88. He added, however, that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."[5]

In considering the significance of respondent's two exhausted claims, the District Court thus evaluated them in the context of the entire trial record. That is precisely what the Tennessee Court of Criminal Appeals did in arriving at its conclusion that these claims, identified as error, were not sufficiently prejudicial to justify reversing the conviction and ordering a retrial.[6] In considering whether the error in these two exhausted claims was sufficient to justify a grant of ha-

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[3] In his closing argument, the prosecutor stated:

"The only story we've heard about what happened from about 8:15 of the night of March 16th until about four o'clock in the morning of March 17th came from the State's witnesses." App. 27.

[4] The judge instructed the jury:

"The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth." *Id.*, at 31.

[5] The court stated in full:

"Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally." *Id.*, at 88.

[6] The appellate court found the prosecutor's improper remark to have been harmless "in the context of the undisputed facts of this case"; the limitation of cross-examination harmless "in the context of this case." See nn. 1, 2, *supra*.

beas corpus relief, the federal court—like the state court—had a duty to look at the context in which the error occurred to determine whether it was either aggravated or mitigated by other aspects of the proceeding.[7] The state court and the federal court formed differing judgments based on that broad review. I happen to share the appraisal of the state court on the merits, but I believe that the procedure followed by the federal court was entirely correct.

The Court holds, however, that the District Court committed two procedural errors. "Unquestionably," according to the Court, it was wrong for the District Court to consider the portions of the trial record described in the unexhausted claims in evaluating those claims that had been exhausted. *Ante*, at 519. More fundamentally, according to the Court, it was wrong for the District Court even to consider the merits of the *exhausted* claims because the prisoner had included unexhausted claims in his pleadings. Both of the Court's holdings are unsatisfactory for the same basic reason: the Court assumes that the character of all claims alleged in habeas corpus petitions is the same. Under the Court's analysis, *any* unexhausted claim asserted in a habeas corpus petition—no matter how frivolous—is sufficient to command the district judge to postpone relief on a meritorious exhausted claim, no matter how obvious and outrageous the constitutional violation may be.

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[7] "Each case must be scrutinized on its particular facts to determine whether a trial error is harmless error or prejudicial error when viewed in the light of the trial record as a whole, not whether each isolated incident viewed by itself constitutes reversible error." *United States* v. *Grunberger*, 431 F. 2d 1062, 1069 (CA2 1970). Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240 ("Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice").

In my opinion claims of constitutional error are not fungible. There are at least four types. The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. In my opinion, each of the four claims asserted in this case falls in that category. The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. *Chapman* v. *California*, 386 U. S. 18, 22; *Harrington* v. *California*, 395 U. S. 250, 254. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465.[8] The fourth category includes those er-

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[8] In my opinion a claim generally belongs in this category if the purpose and significance of the constitutional rule is such that the Court enforces it prospectively but not retroactively, cf. *Linkletter* v. *Walker*, 381 U. S. 618, or if the probable significance of the claim is belied by the fact that otherwise competent defense counsel did not raise a timely objection, cf. *Estelle* v. *Williams*, 425 U. S. 501, 508, n. 3; *Wainwright* v. *Sykes*, 433 U. S. 72, 95–97 (STEVENS, J., concurring).

I recognize the apparent incongruity in suggesting that there is a class of constitutional error—not constitutionally harmless—that does not render a criminal proceeding fundamentally unfair. It may be argued, with considerable force, that a rule of procedure that is not necessary to ensure fundamental fairness is not worthy of constitutional status. The fact that such a category of constitutional error exists, however, is demonstrated by the jurisprudence of this Court concerning the retroactive application of newly recognized constitutional rights. See, *e. g.*, *Linkletter* v. *Walker*, *supra* (exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, not to be applied retroactively); *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (rule of *Griffin* v. *California*, 380 U. S. 609, forbidding adverse comment on the defendant's failure to testify); *Johnson* v. *New Jersey*, 384 U. S. 719 (guidelines for custodial interrogation established in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436); *Stovall* v. *Denno*, 388 U. S. 293 (rules requiring presence of counsel at pretrial identification

rors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained. This category cannot be defined precisely; concepts of "fundamental fairness" are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence;[9] that the prosecutor knowingly made use of perjured testimony;[10] or that the conviction was based on a confession extorted from the defendant by brutal methods.[11] Errors of this kind justify collateral relief no matter how long a judgment may have been final[12] and even though they may not have been preserved properly in the original trial.[13]

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procedures); *DeStefano* v. *Woods*, 392 U. S. 631 (right to trial by jury in serious criminal cases and serious criminal contempts); *Michigan* v. *Payne*, 412 U. S. 47 (rule of *North Carolina* v. *Pearce*, 395 U. S. 711, requiring objective evidence on the record to justify greater sentence imposed after successful appeal). In ruling that a constitutional principle is not to be applied retroactively, the Court implicitly suggests that the right is not necessary to ensure the integrity of the underlying judgment; the Court certainly would not allow claims of such magnitude to remain unremedied.

It is possible that each of these decisions involves a general constitutional principle that—although not necessary to ensure fundamental fairness at trial—is typically vindicated through trial remedies. See, *e. g.*, *Linkletter* v. *Walker*, *supra*, at 639; *Tehan* v. *United States ex rel. Shott*, *supra*, at 415; but see *Stovall* v. *Denno*, *supra*, at 298; *DeStefano* v. *Woods*, *supra*, at 633. Whatever the correct explanation of these decisions may be, they demonstrate that the Court's constitutional jurisprudence has expanded beyond the concept of ensuring fundamental fairness to the accused. My point here is simply that this expansion need not, and should not, be applied to collateral attacks on final judgments.

[9] *Moore* v. *Dempsey*, 261 U. S. 86.

[10] *Mooney* v. *Holohan*, 294 U. S. 103.

[11] See *Brown* v. *Mississippi*, 297 U. S. 278 (direct appeal).

[12] See, *e. g.*, *DeMeerleer* v. *Michigan*, 329 U. S. 663; *Marino* v. *Ragen*, 332 U. S. 561.

[13] See *Wainwright* v. *Sykes*, 433 U. S. 72, 95–96, n. 3 (STEVENS, J., concurring). Justice Black noted in his opinion for the Court in *Chapman* v.

In this case, I think it is clear that neither the exhausted claims nor the unexhausted claims describe any error demonstrating that respondent's trial was fundamentally unfair. Since his lawyer found insufficient merit in the two unexhausted claims to object to the error at trial or to raise the claims on direct appeal,[14] I would expect that the Tennessee courts will consider them to have been waived as a matter of state law; thereafter, under the teaching of cases such as *Wainwright* v. *Sykes*, 433 U. S. 72, they undoubtedly will not support Federal relief. This case is thus destined to return to the Federal District Court and the Court of Appeals where, it is safe to predict, those courts will once again come to the conclusion that the writ should issue. The additional procedure that the Court requires before considering the merits will be totally unproductive.

If my appraisal of respondent's exhausted claims is incorrect—if the trial actually was fundamentally unfair to the respondent—postponing relief until another round of review in the state and federal judicial systems has been completed is truly outrageous. The unnecessary delay will make it more difficult for the prosecutor to obtain a conviction on retrial if respondent is in fact guilty; if he is innocent, requiring him to languish in jail because he made a pleading error is callous indeed.

There are some situations in which a district judge should refuse to entertain a mixed petition until all of the prisoner's claims have been exhausted. If the unexhausted claim appears to involve error of the most serious kind and if it is reasonably clear that the exhausted claims do not, addressing the merits of the exhausted claims will merely delay the ulti-

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California, 386 U. S. 18, 23, that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." In support of this statement he cited *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel at trial); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge).

[14] See App. 27, 35–38, 75, 88.

mate disposition of the case. Or if an evidentiary hearing is necessary to decide the merits of both the exhausted and unexhausted claims, a procedure that enables all fact questions to be resolved in the same hearing should be followed. I therefore would allow district judges to exercise discretion to determine whether the presence of an unexhausted claim in a habeas corpus application makes it inappropriate to consider the merits of a properly pleaded exhausted claim. The inflexible, mechanical rule the Court adopts today arbitrarily denies district judges the kind of authority they need to administer their calendars effectively.[15]

II

In recent years federal judges at times have lost sight of the true office of the great writ of habeas corpus. It is quite unlike the common-law writ of error that enabled a higher court to correct errors committed by a *nisi prius* tribunal in the trial of civil or criminal cases by ordering further proceedings whenever trial error was detected. The writ of habeas corpus is a fundamental guarantee of liberty.[16]

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[15] I do not believe that the Court's "total exhaustion" requirement is simply a harmless rule of procedure whose prospective application will do nothing more than require district judges to instruct state prisoners to redraft their pleadings with black magic markers. If that is the full import of the decision today, the Court disparages federal judges; the Court implies that a federal judge will not obey the statutory command to grant relief on only exhausted claims if an unexhausted claim lurks somewhere in the prisoner's pleadings. More importantly, the unnecessary delay that the Court causes in the disposition of this case will not be limited to the instant proceeding; a similar outcome will follow every time an appellate court disagrees with a district court's judgment that a petition contains only exhausted claims. Given the ambiguity of many habeas corpus applications filed by *pro se* applicants, such differing appraisals should not be uncommon.

[16] "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean

The fact that federal judges have at times construed their power to issue writs of habeas corpus as though it were tantamount to the authority of an appellate court considering a direct appeal from a trial court judgment has had two unfortunate consequences. First, it has encouraged prisoners to file an ever-increasing volume of federal applications that often amount to little more than a request for further review of asserted grounds for reversal that already have been adequately considered and rejected on direct review. Second, it has led this Court into the business of creating special procedural rules for dealing with this flood of litigation. The doctrine of nonretroactivity, the emerging "cause and prejudice" doctrine, and today's "total exhaustion" rule are examples of judicial lawmaking that might well have been avoided by confining the availability of habeas corpus relief to cases that truly involve fundamental unfairness.

When that high standard is met, there should be no question about the retroactivity of the constitutional rule being enforced. Nor do I believe there is any need to fashion definitions of "cause" and "prejudice" to determine whether an error that was not preserved at trial or on direct appeal is subject to review in a collateral federal proceeding.[17] The

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that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. 'The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.' Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." *Brown* v. *Allen*, 344 U. S. 443, 512 (opinion of Frankfurter, J.).

[17] The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach

availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim.[18]

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great importance to the character of the objection, if any, asserted by the defendant's counsel. But if such error is manifest, I would not wrestle with terms such as "cause" and "prejudice" to determine whether habeas corpus relief should be granted. Thus, in *Wainwright* v. *Sykes*, 433 U. S., at 94, I wrote separately because a straightforward analysis of the record revealed the lack of merit in the prisoner's claim. Had the record disclosed an error sufficiently serious to justify habeas corpus relief, I would not have joined a holding that an error of that character had been waived by a procedural default. As I pointed out in *Wainwright*, *supra*, at 95, even an express waiver by the defendant may be excused if the constitutional issue is sufficiently grave. That actually was the case in *Fay* v. *Noia*, 372 U. S. 391. There the Court held that habeas corpus relief was available notwithstanding the client's participation in the waiver decision, and notwithstanding the fact that the decision was made on a tactical basis. See 433 U. S., at 95, n. 3.

[18] It may be argued that limiting habeas corpus relief to claims involving the fundamental fairness of the underlying proceeding is no less "lawmaking" than engrafting a rule that a federal court may not entertain a habeas corpus application containing both exhausted and unexhausted claims. See *Stone* v. *Powell*, 428 U. S. 465, 522, 529 (BRENNAN, J., dissenting). It is interesting to note, however, that the Court unanimously has held that an error of law does not provide a basis for collateral attack on a federal judgment under 28 U. S. C. § 2255 unless the error constituted "'a fundamental defect which inherently results in a complete miscarriage of justice,'" *United States* v. *Timmreck*, 441 U. S. 780, 783 (quoting *Hill* v. *United States*, 368 U. S. 424, 428); see also *United States* v. *Addonizio*, 442 U. S. 178, 185, even though the statute authorizes a federal prisoner to petition for relief whenever he is "in custody under sentence . . . imposed in violation of the Constitution or *laws* of the United States . . . ." 28 U. S. C. § 2255 (emphasis added). See *Davis* v. *United States*, 417 U. S. 333, 343–344.

Although the two situations are not identical, I believe that the reasons that persuaded the Court to limit errors of law cognizable under 28 U. S. C. § 2255 also apply to constitutional errors under 28 U. S. C. § 2254. Section 2254 was enacted in 1948 as part of the revision and recodification of Title 28 of the United States Code. The Reviser's Notes concerning § 2254 provide simply that "[t]his new section is declaratory of existing law

The "total exhaustion" rule the Court crafts today demeans the high office of the great writ. Perhaps a rule of this kind would be an appropriate response to a flood of litigation requesting review of minor disputes. An assumption that most of these petitions are groundless might be thought to justify technical pleading requirements that would provide a mechanism for reducing the sheer number of cases in which the merits must be considered. But the Court's experience has taught us not only that most of these petitions lack merit, but also that there are cases in which serious injustice must

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as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, . . . 321 U. S. 114 . . .)." H. R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947). In 1948, constitutional rules of procedure were relatively few, those that did exist generally were not applicable to the States, and the scope of habeas corpus relief was narrow. As late as the decision in *Palko* v. *Connecticut*, 302 U. S. 319, 328, constitutional claims applicable to the States were limited to those hardships "so acute and shocking that our polity will not endure it"; to those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Ibid.* (quoting *Hebert* v. *Louisiana*, 272 U. S. 312, 316). In *Schechtman* v. *Foster*, 172 F. 2d 339, 341 (CA2 1949), cert. denied, 339 U. S. 924, Judge Learned Hand wrote for the court, in affirming a denial of a habeas corpus petition alleging intentional use of perjured testimony, that "[i]f the [state] judge who denied that [claim] did in fact consider the evidence as a whole, and if he decided that it was not, even prima facie, sufficient to make out a case of deliberate presentation by the prosecution of perjured testimony, [petitioner] was accorded the full measure of his constitutional rights. . . . [T]he District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony."

This Court has long since rejected these restrictive notions of the constitutional protections that are available to state criminal defendants. Nevertheless, the point remains that the law today is very different from what it was when the current habeas corpus statute was enacted in 1948. That statute was amended in 1966, but the amendments merely added to, and did not modify, the existing statutory language. Respected scholars may argue forcefully to the contrary, but in my opinion a limitation of habeas corpus relief to instances of fundamental unfairness is consistent with the intent of the Congress that enacted § 2254 in 1948.

be corrected by the issuance of the writ.[19] In such cases, the statutory requirement that adequate state remedies be exhausted must, of course, be honored. When a person's liberty is at stake, however, there surely is no justification for the creation of needless procedural hurdles.[20]

Procedural regularity is a matter of fundamental importance in the administration of justice. But procedural niceties that merely complicate and delay the resolution of disputes are another matter. In my opinion the federal habeas corpus statute should be construed to protect the former and, whenever possible, to avoid the latter.

I respectfully dissent.

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[19] "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others." *Brown* v. *Allen*, 344 U. S., at 498 (opinion of Frankfurter, J.).

[20] "[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court*, 411 U. S. 345, 350. Cf. *Marino* v. *Ragen*, 332 U. S., at 563–570 (Rutledge, J., concurring).

Syllabus

MARINE BANK *v.* WEAVER ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1562. Argued January 11, 1982—Decided March 8, 1982

After respondents purchased a $50,000 certificate of deposit, with a 6-year maturity, from petitioner federally regulated bank, they pledged it to petitioner to guarantee a $65,000 loan made to a company that owed petitioner $33,000 for prior loans and was also overdrawn on its checking account. In consideration for guaranteeing the new loan, the company's owners entered into an agreement with respondents whereby respondents were to receive a share of the company's profits and other compensation. The new loan, rather than being used as working capital by the company as petitioner's officers allegedly told respondents it would, was applied to pay the company's overdue obligations to petitioner. Subsequently, the company became bankrupt, and petitioner disclosed its intention to claim the pledged certificate of deposit. Respondents then brought suit in Federal District Court, claiming that petitioner violated, *inter alia*, the antifraud provisions of § 10(b) of the Securities Exchange Act of 1934 (Act) by soliciting the loan guarantee while knowing, but not disclosing, the borrowing company's financial plight or petitioner's plans to repay itself from the guaranteed loan. The District Court granted summary judgment in petitioner's favor, holding that if a wrong occurred, it did not occur "in connection with the purchase or sale of any security" as required for liability under § 10(b). The Court of Appeals reversed, holding that it could reasonably be found that either the certificate of deposit or the agreement between respondents and the company's owners was a security.

Held: Neither the certificate of deposit nor the agreement in question is a security within the meaning of § 10(b). Pp. 555–561.

(a) While the definition of "security" in the Act is quite broad, Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud. Pp. 555–556.

(b) A certificate of deposit is not the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities in *Tcherepnin* v. *Knight*, 389 U. S. 332, nor is it similar to any other long-term debt obligation commonly found to be a security. The purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation as-

sumes the risk of the borrower's insolvency. Cf. *Teamsters* v. *Daniel*, 439 U. S. 551. Pp. 556–559.

(c) The agreement in question is not the type of instrument that comes to mind when the term "security" is used and does not fall within "the ordinary concept of a security." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, and *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, distinguished. The provision of the agreement giving respondents a share of the company's profits is not in itself sufficient to make the agreement a security. Pp. 559–560.

637 F. 2d 157, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Daniel L. R. Miller argued the cause for petitioner. With him on the brief was *Christine Hall McClure*.

Andrew J. Conner argued the cause and filed a brief for respondents.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether two instruments, a conventional certificate of deposit and a business agreement between two families, could be considered securities under the antifraud provisions of the federal securities laws.

I

Respondents, Sam and Alice Weaver, purchased a $50,000 certificate of deposit from petitioner Marine Bank on February 28, 1978. The certificate of deposit has a 6-year maturity, and it is insured by the Federal Deposit Insurance Cor-

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*Briefs of *amici curiae* urging reversal were filed by *Acting Solicitor General Wallace, Stephen M. Shapiro, Ralph C. Ferrara, Frank L. Skillern, Jr.*, and *John E. Shockey* for the United States; and by *William H. Smith, Johanna M. Sabol*, and *Michael F. Crotty* for the American Bankers Association.

Leonard I. Schreiber filed a brief for Myrna Ayala as *amicus curiae* urging affirmance.

poration.[1] The Weavers subsequently pledged the certificate of deposit to Marine Bank on March 17, 1978, to guarantee a $65,000 loan made by the bank to Columbus Packing Co. Columbus was a wholesale slaughterhouse and retail meat market which owed the bank $33,000 at that time for prior loans and was also substantially overdrawn on its checking account with the bank.

In consideration for guaranteeing the bank's new loan, Columbus' owners, Raymond and Barbara Piccirillo, entered into an agreement with the Weavers. Under the terms of the agreement, the Weavers were to receive 50% of Columbus' net profits and $100 per month as long as they guaranteed the loan. It was also agreed that the Weavers could use Columbus' barn and pasture at the discretion of the Piccirillos, and that they had the right to veto future borrowing by Columbus.

The Weavers allege that bank officers told them Columbus would use the $65,000 loan as working capital but instead it was immediately applied to pay Columbus' overdue obligations. The bank kept approximately $42,800 to satisfy its prior loans and Columbus' overdrawn checking account. All but $3,800 of the remainder was disbursed to pay overdue taxes and to satisfy other creditors; the bank then refused to permit Columbus to overdraw its checking account. Columbus became bankrupt four months later. Although the bank had not yet resorted to the Weavers' certificate of deposit at the time this litigation commenced, it acknowledged that its

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[1] The certificate of deposit pays 7½% interest and provides that, if the bank permits early withdrawal, the depositor will earn interest at the bank's current savings passbook rate on the amount withdrawn, except that no interest will be paid for the three months prior to withdrawal. When the Weavers purchased the certificate of deposit, it could only be insured up to $40,000 by the FDIC. The ceiling on insured deposits is now $100,000. Act of Mar. 31, 1980, Pub. L. 96–221, 94 Stat. 147, § 308(b)(1), 12 U. S. C. § 1724(b) (1976 ed., Supp. IV).

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other security was inadequate and that it intended to claim the pledged certificate of deposit.

These allegations were asserted in a complaint filed in the Federal District Court for the Western District of Pennsylvania in support of a claim that the bank violated § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b). The Weavers also pleaded pendent claims for violations of the Pennsylvania Securities Act and for common-law fraud by the bank. The Weavers alleged that bank officers actively solicited them to guarantee the $65,000 loan to Columbus while knowing, but not disclosing, Columbus' financial plight or the bank's plans to repay itself from the new loan guaranteed by the Weavers' pledged certificate of deposit. Had they known of Columbus' precarious financial condition and the bank's plans, the Weavers allege they would not have guaranteed the loan and pledged the certificate of deposit. The District Court granted summary judgment in favor of the bank. It concluded that if a wrong occurred it did not take place "in connection with the purchase or sale of any security," as required for liability under § 10(b). The District Court declined to exercise pendent jurisdiction over the state-law claims.

The Court of Appeals for the Third Circuit reversed. 637 F. 2d 157 (1980). A divided court held that a finder of fact could reasonably conclude that either the certificate of deposit or the agreement between the Weavers and the Piccirillos was a security.[2] It therefore remanded for further consideration of the claim based on the federal securities

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[2] The Court of Appeals also concluded that the pledge of a security is a sale, an issue on which the federal Circuits were split. We held in *Rubin* v. *United States*, 449 U. S. 424 (1981), that a pledge of stock is equivalent to a sale for the purposes of the antifraud provisions of the federal securities laws. Accordingly, in determining whether fraud may have occurred here "in connection with the purchase or sale of any security," the only issue now before the Court is whether a *security* was involved.

laws. The Court of Appeals also reversed the District Court's dismissal of the pendent state-law claims.

We granted certiorari, 452 U. S. 904 (1981), and we reverse. We hold that neither the certificate of deposit nor the agreement between the Weavers and the Piccirillos is a security under the antifraud provisions of the federal securities laws. We remand the case to the Court of Appeals to determine whether the pendent state claims should now be entertained.

II

The definition of "security" in the Securities Exchange Act of 1934[3] is quite broad. The Act was adopted to restore investors' confidence in the financial markets,[4] and the term "security" was meant to include "the many types of instru-

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[3] Section 3(a)(10) of the 1934 Act, as set forth in 15 U. S. C. § 78c(a)(10), provides:

"(a) . . . When used in this chapter, unless the context otherwise requires—

. . . . .

"(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity is likewise limited."

We have consistently held that the definition of "security" in the 1934 Act is essentially the same as the definition of "security" in § 2(1) of the Securities Act of 1933, 15 U. S. C. § 77(b)(1). *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847, n. 12 (1975).

[4] Fitzgibbon, What is a Security? A Redefinition Based on Eligibility to Participate in the Financial Markets, 64 Minn. L. Rev. 893, 912–918 (1980).

ments that in our commercial world fall within the ordinary concept of a security." H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933); quoted in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847–848 (1975). The statutory definition excludes only currency and notes with a maturity of less than nine months. It includes ordinary stocks and bonds, along with the "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits . . . ." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1946). Thus, the coverage of the antifraud provisions of the securities laws is not limited to instruments traded at securities exchanges and over-the-counter markets, but extends to uncommon and irregular instruments. *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 10 (1971); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 351 (1943). We have repeatedly held that the test "'is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.'" *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202, 211 (1967), quoting *SEC* v. *C. M. Joiner Leasing Corp.*, *supra*, at 352–353.

The broad statutory definition is preceded, however, by the statement that the terms mentioned are not to be considered securities if "the context otherwise requires . . . ." Moreover, we are satisfied that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud. *Great Western Bank & Trust* v. *Kotz*, 532 F. 2d 1252, 1253 (CA9 1976); *Bellah* v. *First National Bank*, 495 F. 2d 1109, 1114 (CA5 1974).

III

The Court of Appeals concluded that the certificate of deposit purchased by the Weavers might be a security. Examining the statutory definition, n. 3, *supra*, the court correctly

noted that the certificate of deposit is not expressly excluded from the definition since it is not currency and it has a maturity exceeding nine months.[5] It concluded, however, that the certificate of deposit was the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities in *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967). The court also reasoned that, from an investor's standpoint, a certificate of deposit is no different from any other long-term debt obligation.[6] Unless distinguishing features were found on remand, the court concluded that the certificate of deposit should be held to be a security.

Tcherepnin is not controlling. The withdrawable capital shares found there to be securities did not pay a fixed rate of interest; instead, purchasers received dividends based on the association's profits. Purchasers also received voting rights. In short, the withdrawable capital shares in *Tcherepnin* were much more like ordinary shares of stock and "the ordinary concept of a security," *supra*, at 556, than a certificate of deposit.

The Court of Appeals' also concluded that a certificate of deposit is similar to any other long-term debt obligation commonly found to be a security. In our view, however, there is an important difference between a bank certificate of deposit

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[5] The definition of a "security" in the 1934 Act, n. 3, *supra*, includes the term, "certificate of deposit, for a security." However, this term does not refer to certificates of deposit such as the Weavers purchased. Instead, "certificate of deposit, for a security" refers to instruments issued by protective committees in the course of corporate reorganizations. *Canadian Imperial Bank of Commerce* v. *Fingland*, 615 F. 2d 465, 468 (CA7 1980).

[6] In addition, the Court of Appeals noted that the Securities and Exchange Commission had taken the position that certificates of deposit are securities. However, the SEC has filed a brief as *amicus curiae* in this case, jointly with the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency, which argues that the Weavers' certificate of deposit is not a security.

and other long-term debt obligations. This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry.[7] Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated.[8] In addition, deposits are insured by the Federal Deposit Insurance Corporation. Since its formation in 1933, nearly all depositors in failing banks insured by the FDIC have received payment in full, even payment for the portions of their deposits above the amount insured. 1980 Annual Report of the Federal Deposit Insurance Corporation 18–21 (1981).

We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long-term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency. The definition of "security" in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the con-

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[7] In *Teamsters* v. *Daniel*, 439 U. S. 551 (1979), we held that a noncontributory, compulsory pension plan was not a security. One of our reasons for our holding in *Daniel* was that the pension plan was regulated by the Employee Retirement Income Security Act of 1974 (ERISA): "The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans." *Id.*, at 569–570. Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirements of the federal securities laws as well.

[8] See, *e. g.*, 12 U. S. C. § 461(b) (1976 ed., Supp. IV) (reserve requirements); 12 U. S. C. §§ 161, 324, and 1817 (1976 ed. and Supp. IV) (reporting requirements); 12 U. S. C. §§ 481, 483, and 1820(b) (1976 ed. and Supp. IV) (inspection requirements); 12 CFR §§ 217.6 and 329.8 (1981) (advertising).

text otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.[9]

IV

The Court of Appeals also held that a finder of fact could conclude that the separate agreement between the Weavers and the Piccirillos is a security. Examining the statutory language, n. 3, *supra*, the court found that the agreement might be a "certificate of interest or participation in any profit-sharing agreement" or an "investment contract." It stressed that the agreement gave the Weavers a share in the profits of the slaughterhouse which would result from the efforts of the Piccirillos. Accordingly, in that court's view, the agreement fell within the definition of "investment contract" stated in *Howey*, because "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U. S., at 301.

Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world, but the agreement between the Weavers and the Piccirillos is not the type of instrument that comes to mind when the term "security" is used and does not fall within "the ordinary concept of a security." *Supra*, at 556. The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors, not a private transaction as in this case. In *Howey*, for example, 42 persons purchased interests in a citrus grove during a 4-month period. 328 U. S., at 295. In

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[9] We reject respondents' argument that the certificate of deposit was somehow transformed into a security when it was pledged, even though it was not a security when purchased.

C. M. Joiner Leasing, offers to sell oil leases were sent to over 1,000 prospects. 320 U. S., at 346. In *C. M. Joiner Leasing*, we noted that a security is an instrument in which there is "common trading." *Id.*, at 351. The instruments involved in *C. M. Joiner Leasing* and *Howey* had equivalent values to most persons and could have been traded publicly.

Here, in contrast, the Piccirillos distributed no prospectus to the Weavers or to other potential investors, and the unique agreement they negotiated was not designed to be traded publicly. The provision that the Weavers could use the barn and pastures of the slaughterhouse at the discretion of the Piccirillos underscores the unique character of the transaction. Similarly, the provision that the Weavers could veto future loans gave them a measure of control over the operation of the slaughterhouse not characteristic of a security. Although the agreement gave the Weavers a share of the Piccirillos' profits, if any, that provision alone is not sufficient to make that agreement a security. Accordingly, we hold that this unique agreement, negotiated one-on-one by the parties, is not a security.[10]

V

Whatever may be the consequences of these transactions, they did not occur in connection with the purchase or sale of "securities."[11] The Weavers allege that the bank manipulated them so that they would suffer the loss the bank would

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[10] Cf. *Great Western Bank & Trust* v. *Kotz*, 532 F. 2d 1252, 1260–1262 (CA9 1976) (Wright, J., concurring) (unsecured note, the terms of which were negotiated face-to-face, given to a bank in return for a business loan, is not a security).

[11] It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a "security" as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

have borne from the failure of the Columbus Packing Co. Their pendent state-law claims against the bank are not before the Court since the Court of Appeals did not treat the issue of those claims. Accordingly, the case is remanded for consideration of whether the District Court should now entertain the pendent claims.

Reversed and remanded.

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS ET AL. *v.* ROBINSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-61. Argued January 13, 1982—Decided March 8, 1982

A 1974 collective-bargaining agreement between the United Mine Workers of America and the Bituminous Coal Operators' Association increased health benefits, payable out of a trust fund financed by contributions from the operators, for widows of coal miners who died prior to the effective date of the agreement and who were receiving pensions when they died, but did not increase such benefits for widows of miners who died prior to the effective date and were still working at the time of death even though they were eligible for pensions. Respondents, widows of miners who died in 1967 and 1971, respectively, and were eligible for pensions but were still working at the time of their deaths, brought a class action in Federal District Court against the trustees of the fund, alleging that the requirement that a miner be receiving a pension at the time of his death in order to make his widow eligible for the increased health benefits had no rational relationship to the purposes of the trust fund and therefore was illegal under § 302 of the Labor Management Relations Act. The District Court denied relief. The Court of Appeals reversed, holding that § 302(c)(5), which requires jointly administered pension trusts to be maintained "for the sole and exclusive benefit of employees . . . and their families and dependents," means that eligibility rules fixed by a collective-bargaining agreement must meet a reasonableness standard, and that in this case the trustees were unable to produce an acceptable explanation for the discrimination between widows of pensioners and widows of pension-eligible miners.

Held: Section 302(c)(5) does not authorize federal courts to review for reasonableness the provisions of a collective-bargaining agreement, such as the provisions in question, allocating health benefits among potential beneficiaries of an employee benefit trust fund. Pp. 570–576.

(a) Section 302(c)(5)'s language embodies no reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. P. 570.

(b) This reading is amply supported by the legislative history, which indicates that § 302(c)(5) was meant to protect employees from the risk

that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to union leaders' private benefit. Pp. 570–572.

(c) Such interpretation is also supported by § 302(c)(5)'s other requirements prescribing the conditions that must be satisfied to exempt employer contributions to pension funds from a criminal sanction. P. 572.

(d) Absent conflict with federal law, the trustees here breached no fiduciary duties in administering the trust fund in question in accordance with the 1974 collective-bargaining agreement. Pp. 573–574.

(e) When neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract. Pp. 574–576.

205 U. S. App. D. C. 330, 640 F. 2d 416, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

E. Calvin Golumbic argued the cause for petitioners. With him on the briefs was *William F. Hanrahan*.

Larry F. Sword argued the cause for respondents. With him on the brief was *John M. Rosenberg*.*

JUSTICE STEVENS delivered the opinion of the Court.

This case involves a discrimination between two classes of widows of coal miners who died prior to December 6, 1974—those whose husbands were receiving pensions when they died and those whose husbands were still working although they were eligible for pensions. The 1974 collective-bargaining agreement between the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., increased the health benefits for widows in the former class but

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*Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll*, *Laurence Gold*, *Julia Penny Clark*, and *George Kaufmann* for the AFL–CIO; and by *Charles P. O'Connor* and *James H. Lengel* for the Bituminous Coal Operators' Association, Inc.

Gill Deford, *Neal S. Dudovitz*, and *Bruce K. Miller* filed a brief for the National Black Lung Association as *amicus curiae* urging affirmance.

made no increase for those in the latter class. The United States Court of Appeals for the District of Columbia Circuit held that this discrimination was arbitrary and therefore violated § 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA).[1] 205 U. S. App. D. C. 330, 640 F. 2d 416 (1981). We granted certiorari to decide whether § 302(c)(5) authorizes federal courts to review for reasonableness the provisions of a collective-bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund.

I

A description of the origin of the discrimination may explain why the Court of Appeals considered it arbitrary. The

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[1] That section provides in relevant part:

"The provisions of this section [forbidding transfers between employer and representatives of employees] shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . . ; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pension or annuities . . . ." 61 Stat. 157, as amended, 29 U. S. C. § 186(c) (1976 ed., Supp. IV).

1950 collective-bargaining agreement between the union and the operators established a fund to provide pension, health, and other benefits for certain miners and their dependents. That agreement defined the operators' obligation to contribute to the fund but delegated the authority to define the amount of benefits and the conditions of eligibility to the trustees of the fund.[2] In 1967 the trustees adopted two resolutions governing benefits for widows. Under the first, a widow of a retired miner who was receiving a pension at the time of his death was entitled to a death benefit of $2,000 payable over a 2-year period, and a widow of a miner who was eligible for a pension but who was still working at the time of his death was entitled to a $5,000 benefit payable over a 5-year period.[3] The second resolution authorized hospital and medical-care benefits for unremarried widows of deceased miners while they were receiving the widows' benefit

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[2] The National Bituminous Coal Wage Agreement of 1950, in creating the United Mine Workers of America Welfare and Retirement Fund of 1950, provided in part:

"Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters." App. to Pet. for Cert. 78a.

[3] Resolution No. 68, adopted on January 19, 1967, established "a Widows and Survivors Benefit of five thousand dollars ($5,000.00) as a result of the death of miners who at the time of death were regularly employed in a classified job in the bituminous coal industry by coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said Agreement, and two thousand dollars ($2,000.00) in the event of the death of miners who at the time of death were receiving Trust Fund pensions and not employed outside the coal industry. . . ." App. to Pet. for Cert. 82a. The $5,000 benefit was payable in 60 monthly installments and the $2,000 benefit was payable in 22 monthly installments. *Id.*, at 85a.

authorized by the first resolution.[4] The effect of these two resolutions was to provide a greater health benefit for widows of working miners who were eligible for pensions than for widows of miners who were receiving pension benefits.

In 1974, because of their concerns about compliance with minimum funding standards of the recently enacted Employee Retirement Income Security Act (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1976 ed. and Supp. IV), and about the actuarial soundness of the 1950 fund, the union and the operators agreed to restructure the industry's benefit program. They agreed that the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in their collective-bargaining agreement. They also decided to replace the single 1950 fund with four separate funds, two of which provided pension benefits while two others, the "1950 Benefit Trust" and the "1974 Benefit Trust," provided health and death benefits. The 1950 Benefit Trust, which is at issue in this case, extended lifetime health coverage to certain widows of miners who died before December 6, 1974, the effective date of the 1974 collective-bargaining agreement.[5]

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[4] Resolution No. 69, also adopted on January 19, 1967, provided in part: "The following persons shall be eligible for benefits herein provided for hospital and medical care . . . :

"5. Unremarried widows and unmarried dependent children under twenty-two (22) years of age of deceased miners described in Subparagraph B of this Paragraph I as long as they are the recipients of Widows and Survivors Benefits provided in Paragraph II of Resolution No. 68." App. to Pet. for Cert. 90a.

[5] Article II, E(3), of the 1950 Benefit Trust provides that lifetime health benefits shall be provided to the survivors "of a miner who died . . . [p]rior to the effective date of this Plan . . . at a time when he was receiving a retirement or disability pension under the elegibility rules then in effect of the United Mine Workers of America Welfare and Retirement Fund of 1950." App. to Pet. for Cert. 114a. "By the trustee's interpretation, this clause applies to survivors of miners who died while collecting pensions and, as well, to survivors of those who, though not actually receiving re-

During the 1974 negotiations, the union originally demanded that all unremarried widows who were entitled to health benefits for either two years or five years under the old plan be extended lifetime health coverage. Both the amount and the uncertainty of the cost of such coverage for these widows concerned the operators. Relatively early in the negotiations they nevertheless accepted the demand as it related to widows of miners who would die after the agreement became effective, but they objected to the requested increase for widows of already deceased miners. The operators estimated that the latter class consisted of between 25,000 and 50,000 widows, whereas the union's estimate was approximately 40,000. Of that total, about 10% were believed to be widows of miners who had been working at the time of their death, even though eligible for pensions, and thus already had been entitled to five years of health benefits. In the final stages of the 1974 negotiations, after a strike had begun, the operators made a package proposal to the union that excluded this smaller group of perhaps 4,000 or 5,000 widows from any increased health benefits. Besides making it possible to conclude an otherwise acceptable, complex collective-bargaining agreement and to avoid a prolonged strike, the union received no separately identifiable *quid pro quo* for the rejection of this portion of its demands.

II

Respondents are widows of coal miners who died in 1967 and 1971, respectively. Their husbands were over age 55, had been employed in the industry for over 20 years, and had spent most of their careers in the employ of contributing em-

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tirement payments at death, had ceased work and applied for them. This construction, however, excludes widows and dependents of those miners who were eligible for pensions but who continued working and later died before applying for health-care benefits." 205 U. S. App. D. C. 330, 333, 640 F. 2d 416, 419 (1981) (footnotes omitted).

ployers. They were eligible for pensions but were still working at the time of their deaths. Under the 1950 plan, respondents were entitled to $5,000 death benefits and health benefits for five years. They received no additional benefits from the 1974 agreement. Had their husbands applied for the pensions for which they were eligible, they now would be entitled to lifetime health coverage.

On their own behalf and as representatives of a class of similarly situated widows and dependents of deceased coal miners, respondents brought this action against the trustees of the funds in the United States District Court for the District of Columbia.[6] They alleged that the requirement that a miner actually be receiving a pension for which he was eligible at the time of his death in order to make his survivors eligible for lifetime health benefits has no rational relationship with the purposes of the trust funds and therefore was illegal under § 302 of the LMRA. They prayed that the requirement be declared null and void and that the trustees be ordered to pay to them health benefits retrospectively and prospectively.

After certifying the respondents' class,[7] and after indicating that the plaintiffs had made a prima facie showing of arbitrariness, the court scheduled a hearing to give the petitioners an opportunity to prove that the discrimination against respondents was not arbitrary. At that hearing the District Court received documents prepared during the 1974 collec-

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[6] Federal district courts have jurisdiction to restrain violations of § 302. 29 U. S. C. § 186(e).

[7] "The class represents all surviving spouses and dependents of deceased miners who satisfied the age and service requirements for pension benefits at the time of death and who

"(1) were working in classified service in the coal industry at the time of death and had not applied for a pension, or

"(2) had applied for and were eligible to receive pension benefits but were not receiving such benefits at the time of death because of their return to classified service in the coal industry." 449 F. Supp. 941, 942 (1978).

tive-bargaining negotiations and heard the testimony of participants in those negotiations. Based on that evidence, the District Court found that "the question of whether or not to provide plaintiffs the benefits they now seek was the subject of explicit, informed and intense bargaining." App. to Pet. for Cert. 25a. The court rejected the argument that the eligibility requirement was arbitrary and capricious and held that "the trustees are bound to adhere to the terms of the agreement." *Ibid.* The court concluded:

> "Public policy dictates the limited role of courts in reviewing collectively bargained agreements. The familiar history of the anguished relations between the bargaining parties in this case only underscores the delicacy of the balance set in each agreement. Plaintiffs' relief, if indeed any is due, cannot come from the courts." *Ibid.*

A divided panel of the Court of Appeals reversed. Relying on the § 302(c)(5) requirement that jointly administered pension trusts be maintained "for the sole and exclusive benefit of the employees of [the contributing] employer, and their families and dependents," the court held that any rule denying benefits to employees on whose behalf significant contributions had been made must be explained to its satisfaction, particularly if benefits were authorized for others who had worked a lesser period of time for contributing employers. 205 U. S. App. D. C., at 335, 640 F. 2d, at 421. In this case, the trustees were unable to produce an acceptable explanation for the discrimination between widows of pensioners and widows of pension-eligible miners. Specifically, the court held that it was "not enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute." *Id.*, at 338, 640 F. 2d, at 424. Recognizing the legitimacy of a concern about actuarial soundness of pension trust funds, the court held that "financial integrity must be secured by methods dividing beneficiaries from nonbeneficiaries on lines reasonably

calculated to further the fund's purposes." *Id.*, at 337–338, 640 F. 2d, at 423–424.

Judge Robb, in dissent, agreed with the reasoning of the District Court and added the observation that the discrimination against widows of active miners was rational because those widows had received a larger death benefit than widows of pensioners, and because their needs may have been lesser than those of the families of pensioners since their husbands had continued to work after they were eligible for pensions.

III

The Court of Appeals held that the requirement in § 302(c)(5) that an employee benefit trust fund be maintained "for the sole and exclusive benefit of the employees . . . and their families and dependents" means that eligibility rules fixed by a collective-bargaining agreement must meet a reasonableness standard. The statutory language hardly embodies this reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5).

Just last Term, the Court reiterated that "the 'sole purpose' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . .'" *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331 (quoting 93 Cong. Rec. 4678 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, p. 1305 (Leg. Hist. LMRA)). See *Arroyo* v. *United States*, 359 U. S. 419, 425–426.[8] Accord, *Walsh* v. *Schlecht*,

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[8] The Court in *Arroyo* stated:

"Those members of Congress who supported [§ 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with

429 U. S. 401, 410–411; *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 474 (Frankfurter, J., dissenting). This reading is amply supported by the legislative history. See, *e. g.*, 93 Cong. Rec. 4877 (1947), 2 Leg. Hist. LMRA, at 1312;[9] 93 Cong. Rec., at 4752–4753, 2 Leg. Hist. LMRA, at 1321–1322.[10] The section was meant to protect employees

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the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See *United States* v. *Ryan*, 350 U. S. 299.

"Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892–4894, 4899, 5181, 5345–5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746–4747. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 290" (footnotes omitted).

[9] Senator Taft, the primary author of the LMRA, stated:

"Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages."

[10] Senator Ball, one of the sponsors of the floor amendment that became § 302, stated:

"All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected. . . .

. . . . .

"In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting

from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

Our interpretation of the purpose of the "sole and exclusive benefit" requirement is reinforced by the other requirements of § 302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials. Each of the specific conditions that must be satisfied to exempt employer contributions to pension funds from the criminal sanction is consistent with the nondiversion purpose. The fund must be established "for the sole and exclusive benefit" of employees and their families and dependents; contributions must be held in trust for that purpose and must be used exclusively for health, retirement, death, disability, or unemployment benefits; the basis for paying benefits must be specified in a written agreement; and the fund must be jointly administered by representatives of management and labor.[11] All the conditions in the section fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees. None of the conditions places any restriction on the allocation of the funds among the persons protected by § 302(c)(5).

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the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second."

[11] See *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 328–329; H. R. Rep. No. 510, 80th Cong., 1st Sess., 66–67 (1947), 1 Leg. Hist. LMRA, at 570–571.

The Court of Appeals did not attempt to ground its holding on the text or legislative history of § 302(c)(5). Rather, the court relied upon cases in which trustees of employee benefit trust funds, not the collective-bargaining agreement, fixed the eligibility rules and benefit levels. The Court of Appeals has held in those cases "that the Trustees have 'full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards." *Pete* v. *United Mine Workers of American Welfare & Retirement Fund of 1950*, 171 U. S. App. D. C. 1, 9, 517 F. 2d 1275, 1283 (1975) (en banc) (footnote omitted). Noting that "[t]he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." *Kosty* v. *Lewis*, 115 U. S. App. D. C. 343, 346, 319 F. 2d 744, 747 (1963), cert. denied, 375 U. S. 964. Those cases, however, provide no support for the Court of Appeals' holding in this case.[12] The petitioner trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to enforce these

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[12] In *NLRB* v. *Amax Coal Co.*, *supra*, at 330, the Court held that in enacting § 302(c)(5) "Congress intended to impose on trustees traditional fiduciary duties." The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties. It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA. See *Arroyo* v. *United States*, 359 U. S. 419, 426–427.

determinations unless modification is required to comply with applicable federal law.[13] The common law of trusts does not alter this obligation. See *NLRB* v. *Amax Coal Co.*, 453 U. S., at 336–337; Restatement (Second) of Trusts § 164 (1959). Cf. 29 U. S. C. § 1104(a)(1)(D) (1976 ed., Supp. IV). Absent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective-bargaining agreement.

Section 302(c)(5) plainly does not impose the Court of Appeals' reasonableness requirement, and respondents do not offer any alternative federal law to sustain the court's holding. There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective-bargaining agreements because the union need not "affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in be-

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[13] "The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

"They are also authorized and directed, after adquate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

"(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

. . . . .

"(d) to comply with all applicable court or government decisions or ruling." National Bituminous Coal Wage Agreement of 1974, art. XX, § (h)(5), App. to Pet. for Cert. 106a.

half of those whom it does represent." *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 181, n. 20.[14] Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective-bargaining agreement.

The substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of the ERISA. The terms of any collective-bargaining agreement must comply with federal laws that prohibit discrimination on grounds of race, color, religion, sex, or national origin;[15] that protect veterans;[16] that regulate certain industries;[17] and that preserve our competitive economy.[18] Obviously, an agreement must also be substantively consistent with the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*[19] Moreover, in the collective-bargain-

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[14] We also recognized that these persons are not without protection: "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916–920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U. S. 195, 200–201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 470 (1960)." 404 U. S., at 181, n. 20.

[15] See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (Title VII of the Civil Rights Act of 1964); *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (Equal Pay Act).

[16] See, *e. g.*, *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, 285.

[17] See, *e. g.*, *Norfolk & Western R. Co.* v. *Nemitz*, 404 U. S. 37.

[18] See, *e. g.*, *Mine Workers* v. *Pennington*, 381 U. S. 657.

[19] See, *e. g.*, *NLRB* v. *Magnavox Co.*, 415 U. S. 322; *Radio Officers* v. *NLRB*, 347 U. S. 17.

ing process, the union must fairly represent the interests of all employees in the unit.[20] But when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract.[21]

The record in this case discloses no violation of § 302(c)(5) or of any other federal law. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

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[20] See, *e. g.*, *Vaca* v. *Sipes*, 386 U. S. 171, 177; *Syres* v. *Oil Workers*, 350 U. S. 892; *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. See also *Railroad Trainmen* v. *Howard*, 343 U. S. 768.

[21] See, *e. g.*, *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 218–219; *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 105–108; *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488; *Teamsters* v. *Oliver*, 358 U. S. 283, 295–296; *NLRB* v. *American National Ins. Co.*, 343 U. S. 395, 404.

Syllabus

BREAD POLITICAL ACTION COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1481. Argued January 19, 1982—Decided March 8, 1982

Section 310(a) of the Federal Election Campaign Act of 1971 lists three categories of plaintiffs who may challenge the constitutionality of any provision of the Act in a federal district court action in which the district court must certify all questions of constitutionality to the court of appeals sitting en banc: (1) the Federal Election Commission, (2) "the national committee of any political party," and (3) "any individual eligible to vote in any election for the office of President." Appellants, two trade associations and three political action committees (PAC's), filed an action in Federal District Court, challenging the validity of the provisions of the Act limiting the extent to which such associations and their PAC's may solicit funds for political purposes, and sought expedited consideration of the action under § 310(a). The District Court denied such consideration on the ground that appellants were not within any of the three categories listed as eligible to invoke § 310(a)'s expedited procedures. The Court of Appeals reversed and remanded, holding that § 310(a) is available for use by plaintiffs whether they belong to an enumerated category or not, and on subsequent certification from the District Court upheld the challenged solicitation provisions.

Held: Only parties belonging to one of the three categories listed in § 310(a) may invoke its expedited procedures, and since appellants are not within any of those categories, they may not invoke such procedures. The text of § 310(a) states plainly enough which plaintiffs may invoke its special procedures. This plain language controls the construction of § 310(a), absent "clear evidence" of a "clearly expressed" contrary congressional intent, and appellants have not met the burden of showing such "clear evidence" of a contrary intent. The fact that Congress wanted a broad class of questions to be speedily resolved does not imply that it intended the courts to augment the enumeration of qualified plaintiffs. Nor is there any merit to appellants' contention that Congress specified the three enumerated classes of plaintiffs simply to remove any doubts about their standing, but not to exclude others by implication. Pp. 580–585.

635 F. 2d 621, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Jeffrey Cole argued the cause for appellants. With him on the briefs was *Stanley T. Kaleczyc.*

Charles N. Steele argued the cause for appellees. With him on the brief was *Richard B. Bader.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 310(a) of the Federal Election Campaign Act of 1971 (FECA), 88 Stat. 1285, as amended, 2 U. S. C. § 437h(a) (1976 ed., Supp. IV), lists three categories of plaintiffs who may challenge the constitutional validity of FECA in specially expedited suits: (1) the Federal Election Commission (FEC), (2) "the national committee of any political party," and (3) "any individual eligible to vote in any election for the office of President." In this case, we address a question we expressly reserved in *California Medical Assn.* v. *FEC*, 453 U. S. 182, 187, n. 6 (1981): whether a party not belonging to one of the three categories listed in § 437h(a) may nonetheless invoke its procedures.

I

The appellants are two trade associations and three political action committees (PAC's): the National Restaurant Association and its associated PAC, the Restaurateurs Political Action Committee, the National Lumber and Building Material Dealers Association and its associated PAC, the Lumber Dealers Political Action Committee, and the Bread Political Action Committee, the PAC associated with the American Bakers Association. In order to challenge the validity of 2 U. S. C. § 441b(b)(4)(D), which has the effect of limiting the extent to which trade associations and their PAC's may solicit funds for political purposes,[1] the appellants filed an ac-

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[1] Title 2 U. S. C. § 441b(b)(4)(D) permits an incorporated trade association to solicit contributions to its (PAC) only from

"the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved

tion in the United States District Court for the Northern District of Illinois, seeking expedited consideration of their suit under the procedures set forth in § 437h.[2] The District Court denied certification under § 437h on the ground that the plaintiff trade associations and PAC's do not belong to

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by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year."

Other provisions of FECA permit a trade association to solicit contributions to its PAC from its members, § 441b(b)(4)(C), and from its own executive and administrative personnel and their families, § 441b(b)(4)(A).

[2] That section provides:

"(a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc

"The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

"(b) Appeal to Supreme Court; time for appeal

"Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

"(c) Advancement on appellate docket and expedited disposition of certified questions

"It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section." 2 U. S. C. §§ 437h(a)–(c) (1976 ed. and Supp. IV).

The grant of standing to the three listed categories of plaintiffs is similar to the grant Congress had adopted earlier in 26 U. S. C. § 9011(b) authorizing the "Commission, the national committee of any political party, and individuals eligible to vote for President" to bring suits to implement or construe the Presidential Election Campaign Fund Act, 26 U. S. C. §§ 9001–9013.

any of the three categories of plaintiffs listed in § 437h(a) as eligible to invoke its expedited procedures. On an interlocutory appeal from this ruling, a panel of the Court of Appeals reversed, holding that § 437h(a) is available for use by plaintiffs whether they belong to an enumerated category or not. 591 F. 2d 29 (CA7 1979). On remand, the District Court, as required by § 437h, first made findings of fact and then certified the case back to the Court of Appeals sitting en banc for a determination on the constitutional questions raised by the appellants. The en banc court declined to overrule the earlier panel decision regarding the reach of § 437h(a), and proceeded to the merits of the appellants' claims, upholding the constitutionality of the challenged provisions. 635 F. 2d 621 (CA7 1980). The present appeal to this Court followed, confronting us with the question whether § 437h(a) should be construed to permit parties, such as the appellants, who do not belong to one of its three specifically enumerated classes, nonetheless to invoke its procedures.

II

Our analysis of this issue of statutory construction "must begin with the language of the statute itself," *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 187 (1980), and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Moreover, when the statute to be construed creates, as § 437h does, a class of cases that command the immediate attention of this Court and of the Courts of Appeals sitting en banc, displacing existing caseloads and calling circuit court judges away from their normal duties for expedited en banc sittings, close construction of statutory language takes on added importance. As we have said: "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes'; and we are particularly

prone to accord 'strict construction of statutes authorizing appeals' to this Court." *Palmore* v. *United States*, 411 U. S. 389, 396 (1973) (citations omitted). In short, the plain language of § 437h(a) controls its construction, at least in the absence of "clear evidence," *United States* v. *Apfelbaum*, 445 U. S. 115, 121 (1980), of a "clearly expressed legislative intention to the contrary," *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, *supra*, at 108.

The text of § 437h(a) states plainly enough which plaintiffs may invoke its special procedures: "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." Thus, § 437h(a) affords its unique system of expedited review to three carefully chosen classes of persons who might meet the minimum standing requirements of Art. III. The only artificial persons expressly entitled to invoke § 437h(a) are the Federal Election Commission, which is charged with enforcing the Act, and the national committees of political parties, which play a central role in the political process.

In the face of the obvious meaning of the language of § 437h(a), the appellants urge what they concede to be an "expansive construction" of the section. Reply Brief for Appellants 3. Indeed, the construction they advocate could not be more expansive, for they apparently argue that Congress intended the class of permissible plaintiffs to be defined by the outermost limits of Art. III. The appellants, however, fall far short of providing "clear evidence" of a "clearly expressed legislative intention" that the unique expedited procedures of § 437h be afforded to parties other than those belonging to the three listed categories.

In fact, the section's legislative history is too brief and ambiguous to provide much solace to either side of the present controversy. When Senator Buckley introduced the section during the deliberations on the Federal Election Campaign Act Amendments of 1974, he limited his explanation to the following comments:

> "[I]t is a modification that I am sure will prove acceptable to the managers of the bill. It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time." 120 Cong. Rec. 10562 (1974).[3]

In the House, Representative Frenzel echoed this theme in responding to a question from another Member of the House about the constitutionality of the Amendments:

> "Any time we pass legislation in this field we are causing constitutional doubts to be raised. I have many myself. I think the gentleman has pointed out a good one. We have done the best we could to bring out a bill which we hope may pass the constitutional test. But, we do not doubt that some questions will be raised quickly.
>
> "I do call the attention of the gentleman to the fact that any *individual* under this bill has a direct method to raise these questions and to have those considered as quickly as possible by the Supreme Court." *Id.*, at 35140 (emphasis added).

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[3] Perhaps because Senator Buckley's intent as expressed in the legislative history remains uncertain, the appellants have submitted to this Court affidavits from Senator Buckley and David A. Keene, the Executive Assistant to the Senator who prepared the original draft of § 437h, expressing the belief that the amendment was not intended to exclude organizations from challenging the constitutionality of the Act. See Affidavit of James Buckley (Nov. 11, 1977), reprinted at App. 110, 112; Affidavit of David A. Keene (Oct. 21, 1977), reprinted at App. 106, 109.

We cannot give probative weight to these affidavits, however, because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974), quoting *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 639, n. 34 (1967). See also *Quern* v. *Mandley*, 436 U. S. 725, 736, n. 10 (1978), in which we noted that "*post hoc* observations by a single member of Congress carry little if any weight."

These brief remarks by two Members of Congress nearly exhaust the legislative history of the section. The appellants nevertheless suggest that these comments suffice to prove that, in passing § 437h, Congress focused solely on expediting the resolution of all disputes over the constitutionality of FECA, and was unconcerned with the identity of the challenging plaintiffs. In support of this view, the appellants point out that in the first sentence of § 437h(a) Congress authorized suits to challenge "any" provision of the Act, while the second sentence requires the district courts to certify "all" constitutional questions under the Act to the court of appeals sitting en banc. According to the appellants, the fact that Congress expressly extended § 437h to "all" constitutional questions about "any" provision of the Act compels the inference that Congress also intended that § 437h be afforded to any and all plaintiffs, even those not expressly listed in the Act.

The obvious fact that Congress wanted a broad class of questions to be speedily resolved, however, scarcely implies that Congress intended the courts to augment Congress' enumeration of qualified plaintiffs. Indeed, if it suggests anything, the structure of the Act suggests that Congress knew how to specify that "all" constitutional questions about "any" provision of the Act may be raised, and therefore could as easily have directed that "any" person might invoke the unique procedures of § 437h. But Congress did not do so. Instead, it went to the trouble of specifying that only two precisely defined types of artificial entity and one class of natural persons could bring these actions.

Reaching out for some support, the appellants hypothesize that Congress specified the three enumerated classes to remove any doubts about their standing, but not to exclude others by implication. According to the appellants, absent explicit congressional authorization, the members of the three listed classes might not meet the prudential standing requirements this Court imposes. See, *e. g.*, *Warth* v. *Seldin*, 422 U. S. 490, 498–501 (1975). This argument, however, puts

the appellants in the awkward position of simultaneously noting that express congressional authorization is required to overcome prudential standing limitations, while urging us to read an implicit grant of standing into congressional silence. Of course, had Congress intended the result the appellants desire, it could easily have achieved it by expressly granting standing to the limits of Art. III, and then listing as specific examples the three classes now enumerated in § 437h(a). Instead, Congress gave no affirmative indication that it meant to include in its grant any parties beyond the three listed classes.

For these reasons, we cannot impute to Congress the intention to confer standing on the broadest class imaginable. We do not assume the maximum jurisdiction permitted by the Constitution, absent a clearer mandate from Congress than here expressed. We therefore hold that only parties meeting the express requirements of § 437h(a) may invoke its procedures. Because the appellants do not meet these requirements, they may not invoke the expedited procedures of § 437h.

The appellants complain that the practical result of this ruling may be that some provisions of FECA will escape expedited review, thereby defeating Congress' intent that the courts pass as quickly as possible on the validity of FECA. Without a clearer indication of congressional intent than provided by the extremely sketchy legislative history of § 437h, however, we believe the best evidence of what Congress wanted is found in the statute itself, where Congress listed only three types of parties who may invoke the expedited procedures of § 437h. Others, evidently, are remitted to the usual remedies.

We note, moreover, that our decision today raises no threat that an aggrieved party with standing will be unable to litigate questions arising under FECA, since our holding affects only the availability of the extraordinary procedures afforded by § 437h. Section 437g, for example, permits ei-

ther the Commission or, under the proper circumstances, a private person to bring a civil action to enforce the Act, and such suits are themselves given expedited treatment under § 437g(a)(10), being advanced on the calendar ahead of all other actions except those given even higher priority by either § 437g or § 437h. Thus, any challenge, constitutional or nonconstitutional, may be raised as a defense in an enforcement action, and will be afforded expedited review.[4] Furthermore, plaintiffs meeting the usual standing requirements can challenge provisions of the Act under the federal-question jurisdiction granted the federal courts by 28 U. S. C. § 1331.[5]

In sum, the appellants have not met the burden of showing such "clear expression" or "clear evidence" of congressional intent to make the procedures of § 437h available to categories of plaintiff other than those listed in that section. Accordingly, we reverse and remand for proceedings consistent with this opinion.

So ordered.

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[4]The appellants suggest that an anomaly is thereby created, unless parties not listed in § 437h(a) can invoke that section's procedures, because nonconstitutional challenges raised as defenses will be granted expedited service under 2 U. S. C. § 437g(a)(10) (1976 ed., Supp. IV), while constitutional challenges brought by plaintiffs not listed in § 437h(a) will be treated like any other case on the docket. No evidence exists that Congress ever pondered this subtlety, or, if it did, what it thought about it. Suffice it to say that we do not consider the possibility that Congress may have seen fit to expedite claims raised by defendants, but not similar claims raised by some plaintiffs, to shed much light on Congress' purpose in enumerating three specific classes of eligible plaintiffs in § 437h(a).

[5]We express no opinion, however, on the question whether the appellants meet the standing requirements under § 1331.

WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* TORNA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-362. Decided March 22, 1982

Held: The Federal District Court properly dismissed respondent state prisoner's habeas corpus petition asserting that he had been denied his right to the effective assistance of counsel because an application for certiorari—filed by his retained counsel in the Florida Supreme Court to review the Florida Court of Appeal's affirmance of respondent's state conviction—had been dismissed as not having been timely filed. Respondent did not contest the District Court's finding that review by the Florida Supreme Court was discretionary. Since a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals, *Ross* v. *Moffitt*, 417 U. S. 600, respondent could not be deprived of the effective assistance of counsel by his retained counsel's failure to file a timely application.

Certiorari granted; 649 F. 2d 290, reversed.

PER CURIAM.

Respondent is in custody pursuant to several felony convictions that were affirmed by the Third District Court of Appeal of Florida. *Torna* v. *State*, 358 So. 2d 1109 (1978). The Florida Supreme Court dismissed an application for a writ of certiorari, on the ground that the application was not filed timely.[1] 362 So. 2d 1057 (1978). A petition for rehearing and clarification was later denied. App. to Pet. for Cert. A-15.

Respondent thereafter filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, contending that he had been denied his right to the effective assistance of counsel by the failure of his retained

[1] "It appearing to the Court that the notice was not timely filed, it is ordered that the cause is hereby dismissed sua sponte, subject to reinstatement if timeliness is established on proper motion *filed* within fifteen days from the date of this order. See Fla. R. App. P. 9.120." App. to Pet. for Cert. A-13.

counsel to file the application for certiorari timely. The District Court denied the petition on the ground that the failure to file a timely application for certiorari did not render counsel's actions "so grossly deficient as to render the proceedings fundamentally unfair." *Id.*, at A-22. In reaching this conclusion, the District Court noted that review by the Florida Supreme Court was discretionary; "[f]ailure of counsel to timely petition for certiorari to the Supreme Court, therefore, only prevented [respondent] from applying for further discretionary review." *Id.*, at A-28. The Court of Appeals reversed. 649 F. 2d 290 (CA5 1981).[2]

In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), this Court held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court. Respondent does not contest the finding of the District Court that he had no absolute right to appeal his convictions to the Florida Supreme Court.[3] Since respondent had no constitutional right to counsel, he

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[2] Citing its decision in *Pressley* v. *Wainwright*, 540 F. 2d 818 (1976), cert. denied, 430 U. S. 987 (1977), the court first noted that "the failure of court-appointed counsel to file a timely notice of certiorari in the Florida Supreme Court has been held to constitute ineffective assistance." 649 F. 2d, at 291. On the basis of the recent decision in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), the court then stated that "there is no distinction between court-appointed and privately retained counsel in the evaluation of a claim of ineffective assistance." 649 F. 2d, at 292. Finally, the court quoted its recent decision in *Perez* v. *Wainwright*, 640 F. 2d 596, 598 (1981), for the proposition that "'when a lawyer . . . does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal.'" 649 F. 2d, at 292. On the basis of these statements, the court reversed "the district court's denial of the writ of habeas corpus," *ibid.*, and remanded the case to the District Court for further proceedings consistent with its opinion.

[3] Like this Court, the Florida Supreme Court has a limited mandatory appellate jurisdiction. See Fla. Const., Art. V, § 3. Respondent has never contended, however, that he had a right of review under that jurisdiction. Thus, we need not determine the extent of the right to counsel in such a case.

could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely.[4] The District Court was correct in dismissing the petition.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, and the judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE BRENNAN would set the case for oral argument.

JUSTICE MARSHALL, dissenting.

The majority predicates its decision in this case on *Ross* v. *Moffitt*, 417 U. S. 600 (1974), which held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals. The majority reasons that because respondent had no constitutional right to counsel, his lawyer's failure to file a timely appeal did not violate his right to effective assistance of counsel. In my view, however, *Ross* v. *Moffitt* was improperly decided. See *id.*, at 619–621 (Douglas, J., dissenting, joined by BRENNAN and MARSHALL, JJ.). I believe that a defendant does have a constitutional right to counsel to pursue discretionary state appeals. Particularly where a criminal conviction is challenged on constitutional grounds, permissive review in the highest state court may be the most meaningful review a conviction will receive. Moreover, where a defendant seeks discretionary review, the assistance of an attorney is vital. Because I disagree with the Court's position in *Ross* v. *Moffitt*, I disagree with its conclusion in this case also.

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[4] Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation—if even implicating a due process interest—was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law.

Even if I believed that *Ross* v. *Moffitt* were correctly decided, however, I would dissent from the majority's conclusion that habeas corpus provides no recourse to a criminal defendant who has been denied his right to seek discretionary review because of his attorney's error. Although respondent's Sixth Amendment right to effective assistance of counsel may not have been infringed, he was denied his right to due process. Respondent's counsel promised him that he would seek review in the Florida Supreme Court. Respondent reasonably relied on that promise. Counsel nonetheless failed to file a timely application.* As a result, respondent was deprived of his right to seek discretionary review by the State's highest court. As I suggested above, this loss is significant. I would hold that when a defendant can show that he reasonably relied on his attorney's promise to seek discretionary review, due process requires the State to consider his application, even when the application is untimely. To deny the right to seek discretionary review simply because of counsel's error is fundamentally unfair. Requiring the state courts to consider untimely applications when a defendant can show that he reasonably relied on his counsel will not impose a heavy burden. The State is not required to grant the application; it is simply barred from dismissing the application on the ground that it was not timely filed.

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*Notice of the intent to apply for discretionary review was due in the office of the Clerk for the District Court of Appeal, Third District of Florida, on July 17, 1978. It was filed one day late, on July 18, 1978. According to respondent, a secretary in his attorney's office attempted to deliver the required papers on July 14, 1981. She became lost while traveling to the Clerk's office, and did not arrive until after it had closed. Because she did not realize that she could have placed the papers in a night depository box, she took them home and placed them in the mail. Record 29–30. To deny respondent the right to seek discretionary review, where he reasonably relied on his counsel's promise to apply for such review, and where counsel failed to comply with this promise only because of circumstances beyond his control, would be doubly unfair.

pages tightly bound

The majority argues that even if deprivation of the right to petition the Florida Supreme Court for review implicates a due process interest, there was no state action here. It reasons that the deprivation of this right was caused by respondent's counsel—a private retained attorney—and not by the State. *Ante*, at 588, n. 4. In my view, however, there was sufficient state involvement to satisfy the requirements of the Fourteenth Amendment. The majority's position is inconsistent with *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). In that case, the Court rejected the respondent's assertion that the failings of retained counsel at a criminal trial could not provide a basis for federal habeas corpus relief, because his conduct does not involve state action. It held that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. "When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." *Id.*, at 343. "[T]he State's conduct of a criminal trial itself implicates the State in the defendant's conviction." *Id.*, at 344.

It is true that *Cuyler* v. *Sullivan* involved a challenge to the conduct of a private attorney during the trial, while this case involves a challenge to the post-trial conduct of a private attorney. However, post-trial proceedings are an integral part of the criminal process. In my view, the State is just as much implicated in those proceedings as in the trial itself. Here, for example, Florida was responsible for structuring the procedure by which criminal convictions are reviewed. In particular, it designed the rules governing the right to seek discretionary review, including the rule that applications are automatically rejected when filed out of time. Under the circumstances, I think it clear that the state-action requirement is satisfied.

Per Curiam

SUMNER, WARDEN v. MATA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-844. Decided March 22, 1982

Title 28 U. S. C. § 2254(d) requires federal courts in habeas corpus proceedings to accord a presumption of correctness to state-court findings of fact unless specified factors are present. In earlier proceedings in this case, this Court held that the Court of Appeals had not followed § 2254(d) in concluding—contrary to the California Court of Appeal's decision on respondent's appeal from his state murder conviction—that pretrial photographic lineup procedures used by the state police were so impermissibly suggestive as to deprive respondent of due process. The case was remanded so that the federal court could review its determination and either apply the statutory presumption of correctness of the state-court findings or explain why the presumption did not apply in light of the factors listed in § 2254. The Court of Appeals then concluded that § 2254(d) was irrelevant in this case because its findings of fact did not differ from those of the state court, the disagreement being over the constitutional significance of certain facts. It reinstated its conclusion that the pretrial procedures were impermissibly suggestive and that respondent therefore was entitled to release or a new trial.

Held: The case must be remanded again. The ultimate question as to the constitutionality of the pretrial identification procedures is a mixed question of law and fact that is not governed by § 2254. In deciding this question the federal courts may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. However, the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption. Thus, the circumstances of the pretrial identification procedures in this case present questions of fact as to which the statutory presumption applies. The Court of Appeals should either apply the presumption or explain why it is not applicable in view of the factors listed in the statute.

Certiorari granted; 649 F. 2d 713, vacated and remanded.

PER CURIAM.

This is the second time that this matter has come before us. In *Sumner* v. *Mata*, 449 U. S. 539 (1981), decided last Term, we held that 28 U. S. C. § 2254(d) requires federal courts in

habeas proceedings to accord a presumption of correctness to state-court findings of fact. This requirement could not be plainer. The statute explicitly provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct." Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact "is not fairly supported by the record" may the presumption properly be viewed as inapplicable or rebutted.[1]

We held further that the presumption of correctness is

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[1] Section 2254(d) provides:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal

equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact, and we held that if a federal court concludes that the presumption of correctness does not control, it must provide a written explanation of the reasoning that led it to conclude that one or more of the first seven factors listed in § 2254 were present, or the "reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" 449 U. S., at 551.

Applying these general principles to the case at hand, we found in our decision last Term that the Court of Appeals for the Ninth Circuit had neither applied the presumption of correctness nor explained why it had not. See *Mata* v. *Sumner*, 611 F. 2d 754 (CA9 1979). Instead, the court had made findings of fact that were "considerably at odds" with the findings made by the California Court of Appeal without any mention whatsoever of § 2254(d). 449 U. S., at 543.

In reaching the conclusion that the Court of Appeals had not followed § 2254(d), we rejected the argument, advanced by respondent Mata, that the findings of fact made by the Court of Appeals and the California court were not in conflict.[2] Mata was convicted in 1973 in state trial court of the

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court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances repectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

[2] Respondent argued: "All of the facts set forth in the opinion [of the Court of Appeals] are drawn from the record and do not contradict any finding of primary fact made by the California Court of Appeal." Brief for Respondent, O. T. 1980, No. 79-1601, pp. 19-20.

first-degree murder of a fellow inmate. There were three witnesses to the murder, each of whom identified Mata as a participant in the killing.[3] On appeal to the California Court of Appeal, Mata argued for the first time that the photographic lineup procedure used by the state police was so impermissibly suggestive as to deprive him of due process. After examining the evidence,[4] the California Court of Appeal rejected this assertion. It concluded that the pretrial procedures had not been unfair under the test stated by this Court in *Simmons* v. *United States*, 390 U. S. 377 (1968):

> "Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteris-

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[3] Two other inmates—Salvadore Vargas and David Gallegos—were also convicted of taking part in the murder.

[4] The California Court of Appeal summarized the pretrial procedures as follows:

"Three inmate witnesses testified that they saw the stabbing take place. All three—Childress, Almengor, and Allen—identified all three defendants . . . . The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. On that date Childress also selected all three appellants from photographs shown to him.

"Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identification by this action of the investigating officers." App. to Pet. for Cert. C–4 to C–6.

tics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." App. to Pet. for Cert. C–8.

The Court of Appeals for the Ninth Circuit reached a different conclusion,[5] and did so on the basis of factfindings that were clearly in conflict with those made by the state court. We noted that the Court of Appeals had relied, *inter alia*, on its own conflicting findings that "(1) the circumstances surrounding the witnesses' observation of the crime were such that there was a grave likelihood of misidentification; (2) the witnesses had failed to give sufficiently detailed descriptions of the assailant; and (3) considerable pressure from both prison officials and prison factions had been brought to bear on the witnesses." *Sumner* v. *Mata*, 449 U. S., at 543.[6]

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[5] The decision of the Court of Appeals for the Ninth Circuit differed not only with that of the California Court of Appeal on direct appeal but also with the decision of three levels of state courts in state habeas proceedings and with the decision of the Federal District Court in federal habeas proceedings.

[6] In dissent JUSTICE BRENNAN argued that there was no conflict between the facts as found by the state court and as found by the Court of Appeals. He argued that the California court's finding that the witnesses had an opportunity to view the killing was not in conflict with a finding by the Court of Appeals that the witnesses were "quite likely" distracted at the time of the killing. He argued further that the California court's finding that the descriptions given by the witnesses were "accurate" was not in conflict with a finding that these descriptions were not detailed. Finally, the dissent appears to have considered that the existence of influence by prison officials was a not a question of fact but of law. 449 U. S., at 556. It is obvious that a majority of the Court did not find this reasoning persuasive. On our remand, the Court of Appeals apparently adopted JUSTICE BRENNAN's dissenting views. See 649 F. 2d 713, 716 (CA9 1981).

We concluded that the "findings made by the Court of Appeals for the Ninth Circuit are considerably at odds with the findings made by the California Court of Appeal." *Ibid.* We remanded so that the Court of Appeals could review its determination of the issue and either apply the statutory presumption or explain why the presumption did not apply in light of the factors listed in § 2254. We expressed no view as to whether the procedures had been impermissibly suggestive. That was a question for the Court of Appeals to decide in the first instance after complying with § 2254(d).

On remand, the Court of Appeals found that it was not necessary for it to apply the presumption of correctness or explain why the presumption should not be applied. 649 F. 2d 713 (CA9 1981). Rather, agreeing with the argument advanced by Mata and the dissenting opinion in *Sumner* v. *Mata*, *supra*, the court concluded that § 2254(d) was simply irrelevant in this case because its factfindings in no way differed from those of the state court.[7] It argued that its disagreement with the state court was "over the *legal and constitutional significance* of certain facts" and not over the facts themselves. 649 F. 2d, at 716. It found that whether or not the pretrial photographic identification procedure used in this case was impermissibly suggestive was a mixed question of law and fact as to which the presumption of correctness did not apply. And it reinstated its conclusion that the pretrial procedures had been impermissibly suggestive and that Mata therefore was entitled to release or a new trial.[8]

We have again reviewed this case and conclude that the

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[7] "Lest the reviewing court 'be left to guess' as to our reasons for granting habeas relief notwithstanding the provisions of § 2254(d), we reiterate: As our original analysis indicates . . . we substantially agree with the 'historical' or 'basic' facts adduced by the California Court of Appeal Fifth Appellate District . . . . We disagree, however, with the application of the *Simmons* standard . . . to the totality of the circumstances of this case." *Id.*, at 717.

[8] Judge Sneed dissented from the Court of Appeals' original decision,

Court of Appeals apparently misunderstood the terms of our remand. Nor did it comply with the requirements of § 2254. We agree with the Court of Appeals that the ultimate question as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by § 2254.[9] In deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption as our earlier opinion made clear. Thus, whether the witnesses in this case had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others are all questions of fact as to which the statutory presumption applies.[10]

Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was "not fairly supported by the record." But the statute does require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the fac-

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and he dissented again "respectfully, and to some degree sorrowfully." *Ibid.*

[9] Cf. *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Neil* v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972).

[10] In *Neil* v. *Biggers*, *supra*, at 199–200, we noted that "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Each of these "factors" requires a finding of historical fact as to which § 2254 applies. The ultimate conclusion as to whether the facts as found state a constitutional violation is a mixed question of law and fact as to which the statutory presumption does not apply.

tors listed in § 2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the factfindings made by the state courts. To adopt the Court of Appeals' view would be to deprive this statutory command of its important significance.

Our remand directed the Court of Appeals to re-examine its findings in light of the statutory presumption. We pointed the way by identifying certain of its findings that we considered to be at odds with the findings of the California Court of Appeal. We asked the Court of Appeals to apply the statutory presumption or explain why the presumption was not applicable in view of the factors listed in the statute. The Court of Appeals did neither. Accordingly, we again must remand. Again we note that "we are not to be understood as agreeing or disagreeing with the majority of the Court of Appeals on the merits of the issue of impermissibly suggestive identification procedures." 449 U. S., at 552.[11]

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, the judgment of the Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In my view, the opinion of the Court of Appeals for the Ninth Circuit not only accords with the views I expressed last Term, which, as the Court points out, *ante*, at 595, n. 6,

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[11] Because we remand for failure to comply with § 2254(d), we do not reach the second question presented in the petition for certiorari as to whether the Court of Appeals applied the proper legal standard in determining that the pretrial identification procedures used in this case were constitutionally defective.

did not prevail, but also with the principles expressed in the Court opinion last Term and restated by the Court today. It is on this basis that I dissent from the Court's second, and in this instance summary,* reversal.

When this case was before us last Term, I expressed the view that it was unnecessary for the Court of Appeals to explain its failure to consider the restrictions of § 2254(d), because "the difference between the Court of Appeals for the Ninth Circuit and the California Court of Appeal was over the applicable *legal standard*, and not over the particular *facts* of the case," rendering § 2254 obviously inapplicable. *Sumner* v. *Mata*, 449 U. S. 539, 558–559 (1981). The Court disagreed, holding that in all cases federal courts must apply § 2254(d) or explain why it was inapplicable: "No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." 449 U. S., at 552. But I thought then, and the Court today agrees, that § 2254(d) is inapplicable to the ultimate question whether pretrial identification procedures are "impermissibly suggestive," *Simmons* v. *United States*, 390 U. S. 377, 384 (1968). *Ante*, at 597.

The Court's explicit recognition that § 2254(d) does not govern the ultimate question as to the constitutionality of the pretrial identification procedures used in this case renders all the more confounding the Court's present disposition. Following this Court's directive on remand, the Court of Appeals clarified the basis for its original opinion: Section 2254 (d) was inapplicable because the federal court "substantially agree[d] with the 'historical' or 'basic' facts adduced by the

*Although a case in which a lower court misunderstands the terms of our remand might in some instances be an appropriate candidate for summary reversal, in this case, where there is no unanimous agreement that the remand was not complied with, I would not reverse without plenary consideration.

California Court of Appeal," but disagreed with "the *legal and constitutional significance* of certain facts," and thus the "*legal* conclusion" of the state court. 649 F. 2d 713, 716–717 (1981).

I can only interpret this second reversal as evincing either the suspicion that the Court of Appeals, despite its protestations to the contrary, actually relied on factual findings inconsistent with those of the state court or that the Court of Appeals failed to distinguish its ultimate conclusion from subsidiary questions of fact. The unfairness of such suspicion is manifest. There is no reason to think, borrowing from this Court's declaration to the Court of Appeals last Term, that, despite this Court's difference of opinion, the judges of the Ninth Circuit are "not doing their mortal best to discharge their oath of office." 449 U. S., at 549.

There is no basis for disbelieving the Court of Appeals' assurance that it has accepted the factual findings of the California Court of Appeal and that it granted relief only because it concluded that the pretrial identification procedures employed in this case were, as a matter of law, unconstitutional. Accordingly, I dissent and would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

Once again the Court's preoccupation with procedural niceties has needlessly complicated the disposition of a federal habeas corpus petition. Cf. *Rose* v. *Lundy*, *ante*, p. 509. Lurking in the background of this case is the question whether the failure to conduct a lineup has any bearing on the validity of a photographic identification. The Court may one day confront that question. For the present, however, it is more concerned with the Court of Appeals' misunderstanding of the ill-defined mandate of *Sumner* v. *Mata*, 449 U. S. 539, and 28 U. S. C. § 2254(d).

We now seem to agree that § 2254(d) applies to a "basic, primary, or historical fact" and that it does not apply to a "mixed question of law and fact." The articulation of this

proposition certainly is an improvement on the Court's opinion of last Term, which understandably confounded the Court of Appeals on remand. Judge Sneed in dissent read—incorrectly, it turns out—the Court's opinion to apply § 2254(d) to mixed questions of law and fact. The panel majority read—correctly, it turns out—the Court's opinion to apply § 2254(d) only to historical facts. The panel majority held that § 2254(d) simply was not implicated in this case because there was no conflict between its findings of historical facts and those of the California Court of Appeal. The disagreement today is whether that holding is correct. In my opinion, this question is more difficult than either the *per curiam* or JUSTICE BRENNAN's dissent indicates.* Indeed, the difficulty of the analysis behooves this Court either to "poin[t] the

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*The California Court of Appeal and the Court of Appeals for the Ninth Circuit worked from the same state trial court record. The state court made the rather brief findings "that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate." App. to Pet. for Cert. C-8. The federal court analyzed the evidence in greater detail. It found: that although the fight among witnesses and the perpetrators of the crime "would have at least provided an opportunity for the witnesses to observe the perpetrators of the crime[,] . . . the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention"; that "the descriptions of the assailants were clearly not detailed descriptions"; and that "considerable pressure from both the prison officers and opposing prison factions had admittedly been brought to bear on both witnesses." *Mata* v. *Sumner*, 611 F. 2d 754, 758-759 (CA9 1979).

Putting aside the problem of separating findings of historical fact from answers to mixed questions of law and fact, it is mostly an ineffectual exercise to attempt to decide whether the two sets of findings are conflicting. The first and second of the three findings of the federal court seem to supplement, but not contradict, the roughly corresponding findings of the state court. The third does conflict with the state court's determination that there was "no showing of influence," but the reason for the conflict is fully explained by the federal court's reference to evidence in the record that the state court apparently overlooked or ignored. The Court of Appeals might have better complied with § 2254(d) by referring to this explanation. See § 2254(d)(8). In any event, since neither appellate court

way" in a more extensive and reasoned fashion or to rely upon the good faith and good sense of the federal courts in applying the rather straightforward principle of § 2254(d) even though in particular cases its application might be unclear. The Court does neither today. Instead, it merely delays, for the sake of a procedural nicety, either the habeas corpus relief to which the Court of Appeals has held the respondent is entitled or a consideration of the merits of the only significant question that the petitioner has raised. I respectfully dissent from the Court's summary disposition.

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had the benefit of findings of fact by the judge who heard the evidence, it is a strange use of our scarce resources to review such trivial differences between two appellate courts' analyses of this trial record.

Per Curiam

FLETCHER, SUPERINTENDENT, BELL COUNTY FORESTRY CAMP v. WEIR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-1049. Decided March 22, 1982

Held: Respondent was not denied due process of law under the Fourteenth Amendment by the prosecutor's use, at respondent's state-court trial which resulted in a conviction for first-degree manslaughter, of his postarrest silence for impeachment purposes—the record not indicating that respondent had been given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436, during the period in which he remained silent immediately after his arrest. In testifying in his own defense, respondent stated for the first time that he acted in self-defense in stabbing the victim and that the stabbing was accidental. The prosecutor then cross-examined him as to why he had failed to advance his exculpatory explanation to the arresting officers. Absent the sort of affirmative assurances embodied in the *Miranda* warnings—which at least implicitly assure the defendant that his silence will not be used against him—a State does not violate due process by permitting cross-examination as to postarrest silence when a defendant chooses to take the stand. *Doyle* v. *Ohio*, 426 U. S. 610 (where *Miranda* warnings were given), distinguished.

Certiorari granted; 658 F. 2d 1126, reversed and remanded.

PER CURIAM.

In the course of a fight in a nightclub parking lot, Ronnie Buchanan pinned respondent Weir to the ground. Buchanan then jumped to his feet and shouted that he had been stabbed; he ultimately died from his stab wounds. Respondent immediately left the scene, and did not report the incident to the police.

At his trial for intentional murder, respondent took the stand in his own defense. He admitted stabbing Buchanan, but claimed that he acted in self-defense and that the stabbing was accidental. This in-court statement was the first occasion on which respondent offered an exculpatory version of the stabbing. The prosecutor cross-examined him as to

why he had, when arrested, failed either to advance his exculpatory explanation to the arresting officers or to disclose the location of the knife he had used to stab Buchanan. Respondent was ultimately found guilty by a jury of first degree manslaughter. The conviction was affirmed on appeal to the Supreme Court of Kentucky.

The United States District Court for the Western District of Kentucky then granted respondent a writ of habeas corpus, and the Court of Appeals for the Sixth Circuit affirmed. 658 F. 2d 1126 (1981). The Court of Appeals concluded that respondent was denied due process of law guaranteed by the Fourteenth Amendment when the prosecutor used his post-arrest silence for impeachment purposes.[1] Although it did not appear from the record that the arresting officers had immediately read respondent his *Miranda* warnings,[2] the court concluded that a defendant cannot be impeached by use of his postarrest silence even if no *Miranda* warnings had been given. The court held that "it is inherently unfair to allow cross-examination concerning post-arrest silence," 658 F. 2d, at 1130, and rejected the contention that our decision in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), applied only where the police had read *Miranda* warnings to a defendant. Because we think that the Court of Appeals gave an overly broad reading to our decision in *Doyle* v. *Ohio*, *supra*, we reverse its judgment.

One year prior to our decision in *Doyle*, we held in the exercise of our supervisory power over the federal courts that silence following the giving of *Miranda* warnings was ordi-

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[1] During cross-examination, the prosecutor also questioned respondent concerning his failure *prior to his arrest* to report the incident to the police and offer his exculpatory story. Relying on our decision in *Jenkins* v. *Anderson*, 447 U. S. 231 (1980), the Court of Appeals correctly held that there was no constitutional impropriety in the prosecutor's use of respondent's pre-arrest silence for impeachment purposes.

[2] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

narily so ambiguous as to have little probative value. *United States* v. *Hale*, 422 U. S. 171 (1975). There we said:

> "In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof." *Id.*, at 180.

The principles which evolved on the basis of decisional law dealing with appeals within the federal court system are not, of course, necessarily based on any constitutional principle. Where they are not, the States are free to follow or to disregard them so long as the state procedure as a whole remains consistent with due process of law. See *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973). The year after our decision in *Hale*, we were called upon to decide an issue similar to that presented in *Hale* in the context of a state criminal proceeding. While recognizing the importance of cross-examination and of exposing fabricated defenses, we held in *Doyle* v. *Ohio*, *supra*, that because of the nature of *Miranda* warnings it would be a violation of due process to allow comment on the silence which the warnings may well have encouraged:

> "[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.*, at 618 (footnote omitted).

The significant difference between the present case and *Doyle* is that the record does not indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. The majority of the Court of Appeals recognized the difference,

but sought to extend *Doyle* to cover Weir's situation by stating that "[w]e think an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." 658 F. 2d, at 1131. We think that this broadening of *Doyle* is unsupported by the reasoning of that case and contrary to our post-*Doyle* decisions.

In *Jenkins* v. *Anderson*, 447 U. S. 231, 239 (1980), a case dealing with pre-arrest silence, we said:

> "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative."

In *Jenkins*, as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him. In *Roberts* v. *United States*, 445 U. S. 552, 561 (1980), we observed that the post-conviction, presentencing silence of the defendant did not resemble "postarrest silence that may be induced by the assurances contained in *Miranda* warnings." In *Jenkins*, we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his *Miranda* warnings, commenting that no governmental action induced the defendant to remain silent before his arrest. 447 U. S., at 239–240. Finally, in *Anderson* v. *Charles*, 447 U. S. 404, 407–408 (1980), we explained that use of silence for impeachment was fundamentally unfair in *Doyle* because "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."

In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

The motion of respondent for leave to proceed *in forma pauperis* is granted.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN would set the case for oral argument.

JUSTICE MARSHALL dissents from the summary reversal of this case.

U. S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL., *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-518. Argued October 6, 1981—Decided March 23, 1982

Respondent Riley (hereafter respondent) awoke on the morning of November 20, 1975, with severe pains in his neck, shoulders, and arms. Subsequently, he filed a claim for disability benefits under the Longshoremen's and Harbor Workers' Compensation Act (Act), alleging that he suffered an accidental injury in the course of his employment on November 13, 1975, when he was lifting duct work and felt a sharp pain in his neck. The Administrative Law Judge found that the accident never occurred and denied the claim, and the Benefits Review Board affirmed. The Court of Appeals vacated the Board's decision, holding that respondent suffered an "injury" when he awakened in pain on November 20, and that under § 20(a) of the Act—which provides that in any proceeding for the enforcement of a claim for compensation under the Act "it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of [the Act]"—respondent was entitled to a presumption that the injury was "employment-bred."

Held:

1. The Court of Appeals erred in invoking the § 20(a) presumption in support of a claim that respondent did not make, he having claimed that he was injured at work and not that the "injury" occurred at home and that it was somehow "employment-bred." In this case there is no reason to depart from the specific statutory direction that a claim be made and that the presumption, however construed, attach to the claim. Pp. 612–615.

2. The Court of Appeals also erred in its use of the term "injury" as including respondent's attack of pain occurring on the morning of November 20. The Act defines "injury" as an "accidental injury . . . arising out of and in the course of employment," so that a prima facie "claim for compensation," to which the § 20(a) presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment. Here, however, the "injury" noticed by the Court of Appeals arose in bed, not in the course of employment. The statutory presumption is no substitute for the allegations necessary to state a prima facie case. Pp. 615–616.

200 U. S. App. D. C. 402, 627 F. 2d 455, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 617. O'CONNOR, J., took no part in the consideration or decision of the case.

Richard W. Galiher, Jr., argued the cause for petitioners. With him on the briefs were *Richard W. Galiher, William H. Clarke*, and *Frank J. Martell.*

James F. Green argued the cause for respondents. With him on the brief for respondent Riley were *Karl N. Marshall, Martin E. Gerel, James A. Mannino, Mark L. Schaffer*, and *Wayne M. Mansulla.**

JUSTICE STEVENS delivered the opinion of the Court.

In the early morning of November 20, 1975, respondent Ralph Riley awoke with severe pains in his neck, shoulders, and arms, which later were attributed by physicians to an exacerbation of an arthritic condition. The United States Court of Appeals for the District of Columbia Circuit held that this "injury" was sufficient to invoke the "statutory presumption of compensability,"[1] § 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1436, 33 U. S. C. § 920(a), and vacated the administrative denial of disability benefits. We granted certiorari, 450 U. S. 979, and we now reverse.

**John C. Duncan III* filed a brief for the American Insurance Association as *amicus curiae.*

[1] "Injury" and "statutory presumption of compensability" are terms employed by the Court of Appeals. See *Riley* v. *U. S. Industries/Federal Sheet Metal, Inc.*, 200 U. S. App. D. C. 402, 627 F. 2d 455 (1980). As we explain below, the use of the term "injury" to describe Riley's early morning attack of pain is incorrect. We do not decide the scope of the § 20(a) presumption, or, *a fortiori*, the appropriateness of the Court of Appeals' characterization of it.

Contending that he was permanently and totally disabled by the arthritic condition,[2] Riley's retained counsel filed with the Deputy Commissioner a claim for compensation under the Act. See 33 U. S. C. § 913. On standard form LS-203, in response to the direction to "[d]escribe in full how the accident occurred,"[3] Riley wrote that on November 19, 1975, he was "[l]ifting duct work with co-worker, weighing approximately 500 pounds, felt sharp pain in neck and sat down." App. 111.

An evidentiary hearing was convened before an Administrative Law Judge. After construing the evidence in a light most favorable to Riley and resolving all doubts in his favor, the Administrative Law Judge found "that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and Sutherland [Riley's co-worker] gave false testimony as to the happening of the accident." App. to Pet. for Cert. 24A.

A divided panel of the Benefits Review Board affirmed the denial of disability benefits, holding that the Administrative Law Judge's findings were supported by substantial evidence. In dissent, Member Miller stated:

> "The Act does not require that claimant prove an accident in order to establish a claim. To the contrary, compensation is payable under the Act if claimant is disabled because of *injury* which is causally related to his employment. 33 U. S. C. §§ 902(10), 902(2)." 9 BRBS 936, 940 (1979) (emphasis in original).

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[2] Apparently, it is undisputed that Riley is permanently and totally disabled. Brief for Respondent Riley 5, n.

[3] The form continues with a further instruction:

"Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on reverse." App. 111.

Member Miller defined an injury as "something go[ne] wrong within the human frame." *Ibid.* Riley suffered such an injury when he awoke on November 20 with severe pain. Therefore, Member Miller would have remanded the case for a determination of "the real issue in this case," which "is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment." *Ibid.* That determination was to be made in light of the § 20(a) presumption, which "places the burden on employer to prove by substantial evidence that claimant's injury did not arise out of or in the course of employment." *Ibid.*

On Riley's petition for review, the Court of Appeals vacated the decision of the Benefits Review Board, agreeing with Member Miller's position. *Riley* v. *U. S. Industries/Federal Sheet Metal, Inc.*, 200 U. S. App. D. C. 402, 627 F. 2d 455 (1980). The court stated that "it can hardly be disputed that petitioner suffered an 'injury' when he awakened in pain on November 20, 1975." *Id.*, at 405, 627 F. 2d, at 458. The court then turned its "attention to the statutory presumption and the range of situations to which this Court has applied it." *Ibid.* It construed its earlier cases as holding "that an injury need not have occurred during working hours" and "need not be traceable to any particular work-related incident to be compensable." *Id.*, at 405–406, 627 F. 2d, at 458–459.[4]

> "The foregoing cases make clear the pervasive scope of the statutory presumption of compensability. Indeed, no decision of this Court has ever failed to apply the pre-

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[4] The cases cited by the Court of Appeals do not support this proposition. In *Butler* v. *District Parking Management Co.*, 124 U. S. App. D. C. 195, 363 F. 2d 682 (1966), the claimant became ill at work and the illness was diagnosed as a schizophrenic reaction. In *Wheatley* v. *Adler*, 132 U. S. App. D. C. 177, 407 F. 2d 307 (1968), the employee collapsed from a heart attack at work. In *Mitchell* v. *Woodworth*, 146 U. S. App. D. C. 21, 449 F. 2d 1097 (1971), the employee died of a cerebral vascular accident shortly after collapsing at work.

sumption to any facet of any claim before it. We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment." *Id.*, at 406, 627 F. 2d, at 459.

The question for remand was not whether Riley's "injury" stemmed from a "work-related incident," but whether it was "'employment-bred.'" *Ibid.*

The Court of Appeals erred because it overlooked (1) the statutory language that relates the § 20(a) presumption to the employee's claim, and (2) the statutory definition of the term "injury."

I

The Court of Appeals' first error was its invocation of the § 20(a) presumption in support of a claim that was not made by Riley. Riley claimed that he suffered an injury at work on November 19 when he was lifting duct work and felt a sharp pain in his neck. The Administrative Law Judge found as a matter of fact that the accident had not occurred; this finding is no longer challenged. The Court of Appeals' theory of recovery was that Riley suffered an injury at home in bed on November 20 and that Riley was entitled to a presumption that this injury was "employment-bred."

Section 20(a), 44 Stat. (part 2) 1436, provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." The coverage of the presumption is debatable,[5] but one thing is clear: the pre-

[5] We need not resolve that debate in this case. It seems fair to assume, however, that the § 20(a) presumption is of the same nature as the presumption created by § 20(d) of the Act, 33 U. S. C. § 920(d), as construed in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285–287, and the presumption de-

sumption applies to the claim. Even if a claimant has an unfettered right to amend his claim to conform to the proof, the presumption by its terms cannot apply to a claim that has never been made.

Section 13 of the Act, 33 U. S. C. § 913, provides that a claimant must timely file a claim with the Deputy Commissioner. The content of the claim is not specified in that section. But § 12(b), 33 U. S. C. § 912(b), requires that the claimant timely give the Deputy Commissioner and his employer notice of his injury, and provides further that "[s]uch notice . . . shall contain . . . a statement of the time, place, nature, and cause of the injury."[6] The claim, like the notice required by § 12 and like the pleadings required in any type of litigation, serves the purposes of notifying the adverse party of the allegations and of confining the issues to be tried and adjudicated.[7]

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fined in Rule 301 of the Federal Rules of Evidence. See also *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248.

[6] "This statement must be more than a mere declaration that the employee has received an injury or is suffering from an illness that is related to his employment; it must contain enough details about the nature and extent of the injury or disease to allow the employer to conduct a prompt and complete investigation of the claim so that no prejudice will ensue." 1A E. Jhirad, A. Sann, N. Golden, & B. Chase, Benedict on Admiralty § 71, p. 4-5 (7th ed. 1981).

[7] See generally F. James & G. Hazard, Civil Procedure § 2.1 (2d ed. 1977). Of course, the workmen's compensation process is much more simplified than modern civil litigation. Indeed, this is one of the hallmarks of the system:

"The adjective law of workmen's compensation, like the substantive, takes its tone from the beneficent and remedial character of the legislation. Procedure is generally summary and informal. . . . The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. . . . On the other hand, as every lawyer knows, there is a point beyond which the sweeping-aside of 'technicalities' cannot go, since evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the

In Riley's claim, he alleged that he suffered an accidental injury in the course of his employment on November 19. No claim has ever been made that the "injury" occurred at home and that it was somehow "employment-bred." Even if such a vague claim stated a prima facie case of compensability, the statutory presumption does not require the administrative law judge to address and the employer to rebut every conceivable theory of recovery. At least when the claimant is represented by counsel,[8] as Riley was, there is no reason to depart from the specific statutory direction that a claim be

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merits of a case." 3 A. Larson, The Law of Workmen's Compensation § 78.10, p. 15–2 (1976).

Professor Larson writes that an informal substitute for a claim may be acceptable if it "identif[ies] the claimant, indicate[s] that a compensable injury has occurred, and convey[s] the idea that compensation is expected," *id.*, § 78.11, p. 15–9; that "considerable liberality is usually shown in allowing amendment of pleadings to correct . . . defects," unless the "effect is one of undue surprise or prejudice to the opposing party," *id.*, at 15–11; and that "wide latitude is allowed" as to variance between pleading and proof, "[b]ut if the variance is so great that the defendant is prejudiced by having to deal at the hearing with an injury entirely different from the one pleaded, the variance may be held fatal," *id.*, at 15–13—15–14. Riley had the benefit of these liberal pleading rules; nonetheless, the Court of Appeals applied the statutory presumption to a claim that was not fairly supported by the existing claim or by the evidentiary record. As Professor Larson warns, "[n]o amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements in his case." *Id.*, at 15–12.

[8] "If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final." 33 U. S. C. § 928(a).

made and that the presumption, however construed, attach to the claim.

II

The Court of Appeals' second error was its incorrect use of the term "injury." The court stated that Riley's attack of pain in the early morning of November 20 was an "injury" compensable under the Act if the employer did not disprove by substantial evidence that the "injury" was "employment-bred." The fact that "'something unexpectedly goes wrong with the human frame,'" 200 U. S. App. D. C., at 405, 627 F. 2d, at 458 (quoting *Wheatley* v. *Adler*, 132 U. S. App. D. C. 177, 183, 407 F. 2d 307, 313 (1968)), however, does not establish an "injury" within the meaning of the Act. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.

Section 3(a) provides that "[c]ompensation shall be payable under this Act in respect of disability . . . of an employee, but only if the disability . . . results from an injury." 44 Stat. (part 2) 1426, as amended, 33 U. S. C. § 903(a). Injury is defined as an "accidental injury . . . arising out of and in the course of employment." 33 U. S. C. § 902(2). Arising "out of" *and* "in the course of" employment are separate elements: the former refers to injury causation; the latter refers to the time, place, and circumstances of the injury.[9] Not only must the injury have been caused by the employment, it also must have arisen during the employment.

A prima facie "claim for compensation," to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment.[10] The "injury" noticed by the Court of Appeals, how-

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[9] See, *e. g.*, *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Thom* v. *Sinclair*, [1917] A. C. 127; 1A Benedict on Admiralty, *supra*, § 43; 1 A. Larson, *supra*, § 6.10, at 3–2—3–3 (1978).

[10] The Act was enacted to create a federal workmen's compensation statute for maritime employments after this Court held that state workmen's compensation statutes constitutionally could not apply to injured maritime workers. See generally *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S.

ever, arose in bed, not in the course of employment. Even if the Court of Appeals simply mislabeled the early morning attack of pain as the "injury" itself rather than as a manifestation of an earlier injury, the claim envisioned by the Court of Appeals did not allege any facts that would establish that Riley suffered an injury that arose in the course of employment. The statutory presumption is no substitute for the allegations necessary to state a prima facie case.

III

Riley's claim stated a prima facie case of compensability; if the Administrative Law Judge had believed Riley's allegations, he would have found that Riley's attack of pain in the early morning of November 20 was caused by an injury suffered when Riley was lifting duct work on the job on November 19. The judge, however, disbelieved Riley's allegations and marshaled substantial evidence to support his findings. The statutory presumption did not require him to adjudicate any claim that was not made, and the Court of Appeals erred in remanding for that purpose. Nor could the statutory presumption have aided Riley had he made the claim envisioned by the Court of Appeals—that he suffered an "injury" at home—for such a claim omits the requirement that a compensable injury arise in the course of employment.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

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128. Workmen's compensation legislation has never been intended to provide life or disability insurance for covered employees. The required connection between the death or disability and employment distinguishes the workmen's compensation program from such an insurance program, and the separate requirements that the injury arise out of and in the course of employment are the means for assuring, to the extent possible, that the work connection is proved. See W. Dodd, Administration of Workmen's Compensation 681 (1936); see generally *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 422–424.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 920(a), provides that "it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat [a] claim [for compensation] comes within the provisions of this chapter." The central issue before us is whether this provision requires the employer in a compensation hearing to offer "substantial evidence" refuting the existence of a causal relationship between a compensation claimant's injury and his employment. The question has been fully briefed and argued, but the Court does not address it. For me, however, the answer is clear and controls the proper disposition of this case.

By its terms, and quite in contrast to the practice in judicial proceedings, § 20(a) requires the employer to take the initial steps to disprove his liability. This preliminary shifting of the burden to the employer exemplifies the "humanitarian' nature of the Act," *O'Keeffe* v. *Smith Associates*, 380 U. S. 359, 362 (1965) (*per curiam*), and the "strong legislative policy favoring awards in arguable cases," *Wheatley* v. *Adler*, 132 U. S. App. D. C. 177, 183, 407 F. 2d 307, 313 (1968) (en banc). Section 20(a) is clearly broad enough to encompass the question of causation. "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *In re District of Columbia Workmen's Compensation Act*, 180 U. S. App. D. C. 216, 223, 554 F. 2d 1075, 1082 (1976). To defeat a claim for compensation, the employer must rebut the presumption of compensability by offering substantial evidence that the claim is not one "arising out of and in the course of employment." 33 U. S. C. §§ 902(2), 903; see *Marra Bros., Inc.* v. *Cardillo*, 154 F. 2d 357 (CA3 1946). Only after the employer offers such substantial evi-

dence does the presumption fall "out of the case." *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286 (1935).

The statutory presumption thus defines the basic agenda for the hearing before the Office of Worker's Compensation Programs (OWCP), and the factfinding required before the OWCP may deny a compensation claim. In this case, there is no serious dispute that respondent Riley suffered some disabling injury.[1] See *Riley* v. *U. S. Industries/Federal Sheet Metal, Inc.*, 200 U. S. App. D. C. 402, 406, n. 3, 627 F. 2d 455, 459, n. 3 (1980). Riley has an arthritic neck condition, and "the pain [he] suffered . . . was due to an exacerbation of his arthritic neck condition." *Id.*, at 405, 627 F. 2d, at 458. Given the existence of this condition, and the statutory presumption, the relevant inquiry was whether the employer had shown that the condition was not sufficiently work-related to render the employer accountable.[2] No such finding was ever entered. Rather, the Administrative Law Judge and the Benefits Review Board focused exclusively on the testimony of Riley and his co-worker that something happened to Riley while lifting duct work on November 19, 1975, causing an immediate pain in his neck. The Administrative

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[1] It may be that the opinion for the Court of Appeals suffered from failing to distinguish between the use of the term "injury" in its ordinary meaning, and in its specialized meaning under the Act. See 33 U. S. C. § 902(2). But there is absolutely no basis for the suggestion in Part II of the Court's opinion that the Court of Appeals thought it sufficient to ground a compensation claim on an "injury" that "arose in bed, not in the course of employment." *Ante*, at 616. The suggestion is plainly wrong; virtually every aspect of the opinion for the Court of Appeals reaffirms that the issue before the Administrative Law Judge and the Benefits Review Board was whether there existed some causal connection between the claimant's disability and his employment.

[2] In practice, the two tests of "arising out of" and "in the course of" tend to merge into a single determination of work-relatedness. See 1A A. Larson, The Law of Workmen's Compensation §§ 29.00–29.10, pp. 5–354–5–357 (1979). The dissenting member of the Benefits Review Board Panel thus properly described "the real issue in this case" as "whether claimant's injury is causally related to his employment." 9 BRBS 936, 940 (1979).

Law Judge concluded only that no such incident occurred; the Benefits Review Board affirmed that finding.

Had the Administrative Law Judge credited the testimony of Riley with respect to the November 19 incident, it would surely have strengthened Riley's position that the exacerbation of his arthritic neck condition was work-related. But the finding that this incident did not occur hardly demonstrates that Riley's disability did not arise out of and in the course of employment. An injury need not be traceable to a single event at work in order to be compensable. "Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been 'employment bred.'"[3] *Id.*, at 406, 627 F. 2d, at 459.

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[3] It is surely plausible that there was a causal relation between the exacerbation of Riley's arthritic neck condition and the overhead sheet metal duct work that he was engaged in until the night he awoke in bed in pain. But however logical this connection might be in some lay sense, it could hardly assure Riley of recovery. The term "substantial" is relative, and the quantum and type of evidence required of the employer correspond to the specificity of the claimaint's evidence and allegations. The evidence necessary to overcome the presumption is least when the claim rests—as this one apparently did once the testimony respecting the November 19 accident was rejected—on little more than some arguable link between the disabling condition and the nature of the work.

There appears to be little in the abbreviated record before this Court directly supporting this broader theory of recovery. Although one physician testified that "[t]he man is certainly disabled from working," App. 130, this statement was made in the course of questioning about the possible effects of the alleged November 19 incident. Another doctor, describing Riley's condition shortly after he entered the hospital, noted: "[M]ost of his work is overhead type and involves quite a bit of hyperextention of the neck. That means that most of his work he will have to do with his neck bending upwards." *Id.*, at 158. That same doctor, however, referred repeatedly to Riley's assertion that he felt pain as a result of bending or twisting his neck while lifting duct work in November 1975, and rendered his diagnosis on that basis. See *id.*, at 162–169. Although Riley hardly proved his theory by this medical evidence, given the nature of the injury, and the nature of his work, Riley clearly made the "initial demonstration of employment-connection [that] will give the presumption a foothold." 1 A. Larson, *supra*, § 10.33, at 3–121 (1978).

Absent a finding excluding this possibilty, compensation could not be denied. In addition, the failure of the Administrative Law Judge to focus on the broader issue of the injury's work-relatedness suggests that he may have failed to conduct the proceedings with proper attentiveness to the basic issue in a case such as this: namely, had the claimant been disabled as a result of his employment? Because the agency did not make the crucial finding, the Court of Appeals quite properly remanded this case so that the necessary determination could be made.

II

Rather than allow a remand so that the normal process of administrative adjudication might run its course, the Court discerns a dispositive procedural requirement within the Act. The Court places its emphasis on the language of § 20(a):

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat *the claim* comes within the provisions of this Act." (Emphasis added.)

Unremarkably, the Court reads this language as applying the presumption to the "claim for compensation." But quite remarkably, and without any support in precedent or the language of the Act, the Court construes the words "claim for compensation" to mean some sort of legal document, or at least some stated theory, setting forth a prima facie case for compensation, upon which all further proceedings must be based, and to which the presumption may attach.

The Court appears to glean its understanding of the word "claim" from the meaning assigned to the term "claim for relief" by Rule 8(a) of the Federal Rules of Civil Procedure. The Court concedes, as it must, that this understanding of the word "claim" finds no direct authority in the LHWCA itself. The Act does require the employee to file a timely "claim" with the Deputy Commissioner. 33 U. S. C.

§913(a). See *ante*, at 613. But it is clear that the referred-to "claim" is nothing more than a simple request for payment,[4] carrying with it the implicit assertion of an entitlement to compensation. To the extent an allegation of "time, place, nature, and cause of injury" is statutorily required, it is only in connection with the *notice* to the employer referred to by § 12.[5] 33 U. S. C. § 912.

Moreover, the Court's reliance on a written pleading requirement is wholly out of step with the sensible informality with which the Act is administered.[6] Under the present regime of administrative enforcement, issues are not narrowed through pleadings, but rather through a mixture of formal

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[4]This definition of "claim" comports with its accustomed meaning in the context of comparable compensation statutes. For example, "claim" is defined for purposes of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 *et seq.* (1976 ed. and Supp. IV), as "a written assertion of entitlement to benefits under [the Act], submitted in a form and manner authorized by the provisions of this subchapter." 20 CFR § 725.101(a)(16) (1981). See also 20 CFR § 10.5(a)(7) (1981) (Federal Employees' Compensation Act, 5 U. S. C. § 8101 *et seq.*).

[5]The Court's reliance on the notice requirement of § 12 to suggest that the *claim* encompass some allegation of "time, place, and manner," so that the Court can in turn conclude that the statutory presumption applies to what is alleged in the "claim," is a patchwork job. The "claim" is something entirely apart from the § 12 notice. Indeed, § 12(d) employs the very distinction that the Court seeks to blur: "Failure to give such *notice* shall not bar any *claim* under this chapter" where the employer had actual notice, the Deputy Commissioner excuses such notice, or where no objection was raised to the failure "before the deputy commissioner at the first hearing of a claim for compensation . . . ." 33 U. S. C. § 912(d).

[6]For example, the regulations provide that "[t]he order in which evidence and allegations shall be presented and the procedures at the hearings generally . . . shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing." 20 CFR § 702.338 (1981). That same regulation provides that "[i]f the adminstrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may . . . at any time, prior to the filing of the compensation order, reopen the hearing for the receipt of such evidence."

and informal prehearing procedures. 20 CFR §§ 702.311–702.317 (1981). The regulations governing the administration of the Act reflect the method chosen by the agency charged with administering the Act for addressing the practical problems of issue narrowing that inevitably arise in the course of administrative proceedings. In addition to the prehearing conference report, which sets forth the issues for the hearing, the parties are required to submit a prehearing statement defining the issues to be considered. See § 702.317. Nevertheless, the employee's failure to raise a particular issue at the prehearing conference, or in his prehearing statement, does not preclude him from raising that issue at the formal hearing. See § 702.336(a). In addition, "[a]t any time prior to the filing of the compensation order . . . the administrative law judge may in his discretion" reopen the hearing to consider a new issue. § 702.336(b).[7]

Apparently the Court is of the view that its imported definition of "claim" is necessary to protect employers from being called into a compensation hearing without any warning of the basis upon which compensation is sought; on this argument, the employer would otherwise be forced to offer evidence refuting every conceivable basis upon which an employee's claim might be grounded. I do not share the Court's fear. The Act already contains sufficient accommodation to such legitimate employer concerns: in the form of a *statutory* notice requirement, in the practical manner in which the presumption of compensability has historically

[7] Although I do not profess expertise in the administration of the LHWCA, it does seem to me that this provision might have relevance in a case, such as the present one, where the administrative law judge intends to reject the claimaint's principal theory of the case, but where a second theory should be more fully explored before the question of compensation is finally determined. Of course, I would leave questions regarding the application of this and all other regulations governing LHWCA proceedings for the Review Board to resolve on remand. See also 20 CFR § 702.336(a) (1981).

been applied, and in the good-sense application of agency regulations and case management principles by the administrative officals charged with the execution of this Act's provisions. In sum, I am confident, as the Court apparently is not, that any legitimate claim of surprise by the employer in this or in any other case may be fairly considered within the framework of the governing regulations, and resolved in a manner that effectuates the humanitarian purposes of this Act. Rather than rely on some fictive legal analysis to dispose of the case "as a matter of law," by intertwining the problem of notice with the § 20(a) presumption, I would leave all such questions of proof and notice for the agency on remand, as did the Court of Appeals.

III

As Justice Douglas once had occasion to remind us, "[t]he problems under this Act should rest mainly with the Courts of Appeals." *O'Keeffe* v. *Smith Associates*, 380 U. S., at 371 (*dubitante*). The Court's treatment of the relatively simple issues raised by the present case underscores the wisdom of that counsel of deference. The Court of Appeals concluded below that the relevant issues were never resolved by the Administrative Law Judge. I can hardly disagree. Therefore, I dissent.

LANE, CORRECTIONS DIRECTOR *v.* WILLIAMS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1240. Argued December 1, 1981—Decided March 23, 1982

In 1975, both respondents pleaded guilty in unrelated Illinois state-court prosecutions for burglary, an offense punishable at that time by imprisonment for an indeterminate term of years and a mandatory 3-year parole term. Neither respondent, during his plea acceptance hearing, was informed that his negotiated sentence included the mandatory parole term. Each respondent completed his prison sentence, was released on parole, and was then reincarcerated for parole violation. While in custody, each filed petitions for federal habeas corpus, which were consolidated in the District Court, alleging that the failure of the trial courts to advise them of the mandatory parole requirement before accepting their guilty pleas deprived them of due process of law. The District Court found for respondents and, in accordance with the relief requested by them, merely ordered their release through "specific performance" of the plea bargains rather than nullifying the guilty pleas and allowing them to plead anew. After a remand from the Court of Appeals based on a question as to exhaustion of state remedies, the District Court ultimately again entered judgment for respondents. Since they had already been discharged from custody, the court simply entered an order "declaring void the mandatory parole term[s]." The Court of Appeals affirmed.

Held: Respondents' claims for relief are moot. Assuming that the failure to advise respondents of the mandatory parole requirement rendered their guilty pleas void, they could have sought to have their convictions set aside and to plead anew, and this case would not then be moot. Such relief would free them from all consequences flowing from their convictions as well as subject them to reconviction with a possibly greater sentence, thus preserving a live controversy to determine whether a constitutional violation had occurred and whether respondents were entitled to the relief sought. However, by seeking "specific enforcement" of the plea agreement by elimination of the mandatory parole term from their sentences, respondents instead elected to attack only their sentences and to remedy the alleged constitutional violation by removing the consequence that gave rise to the constitutional harm. Since their parole terms have now expired, they are no longer subject to any direct re-

straint as a result of the parole terms, and the case is moot. Neither the doctrine that an attack on a criminal conviction is not rendered moot by the fact that the underlying sentence has expired, nor the doctrine that a case is not moot where it is "capable of repetition, yet evading review," is applicable here. Pp. 630–634.

633 F. 2d 71, vacated.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 634.

Michael B. Weinstein, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Tyrone C. Fahner*, Attorney General, and *Herbert L. Caplan* and *Melbourn A. Noel, Jr.*, Assistant Attorneys General.

Martha A. Mills, by appointment of the Court, 453 U. S. 921, argued the cause and filed a brief for respondents.

JUSTICE STEVENS delivered the opinion of the Court.

In 1975, respondents pleaded guilty in Illinois state court to a charge of burglary, an offense punishable at that time by imprisonment for an indeterminate term of years and a mandatory 3-year parole term. We granted certiorari to consider whether the failure of the trial court to advise respondents of that mandatory parole requirement before accepting their guilty pleas deprived them of due process of law. We are unable to reach that question, however, because we find that respondents' claims for relief are moot.

I

On March 11, 1975, respondent Lawrence Williams appeared in Illinois state court and pleaded guilty to a single count of burglary. Before accepting the guilty plea, the trial judge elicited Williams' understanding of the terms of a plea agreement, in which his attorney and the prosecutor had

agreed that Williams would receive an indeterminate sentence of from one to two years in prison in exchange for pleading guilty. The judge informed Williams that he would impose the bargained sentence, and advised him of both the nature of the charge against him and the constitutional rights that he would waive by pleading guilty. After the prosecutor established a factual basis for the plea, Williams indicated that he understood his rights and wished to plead guilty.

At the time that Williams pleaded guilty, Illinois law required every indeterminate sentence for certain felonies, including burglary, to include a special parole term in addition to the term of imprisonment.[1] During the plea acceptance hearing, neither the trial judge, the prosecutor, nor defense counsel informed Williams that his negotiated sentence included a mandatory parole term of three years.

Williams was discharged from prison on May 20, 1976, and released on parole. On March 3, 1977, he was arrested for

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[1] See Ill. Rev. Stat., ch. 38, ¶ 1005–8–1 (1975). The mandatory parole requirement was first imposed by the Illinois Legislature in 1972. 1972 Ill. Laws, P. A. 77–2097, § 5–8–1. At the time that Williams pleaded guilty, the mandatory parole term for the offense of burglary was three years; however, Illinois law also provided that "[t]he Parole and Pardon Board may enter an order releasing and discharging a parolee from parole and his commitment to the Department when it determines that he is likely to remain at liberty without committing another offense." § 3–3–8 (current version Ill. Rev. Stat., ch. 38, ¶ 1003–3–8 (Supp. 1980)). In 1978 the parole requirement was amended by the Illinois Legislature and reduced, for the offense in question, to two years. 1977 Ill. Laws, P. A. 80–1090, § 3.

In *People* v. *Wills*, 61 Ill. 2d 105, 330 N. E. 2d 505 (1975), cert. denied, 423 U. S. 999, the Illinois Supreme Court held that the mandatory parole term is one of the consequences of a guilty plea that must be explained to the defendant before such a plea may be accepted. The court also held, however, that its decision should not be applied retroactively; thus, during the period between January 1, 1973, when the mandatory parole requirement became effective, and May 19, 1975, when *Wills* was decided, there was no state-law requirement that a defendant be advised of the parole requirement before pleading guilty.

reasons that do not appear in the record and, on March 16, 1977, he was returned to prison as a parole violator. While in custody, Williams filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. He alleged that he "was not informed" that a mandatory parole term had attached to his sentence until two months before his discharge from prison and that "his present incarceration is therefore in violation of the Due Process Clause of the 14th Amendment to the U. S. Constitution." App. 12. Williams' petition did not ask the federal court to set aside his conviction and allow him to plead anew. It requested an order "freeing him from the present control" of the warden and from "all future liability" under his original sentence.[2]

On January 4, 1978, the District Court found that Williams' guilty plea had been induced unfairly in violation of the Due Process Clause of the Fourteenth Amendment and ordered Williams released from custody. *United States ex rel. Williams* v. *Morris*, 447 F. Supp. 95 (1978). The court expressly "opted for specific performance" of the plea bargain "rather than nullification of the guilty plea." *Id.*, at 101. The relief granted was precisely what Williams had requested.

Williams was not, however, immediately released from custody. The District Court entered a stay to give the State an opportunity to file a motion for reconsideration. Before that stay was lifted, Williams was released from prison on a special 6-month "supervisory release term." The District Court subsequently denied the State's motion to reconsider and the State appealed.[3] While that appeal was pending,

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[2] The petition also requested "[a]ny further relief that [the] Court deems appropriate and just in this [m]atter." App. 13.

[3] Although the denial of the motion to reconsider is dated January 27, 1978, it was not entered until February 2, 1978. Williams was released on February 1, 1978.

Williams' 6-month release term expired and he was released from the custody of the Illinois Department of Corrections.

The facts concerning respondent Southall are similar. Pursuant to a plea bargain with the prosecutor that was accepted in advance by an Illinois trial court, Southall pleaded guilty to a single charge of burglary and was sentenced to prison for a minimum period of one year and a maximum period not to exceed three years. The transcript of the plea acceptance proceeding contains no statement by the prosecutor, Southall's public defender, or the trial judge that the bargained and imposed sentence included the mandatory 3-year parole term. Like respondent Williams, Southall completed his sentence, was released on parole, and later declared a parole violator.[4] While reincarcerated, he filed a petition for habeas corpus in federal court, seeking his "immediate release." App. 65.[5] His case was consolidated in the District Court with that of respondent Williams.

The District Court found "Southall's situation to be factually indistinguishable from Williams'." 447 F. Supp., at 102. The court thus granted Southall's petition for a writ of habeas corpus. The State filed an appeal from that decision, but discharged Southall in compliance with the decision of the District Court.[6]

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[4] Southall began serving his sentence on October 8, 1974, the date of his arrest. He was released on parole on September 22, 1975. On October 8, 1976—well within the 3-year period that Southall was told he could be subject to the control of the Illinois Department of Corrections—he was declared a parole violator "as of November 1, 1975." The record does not disclose the nature of this parole violation.

[5] Southall did not allege that he did not know of the parole requirement at the time he pleaded guilty. Southall simply alleged that "[he] was not previously aware that [he] would be detained on violation of mandatory parole." *Id.*, at 65.

[6] The District Court's original order commanding Southall's release was stayed until further order of the court, to permit the State to file the motion for reconsideration. Although the record does not contain an order terminating the stay, the Court of Appeals subsequently indicated that Southall had been released pursuant to the District Court's order. 594 F. 2d 614, 615 (CA7 1979).

The Court of Appeals reversed on the ground that respondents had failed to exhaust an available state remedy. 594 F. 2d 614 (CA7 1979). Before reaching that decision, however, the court requested the parties to submit supplemental briefs on the issue of mootness. The court concluded that the cases were not moot. It noted that Southall's mandatory parole term extended beyond the date of its decision and thus could be reinstated. While Williams' parole term had expired, the court concluded that the controversy was still alive because "there remain collateral consequences which might have lingering effects since [Williams was] found guilty of [a] violatio[n] of the mandatory parole"; that violation "would remain upon [his] recor[d] with various possible adverse consequences." *Id.*, at 615.[7] Moreover, the court found the issue to be capable of repetition, yet evading review; "[i]t is obvious that because of the short terms often remaining in the mandatory parole terms that the same issue may be expected to be raised as to other petitioners similarly situated with doubtful expectations of resolution." *Ibid.*

After the Court of Appeals had rendered its decision, respondent Southall was discharged from the custody of the Illinois Department of Corrections.[8] On remand, the District Court concluded that, as a result of an intervening decision of the Illinois Supreme Court, exhaustion of state remedies would be futile. 483 F. Supp. 775 (1980). The court again entered judgment for respondents; since they had already

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[7] The court did not identify these collateral effects or adverse consequences. It found the situation "similar in principle," however, to that considered in *Carafas* v. *LaVallee*, 391 U. S. 234.

[8] In subsequent proceedings in the District Court, some uncertainty existed concerning the current effect of the parole term on Southall, since he had been returned to custody after committing a new offense. In its brief in this Court, however, the State declares that, as to the sentence at issue here, Southall was "totally discharged from the custody of the Illinois Department of Corrections as of October 24, 1979." Brief for Petitioner 10. Our holding that his case is moot is based on the understanding that the State may not subject Southall to any further detention or restraint as a result of the mandatory parole term at issue in this case.

been released from custody, the court simply entered an order "declaring void the mandatory parole terms." App. 39. The Court of Appeals affirmed that decision, 633 F. 2d 71 (1980), and we granted the State's petition for certiorari. *Sub nom. Franzen* v. *Williams*, 452 U. S. 914.

II

Respondents claim that their constitutional rights were violated when the trial court accepted their guilty pleas without informing them of the mandatory parole requirement. Assuming, for the sake of argument, that the court's failure to advise respondents of this consequence rendered their guilty pleas void,[9] respondents could seek to remedy this error in two quite different ways. They might ask the District Court to set aside their convictions and give them an opportunity to plead anew; in that event, they might either plead not guilty and stand trial or they might try to negotiate a different plea bargain properly armed with the information that any sentence they received would include a special parole term. Alternatively, they could seek relief in the nature of "specific enforcement" of the plea agreement as they understood it; in that event, the elimination of the mandatory parole term from their sentences would remove any possible harmful consequence from the trial court's incomplete advice.

If respondents had sought the opportunity to plead anew, this case would not be moot. Such relief would free respondents from all consequences flowing from their convictions, as well as subject them to reconviction with a possibly greater sentence. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711. Thus, a live controversy would remain to determine whether

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[9] Cf. *Boykin* v. *Alabama*, 395 U. S. 238; *Santobello* v. *New York*, 404 U. S. 257; *Henderson* v. *Morgan*, 426 U. S. 637. We do not decide whether, to establish such a constitutional violation, respondents must claim that they in fact did not know of the parole requirement at the time they pleaded guilty or that they would not have pleaded guilty had they known of this consequence.

a constitutional violation in fact had occurred and whether respondents were entitled to the relief that they sought.[10]

Since respondents had completed their previously imposed sentences, however, they did not seek the opportunity to plead anew.[11] Rather, they sought to remedy the alleged constitutional violation by removing the consequence that gave rise to the constitutional harm. In the course of their attack, that consequence expired of its own accord. Respondents are no longer subject to any direct restraint as a result of the parole term. They may not be imprisoned on the lesser showing needed to establish a parole violation than to prove a criminal offense. Their liberty or freedom of movement is not in any way curtailed by a parole term that has expired.

Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot. "Nullification of a conviction may have important benefits for a defendant . . . but urging in a habeas corpus proceeding the correction of a sentence already served is another matter." *North Carolina* v. *Rice*, 404 U. S. 244, 248.

The Court of Appeals, relying on *Carafas* v. *LaVallee*, 391 U. S. 234, concluded that respondents' parole violations had sufficient "collateral effects" to warrant an exercise of federal

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[10] Since this relief would free respondents from collateral, as well as direct, consequences of a criminal conviction, the case would not be moot even if the previous sentence had been served and the State indicated that it would not seek a retrial. *Carafas* v. *LaVallee*, *supra*.

[11] Williams' general prayer for "[a]ny further relief that [the] Court deems appropriate and just in this [m]atter"—or the fact that the District Court may have inherent power to fashion an appropriate remedy for the violation of a constitutional right—is not equivalent to a specific request by respondents to set aside their convictions. We need not decide here whether respondents would ever be entitled to relief other than the opportunity to plead anew. Unless respondents requested such relief, however, it surely would not be appropriate to enter an order that would subject them to the risk of retrial after their sentences had been served.

habeas corpus relief. In *Carafas* we held that an attack on a criminal conviction was not rendered moot by the fact that the underlying sentence had expired. On the basis of New York law, we noted that "[i]n consequence of [the petitioner's] conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror." *Id.*, at 237 (footnotes omitted). These substantial civil penalties were sufficient to ensure that the litigant had "'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.'" *Ibid.* (quoting *Fiswick* v. *United States*, 329 U. S. 211, 222). In *Sibron* v. *New York*, 392 U. S. 40, 57, we stated that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

The doctrine of *Carafas* and *Sibron* is not applicable in this case. No civil disabilities such as those present in *Carafas* result from a finding that an individual has violated parole.[12] At most, certain nonstatutory consequences may occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected. Cf. *People* v. *Halterman*, 45 Ill. App. 3d 605, 608, 359 N. E. 2d 1223, 1225 (1977).[13] The discretionary decisions that are made by an

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[12] The State of Illinois has chosen to define narrowly the collateral civil penalties that attach even to a conviction of a criminal offense; generally, collateral consequences do not extend beyond the completion of the sentence or the release from imprisonment. See Ill. Rev. Stat., ch. 38, ¶ 1005-5-5 (Supp. 1980).

[13] In his dissenting opinion, JUSTICE MARSHALL argues that this case is not moot because a possibility exists under state law that respondents' parole violations may be considered in a subsequent parole determination. This "collateral consequence" is insufficient to bring this case within the doctrine of *Carafas*. That case concerned existing civil disabilities; as a result of the petitioner's conviction, he was presently barred from holding certain offices, voting in state elections, and serving as a juror. This case

employer or a sentencing judge, however, are not governed by the mere presence or absence of a recorded violation of parole; these decisions may take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation. Any disabilities that flow from whatever respondents did to evoke revocation of parole are not removed—or even affected—by a District Court order that simply recites that their parole terms are "void."[16]

Respondents have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole. Respondent Williams simply sought an order "freeing him from the present control" of the warden and from "all future liability" under his original sentence; Southall sought his "immediate release" from custody. Through the mere passage of time, respondents have obtained all the relief that they sought. In these circumstances, no live controversy remains.

The Court of Appeals also held that this case was not moot because it was "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515.

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involves no such disability. The parole violations that remain a part of respondents' records cannot affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole. Respondents themselves are able—and indeed required by law—to prevent such a possibility from occurring. Moreover, the existence of a prior parole violation does not render an individual ineligible for parole under Illinois law. It is simply one factor, among many, that may be considered by the parole authority in determining whether there is a substantial risk that the parole candidate will not conform to reasonable conditions of parole.

Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid.

[16] The District Court's order did not require the Warden to expunge or make any change in any portion of respondents' records. Nor have respondents ever requested such relief.

That doctrine, however, is applicable only when there is "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149; *Murphy* v. *Hunt*, *ante*, at 482. Respondents are now acutely aware of the fact that a criminal sentence in Illinois will include a special parole term; any future guilty plea will not be open to the same constitutional attack. The possibility that other persons may litigate a similar claim does not save this case from mootness.

The judgment of the Court of Appeals is vacated. The case should be dismissed as moot.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The majority announces today that this case is moot because, in its view, no collateral consequences flow from respondents' parole revocations, which were based on findings that respondents had violated the conditions of parole terms declared void by the courts below. I dissent from this holding because I believe it is contrary to this Court's precedents and because it ignores the fact that the State of Illinois does attach collateral consequences to parole revocations, a fact recognized both in the State's brief to the Court of Appeals on the issue of mootness and in state-court decisions in analogous cases.

I

The majority recognizes that in habeas corpus challenges to criminal convictions, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron* v. *New York*, 392 U. S. 40, 57 (1968). This Court has consistently refused to canvass state law to ascertain "the actual existence of specific collateral consequences," and has presumed that such consequences exist. *Id.*, at 55

(discussing *United States* v. *Morgan*, 346 U. S. 502 (1954), and *Pollard* v. *United States*, 352 U. S. 354 (1957)). See also *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238 (1968).

Today, the majority finds the *Carafas* doctrine inapplicable, arguing that because respondents did not seek to set aside their convictions, their situation is analogous to that of a defendant who seeks habeas corpus review to correct a sentence already served. See *North Carolina* v. *Rice*, 404 U. S. 244 (1971) (*per curiam*). Had respondents served the allegedly void mandatory parole term without incident, I might agree that *North Carolina* v. *Rice* controls and join the majority's conclusion that the consequence of the constitutional violation "expired of its own accord." *Ante*, at 631. Here, however, respondents were found to have violated the conditions of their parole. Therefore, unlike the situation in *North Carolina* v. *Rice*, respondents seek more than a mere reduction in sentence after the sentence has been completed: they seek to have the parole term declared void, or expunged, in order to avoid the future consequences that attach to parole violations. If collateral consequences do attach to parole violations, both the State and respondents have a live interest in this Court's review of the lower courts' holdings that the alleged constitutional violations rendered the guilty pleas void and that respondents were entitled to specific performance of the pleas, in the form of a declaration that the mandatory parole terms were void and should be expunged.

The existence of a live controversy in this case turns on whether collateral consequences attach to parole violations. Because this determination involves a difficult question of state law, I believe that the doctrine of *Sibron* and *Carafas* should be applied. This doctrine avoids placing a federal court in the awkward position of determining questions of state law not directly before it. By presuming the existence of collateral consequences, federal courts are not required to predict the manner in which a State may use convictions or

parole violations in future proceedings. An erroneous determination that collateral consequences do not attach not only injures the individuals challenging the constitutionality of the guilty pleas, but also hinders the State's ability to use these violations in future proceedings. Today's opinion is an unfortunate example of such an erroneous interpretation.

II

The majority's decision is apparently based on a cursory examination of Illinois statutes. Finding no statutory civil disabilities, the majority glibly dismisses nonstatutory consequences as "discretionary decisions" that would remain whether or not the parole terms were declared void or expunged. *Ante*, at 632–633.[1] This reasoning has no basis in

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[1] The majority makes a cryptic reference to the fact that respondents did not request the District Court to expunge or make any change in their records. *Ante*, at 633, n. 14. The failure to make this request is easily explained on several grounds and is irrelevant to the question whether this case is moot. The respondents did request that the District Court "expunge" the parole terms on which the violations were based. This "expungement" would have the effect of removing respondents' parole-violation status and would relieve respondents of the collateral consequences flowing from this status. Any further "expungement" that respondents might obtain should be requested in future state proceedings. The State of Illinois has a very limited expungement procedure that would not cover the expungement to which the majority apparently refers. See Ill. Rev. Stat., ch. 38, ¶ 206–5 (Supp. 1980) (person, not convicted of any previous criminal offense, who is acquitted or released without conviction may petition the court for expungement of arrest records).

Furthermore, the State of Illinois has no procedure to expunge convictions that are later reversed or vacated on appeal, but this fact, or the failure of a habeas petitioner to request that a federal district court accord him relief that is unavailable under state law, would hardly render moot a habeas petition to set aside a conviction unconstitutionally obtained. The Illinois courts may not consider a reversed conviction in aggravation of sentence, despite the fact that the records of this conviction have not been officially "expunged." See, *e. g.*, *People* v. *Wunnenberg*, 87 Ill. App. 3d 32, 409 N. E. 2d 101 (1980); *People* v. *Chellew*, 20 Ill. App. 3d 963, 313 N. E. 2d 284 (1974).

Illinois law and appears to derive from nothing more than judicial intuition.

Several collateral consequences attach to parole violations under Illinois law.[2] First, a sentencing judge may consider parole violations in aggravation of sentence. The majority makes the unwarranted assumption that declaring void the parole term upon which a violation is based has no effect because a sentencing judge would consider the conduct underlying the violation, and not the violation itself, in deciding whether to enhance a sentence. However, as the majority recognizes, there is no way for this Court to determine the basis for respondents' parole revocation. Under Illinois law, the Prisoner Review Board is given substantial discretion in setting conditions of parole. See Ill. Rev. Stat., ch. 38, ¶1003–3–7 (Supp. 1980).[3] Conditions of parole may prohibit

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[2] Of course, the existence of express statutory civil disabilities is not a prerequisite to holding that a habeas challenge to a criminal conviction is not moot. See, *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 54–57 (1968) (discussing *Fiswick* v. *United States*, 392 U. S. 211 (1946)); *United States* v. *Morgan*, 346 U. S. 502 (1954); *Pollard* v. *United States*, 352 U. S. 354 (1957)).

[3] Paragraph 1003–3–7 provides:

"(a) The conditions of parole or mandatory supervised release shall be such as the Prisoner Review Board deems necessary to assist the subject in leading a law-abiding life. The conditions of every parole and mandatory supervised release are that the subject:

"(1) not violate any criminal statute . . . ; and

"(2) refrain from possessing a firearm or other dangerous weapon.

"(b) The Board may *in addition to other conditions* require that the subject:

"(1) work or pursue a course of study or vocational training;

"(2) undergo medical or psychiatric treatment, or treatment for drug addiction or alcoholism;

"(3) attend or reside in a facility established for the instruction or residence of persons on probation or parole;

"(4) support his dependents;

"(5) report to an agent of the Department of Corrections;

"(6) permit the agent to visit him at his home or elsewhere to the extent necessary to discharge his duties; . . ." (emphasis added).

[*Footnote 3 is continued on page 638*]

conduct that is otherwise innocent and may affirmatively require the parolee to engage in specified work or rehabilitation programs. Parole may be revoked upon a finding that the parolee has violated *any* of these parole conditions. See Ill. Rev. Stat., ch. 38, ¶ 1003–3–9 (Supp. 1980); Illinois Prisoner Review Board, Rules Governing Parole 9–10, 13–16 (1979), 3 Ill. Register 144, 162–166 (1979). Therefore, conduct giving rise to a parole violation may be completely innocuous but for the fact that it was prohibited or required as a condition of parole, and it may be entirely irrelevant to a sentencing decision once the parole term is declared void.

Moreover, it is not clear under Illinois law whether a sentencing judge would consider the conduct underlying a parole violation, even if the conduct is not otherwise innocent, where the parole term itself is declared void. In a similar context, the Illinois appellate courts have held that trial courts may not consider a reversed conviction in aggravation of sentence, even where the court, in remanding for a new trial, noted that the evidence was sufficient to support the verdict beyond a reasonable doubt and the matter was never retried. See, *e. g.*, *People* v. *Chellew*, 20 Ill. App. 3d 963, 313 N. E. 2d 284 (1974). Cf. *People* v. *Wunnenberg*, 87 Ill. App. 3d 32, 34, 409 N. E. 2d 101, 103 (1980). The Illinois courts have also held that review of probation revocation is not rendered moot merely because the defendant has served his entire sentence. See *People* v. *Halterman*, 45 Ill. App. 3d 605, 608, 359 N. E. 2d 1223, 1225 (1977) (challenge to probation revocation not moot because "the fact that the defendant has had his probation revoked might be submitted to another judge for his consideration in sentencing the defendant if he has the misfortune of again being convicted of some crime"). These cases do not conclusively demonstrate that a judge would not consider the conduct underlying the violation

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See also Illinois Prisoner Review Board, Rules Governing Parole 9–12 (1979), 3 Ill. Register 158–160 (1979).

of a void parole term in aggravation of sentence. However, they cast serious doubt on the validity of the majority's assumption to the contrary. Furthermore, the State argued to the Court of Appeals that the case was not moot because the State "is deeply interested in whether or not it can use the parole violation status of [respondents] for sentencing purposes should they ever again come into contact with the criminal justice system." Additional Memorandum for Appellants in Nos. 78–1321, 78–1322, 78–1323, 78–1380 (CA7), p. 5 (Mem. to Court of Appeals). This argument at least implies that the State would not use this status for sentencing purposes after a court had declared the parole terms void.

Second, the majority completely overlooks an important collateral consequence that attaches to parole violations should the respondents ever have the misfortune of returning to prison. In rules promulgated by the Prisoner Review Board pursuant to Ill. Rev. Stat., ch. 38, ¶¶ 1003–3–1, 1003–3–2 (Supp. 1980), the State of Illinois has set forth fairly specific criteria upon which parole may be denied. See Illinois Prisoner Review Board, Rules Governing Parole (1979), 3 Ill. Register 144–169 (1979). The Rules provide in relevant part:

> "V. BASIS FOR DENYING PAROLE
>
> In accordance with statute, the Board shall not parole a candidate if it determines that:
>
> "A. There is a substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:
>
> "1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).
>
> "2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
>
> "*3. Prior adult parole or probation violations within five years prior to the present offense.*
>
> "4. Refusal to be supervised on parole.

"5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)

"6. A psychiatric examination determines the candidate is not likely to conform." Illinois Prisoner Review Board, Rules Governing Parole 6 (1979), 3 Ill. Register 153 (1979) (emphasis added).

Under these rules, parole may be denied simply on the basis of a prior parole violation; the conduct underlying the parole violation is apparently irrelevant unless it falls within one of the other criteria listed in that section. We have no reason to assume that the conduct underlying respondents' violations would fall within one of the other factors, or that the Prisoner Review Board would deny parole based on a parole violation notwithstanding the fact that the parole term had been declared void. In fact, the State argued to the Court of Appeals that the case was not moot because respondents "still have a substantial stake in ensuring that their parole terms are, indeed, expunged," because the parole violations would be burdensome if respondents were ever again considered for parole. Mem. to Court of Appeals 5. See also *United States ex rel. Howell* v. *Wolff*, No. 78 C 951 (ND Ill. Aug. 9, 1978) (unpublished opinion of Judge Leighton, reprinted in App. to Mem. to Court of Appeals) (finding case not moot due to potential burden on future parole decision from parole-violation status).

III

Today's decision, in which the majority undertakes a cursory and misleading examination of state law, starkly demonstrates the wisdom of applying the doctrine of *Carafas* and *Sibron* to the determination whether a State attaches collateral consequences to parole violations. I would apply that doctrine, presume the existence of collateral consequences, and reach the merits of this case. Even if the doctrine of

Carafas and *Sibron* does not apply, an examination of state law reveals that the majority is wrong in concluding that actual collateral consequences do not attach under state law; there are sufficient collateral consequences flowing from parole-violation status that both the State and the respondents have a live interest in this Court's resolution of the constitutional question. Therefore, I dissent from the majority's conclusion that this case is moot.

McELROY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-6680. Argued January 12, 1982—Decided March 23, 1982

Petitioner was convicted in Federal District Court of two counts of violating 18 U. S. C. § 2314, which prohibits the transportation "in interstate or foreign commerce [of] any . . . forged . . . securities . . . , knowing the same to have been . . . forged." The proof at trial showed that blank checks had been stolen in Ohio and that several months later petitioner used two of the checks, on which signatures had been forged, to pay for a car and for a boat and trailer purchased in separate transactions in Pennsylvania. The trial court instructed the jury that in order to find petitioner guilty, it must find that he transported the checks in a forged condition in "interstate commerce," and that such transportation could take place entirely within Pennsylvania if it was a "continuation of the movement that began out of state." The court rejected petitioner's objection to the instruction on the asserted ground that under § 2314 the Government had the burden of proving that the checks had been forged in Ohio before being transported across state lines to Pennsylvania. The Court of Appeals affirmed petitioner's convictions.

Held: Section 2314 does not require proof that the securities were forged before being taken across state lines, and thus the trial court's jury instructions were correct. Pp. 647–659.

(a) Use of the past tense "forged" in § 2314 does not establish Congress' intent to prohibit only the transportation of securities that were forged before crossing state lines. Congress' use of the phrase "interstate commerce" rather than "state borders," as well as the legislative history of the phrase, shows that Congress intended it to be as broad in scope as this Court's decisions holding that interstate commerce begins well before state lines are crossed and ends only when movement of the item in question has ceased in the destination State. Moreover, § 2314's purpose of aiding the States in detection and punishment of criminals who evade state authorities by using channels of interstate commerce supports the conclusion that Congress could not have intended to require federal prosecutors to prove that the securities had been forged before crossing state lines. Pp. 648–656.

(b) The language of § 2314 does not raise significant questions of ambiguity sufficient to warrant application of the principle of lenity and con-

struction in petitioner's favor. *United States* v. *Bass*, 404 U. S. 336, distinguished. Pp. 657–658.

644 F. 2d 274, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 659.

Thomas S. White argued the cause for petitioner. With him on the brief was *George E. Schumacher*.

Carter G. Phillips argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Joel M. Gershowitz*.

JUSTICE O'CONNOR delivered the opinion of the Court.

The petitioner was convicted of two counts of transporting a forged security in interstate commerce in violation of 18 U. S. C. § 2314. He challenges his conviction on the ground that the statute requires proof, concededly lacking at trial, that the securities had been forged before being taken across state lines. Because of a conflict among the Circuits on this issue of statutory construction, we granted certiorari. 454 U. S. 815 (1981). For the reasons stated below, we affirm the petitioner's conviction.

I

Petitioner Charles McElroy was indicted by a federal grand jury on three counts. Counts 1 and 3 charged that on two occasions the petitioner transported in interstate commerce falsely made and forged securities from Ohio to Pennsylvania in violation of 18 U. S. C. § 2314, the National Stolen Property Act.[1] Count 2 charged McElroy with trans-

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[1] Title 18 U. S. C. § 2314 provides in pertinent part:

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited se-

porting a stolen car in interstate commerce from Pennsylvania to Ohio in violation of 18 U. S. C. § 2312.[2]

According to the proof at trial, several blank checks[3] were stolen from Local 125 of the Laborers' International Union in Youngstown, Ohio, in late March or early April 1977. After the Union discovered the theft, it closed the account on which the checks were drawn. Seventeen months later, in October 1978, the petitioner ordered a used Corvette from the Don Allen Chevrolet Agency in Pittsburgh, Pa., for $6,706. Using the name "William Jones," the petitioner told the salesman that he lived in Warrenville Heights, Ohio, but worked in the Pittsburgh area. The petitioner returned the next day and paid for the car with one of the stolen Union checks, on which a signature had been forged. After learning the following day from the drawee bank in Ohio that the account had been closed, the dealership made no effort to negotiate the check. This transaction formed the basis for count 1 (transportation of a forged check in interstate commerce) and count 2 (transportation of a stolen vehicle, the Corvette, in interstate commerce) of the indictment.

In December 1978, the petitioner sought to purchase a boat and trailer from the Rini Marine Sales Co. in Beaver Falls, Pa. Adhering to his previously successful scheme, he used the fictitious name "William Jones" and gave an Ohio address for his residence. One week after his initial inquiry he paid for a boat and trailer with one of the stolen Union checks, on

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curities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;

. . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[2] Title 18 U. S. C. § 2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

[3] Title 18 U. S. C. § 2311 states that, as used in §§ 2311–2318, the term "[s]ecurities includes any . . . check."

which a signature had been forged. Too late, Philip Rini, the owner of Rini Marine Sales, became suspicious and telephoned the Youngstown, Ohio, bank only to learn that the check had been stolen and the signature forged. He, too, abandoned hope of negotiating the check, and turned to the Federal Bureau of Investigation for help. Count 3 arose from this transaction.

At the conclusion of the Government's case, the petitioner moved for a judgment of acquittal on all three counts on the ground that the Government had not submitted sufficient evidence for the case to go to the jury. The petitioner contended that he was entitled to an acquittal on count 2 because the Government failed to submit any evidence showing that the petitioner had transported the Corvette from Pennsylvania to Ohio, and on counts 1 and 3 because the Government had not adduced any evidence showing that the petitioner had caused the stolen checks to be brought through interstate commerce into Pennsylvania. The trial court denied these motions.[4]

After the petitioner rested,[5] the trial court instructed the jury that in order to find the petitioner guilty on counts 1 and 3, it must find that he transported the check in a forged condition in "interstate commerce," and that such transportation could take place entirely within the State of Pennsylvania if it was a "continuation of the movement that began out of state." Tr. 164A.[6] The petitioner unsuccessfully objected

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[4]Tr. 68A–78A.

[5]The petitioner introduced no evidence.

[6]The entire instruction on this issue was as follows:

"Well, [interstate commerce] means any movement or transportation of these forged checks from one state into another, and it includes all continuing movements of said forged check while in the second state, in this case Pennsylvania, until the movement of said forged check has ceased.

"Now, the Government must show that the checks were transported in interstate commerce in a forged condition. However, the transportation within the destination state here, Pennsylvania, may be considered trans-

to this instruction, contending that under § 2314 the Government had the burden of proving that the check was forged in Ohio before it was transported across the state line to Pennsylvania. Tr. 92A. The petitioner was convicted on all three counts, and sentenced to serve seven years on each of counts 1 and 3 and five years on count 2, the sentences on all three counts to run concurrently.

The Court of Appeals, sitting en banc, vacated the judgment on count 2, holding that the Government had presented insufficient evidence to sustain a conviction.[7] 644 F. 2d 274 (CA3 1981) (en banc). The court affirmed the judgment on counts 1 and 3, however, holding that the Government had

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portation in interstate commerce if it is a continuation of the movement that began out of state.

"The Government need not exclude every speculative possibility that the transportation may have been interrupted at some point, nor need the Government show each step in the security's movement in interstate commerce.

"Now, if you believe that the Government has shown that the Defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part of interstate commerce. In other words, the check had to originate at sometime in Ohio and had to have been transported at sometime in Pennsylvania in order to effect interstate commerce. So the Government must prove this Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which the checks started or from where the Defendant started." *Id.*, at 164A–165A.

After some discussion at the bench with the lawyers, the judge further instructed the jury:

"As to Counts 1 and 3, the Government must prove with evidence that convinces you beyond a reasonable doubt that the Defendant caused the transportation of the two checks in question, that is, in Counts 1 and 3, the check to Rini, the check to Don Allen Chevrolet, in interstate commerce, from Ohio to Pennsylvania." *Id.*, at 181A.

[7] The judgment of the Court of Appeals vacating the conviction on count 2 is not before this Court.

presented sufficient evidence to sustain the convictions, and that the trial judge correctly had instructed the jury that the Government need not prove that the stolen checks had been forged before crossing state lines. "It is immaterial whether the signatures were forged in Ohio or in Pennsylvania. If at any point in the interstate movement the check was in a forged condition, the statute was satisfied." *Id.*, at 279. All but one judge agreed with the majority's construction of the phrase "interstate commerce" as used in § 2314.[8]

II

The question presented by this case is one of statutory construction.[9] The petitioner claims that the language and legislative history of § 2314 demonstrate congressional intent to limit the reach of that provision to those persons who transport forged securities across state lines. As a fallback position, the petitioner contends that § 2314's use of the expression "interstate commerce" is sufficiently ambiguous to

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[8] Judge Adams, joined by Chief Judge Seitz, concurred in the majority opinion on counts 1 and 3, but dissented from the court's holding that the conviction on count 2 should be vacated. Although he agreed that the trial judge correctly had instructed the jury on counts 1 and 3, Judge Garth dissented from the affirmance on those counts, arguing that the Government had presented insufficient evidence to sustain the convictions. Judge Higginbotham concurred with the majority opinion on count 2, but dissented from its holdings on counts 1 and 3. He reasoned that § 2314 was ambiguous, and that consequently the principle of lenity required the court to construe the statute strictly against the Government and hold that the statute was violated only if the security had been forged before crossing state lines.

[9] The petitioner concedes that Congress has authority under the Commerce Clause, Art. I, § 8, cl. 3 (which provides in part that "Congress shall have Power . . . To regulate Commerce . . . among the several States"), to enact a criminal statute prohibiting the transportation in interstate commerce of a security that was not forged until after crossing state lines. Consequently, the issue in the present case is the meaning that Congress ascribed to the phrase "interstate commerce" in § 2314.

require this Court to apply the principle of lenity and construe the provision in the petitioner's favor.[10]

A

Petitioner bases his initial argument on Congress' use of the past tense "forged" in § 2314, from which he urges us to infer that Congress intended to prohibit only the transportation of securities that were forged before entering the stream of interstate commerce, that is, before crossing state lines. Fundamental to the petitioner's argument is the unarticulated assumption that "interstate commerce," as used in the section, does not continue after the security has crossed the state border. However, if subsequent movement of the check in the destination State constitutes interstate commerce, then a forgery of the check in the course of that movement involves transportation of a forged security in interstate commerce in violation of § 2314. Thus, the validity of the petitioner's argument turns on whether the statutory phrase "interstate commerce" comprehends movement of a forged security within the destination State.

The paragraph of § 2314 under which the petitioner was convicted prohibits the "transport[ation] in interstate or foreign commerce [of] any . . . forged . . . securities . . . , knowing the same to have been . . . forged." Title 18 U.S.C. § 10 provides that the "term 'interstate commerce,' as used in this title, includes commerce between one State . . . and another State." On their face, these two provisions are not limited to unlawful activities that occur while crossing state borders, but seemingly have a broader reach. In particular, the lan-

[10] Although the petitioner challenged the sufficiency of the evidence on counts 1 and 3 in his petition for writ of certiorari, this Court limited the grant of certiorari to the statutory construction issue. Thus, we accept the Court of Appeals' conclusion that the evidence was sufficient to sustain the jury's finding that "on each occasion [the petitioner] made a trip from Ohio to Pennsylvania, carrying with him a check that was forged either in Ohio or Pennsylvania." 644 F. 2d 274, 279 (CA3 1981).

guage of § 10 suggests that crossing state lines is not the sole manifestation of "interstate commerce."[11]

The origin of the "interstate commerce" element of § 2314 was the National Motor Vehicle Theft Act (Dyer Act), 41 Stat. 324,[12] which was enacted in 1919 to provide "severe pun-

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[11] The predecessor of 18 U. S. C. § 10 was § 2(b) of the Dyer Act, which stated that the term "interstate commerce" "shall include transportation from one State . . . to another State." 41 Stat. 325.

[12] The Act provided in part:

"SEC. 2. That when used in this Act:

. . . . .

"(b) The term 'interstate or foreign commerce' as used in this Act shall include transportation from one State . . . to another State . . . .

"SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."

The Act was expanded in 1934 to cover other types of stolen property, see National Stolen Property Act, 48 Stat. 794, and in 1939 to cover forged securities. See Act of Aug. 3, 1939, 53 Stat. 1178. Sections 3 and 4 were later codified as 18 U. S. C. §§ 2312 and 2313 respectively. None of the legislative Reports or debates concerning these amendments, however, contains any explanation of the "interstate commerce" requirement. See H. R. Rep. No. 1462, 73d Cong., 2d Sess., 2 (1934) (stating that the new Act was "designed to punish interstate transportation of stolen property, securities, or money," and that it was "drafted to follow the language of the Dyer Act, the constitutionality of which has frequently been upheld in the Federal courts"); S. Rep. No. 538, 73d Cong., 2d Sess., 1 (1934) (approving a Justice Department memorandum stating that the purpose of the Act is "to provide a penalty for knowingly transporting stolen property in interstate or foreign commerce"); H. R. Rep. No. 422, 76th Cong., 1st Sess., 1 (1939) (stating that the bill "widens the scope of the National Stolen Property Act of 1934 . . . by making its provisions applicable to embezzled property, securities and money"); S. Rep. No. 674, 76th Cong., 1st Sess., 2 (1939) (approving a letter from the Attorney General stating in part that

ishment of those guilty of the stealing of automobiles in interstate or foreign commerce." H. R. Rep. No. 312, 66th Cong., 1st Sess., 1 (1919). See S. Rep. No. 202, 66th Cong., 1st Sess., 1 (1919) (describing the bill as designed to "punish the transportation of stolen motor vehicles in interstate or foreign commerce"). Representative Dyer, the sponsor of the bill that was enacted, defended Congress' authority to enact the proposed law, noting that the courts had upheld a variety of regulatory statutes enacted under the Commerce Clause, including a criminal statute declaring unlawful the "[l]arceny of goods from railroad cars being transported in interstate commerce." 58 Cong. Rec. 5472 (1919).[13] In response to a question from Representative Anderson concerning possible differences in the meaning of "interstate commerce" in §§ 2 and 4 of the Act, Representative Dyer replied:

> "[I]f there is any difference there, which I do not see, the matter would be construed by the Supreme Court, which has passed many times upon what is meant by interstate and foreign commerce." *Ibid.*[14]

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the "principal purposes of the pending bill are to extend the existing law to property that has been embezzled, and also to forged or counterfeited securities").

[13] Obviously, Representative Dyer believed that a federal crime would be committed even though the larceny did not occur at the exact moment that the railroad car crossed a state line. It is fair to conclude from this example that he understood "interstate commerce," as used in the Dyer Act, to have a broader meaning than transportation across state lines.

[14] The entire colloquy between Representatives Dyer and Anderson is as follows:

"Mr. ANDERSON. I will ask the gentleman whether the committee meant the same thing in its definition of interstate commerce in section 2 as it meant in section 4?

"Mr. DYER. I think so. If the gentleman will point out wherein it differs, I shall be glad.

"Mr. ANDERSON. In the definition under section 2 interstate commerce means transportation from one State to another, while if you refer to

Plainly, Representative Dyer, the chief sponsor of the bill, believed that the statutory meaning of "interstate commerce" could be found in previous Supreme Court decisions using the

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section 4 you find there you have a vehicle or motor car constituting interstate or foreign commerce, and you scarcely have a sensible section.

"Mr. DYER. I will say to the gentleman that if there is any difference there, which I do not see, the matter would be construed by the Supreme Court, which has passed many times upon what is meant by interstate and foreign commerce. I think it really is not necessary to put the definition in this bill. It was done at the request of some of the members of the committee. The Supreme Court has decided many times what is interstate commerce. I do not think myself that any definition is necessary." 58 Cong. Rec. 5472 (1919).

Of course, the definition to which Representative Dyer refers stated that interstate commerce "shall *include* transportation from one State . . . to another State." 41 Stat. 325 (emphasis added). The dissenting opinion entirely ignores Congress' use of the word "include" in the 1919 Act, choosing instead to read the definition as if Congress' only "objective . . . was to proscribe the transportation of a stolen automobile from one State to another." *Post*, at 666.

In the 1934 National Stolen Property Act, 48 Stat. 794, Congress expanded the coverage of the Dyer Act, and in § 2(a) provided that "[t]he term 'interstate . . . commerce' shall mean transportation from one State . . . to any State." The House Report makes clear that the "bill is drafted to follow the language of the Dyer Act, the constitutionality of which has frequently been upheld in the Federal courts." H. R. Rep. No. 1462, 73d Cong., 2d Sess., 2 (1934). Although a "change of [statutory] language is some evidence of a change of purpose," *Johnson* v. *United States*, 225 U. S. 405, 415 (1912), the inference of a change of intent is only "a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence." *United States* v. *Dickerson*, 310 U. S. 554, 561 (1940). Because the legislative history contains no indication that the variation in the language had changed the meaning of "interstate commerce," and more importantly, because the House Report states that the language of the 1934 Act was drafted to follow the language of the Dyer Act, we conclude that Congress intended nothing by the change in language. Moreover, in 1948, Congress made an additional modification in the definition of "interstate commerce," this time resubstituting the word "include" and substituting the word "commerce" for the word "transportation" to "avoid the narrower connotation" of the latter word. H. R. Rep. No. 304, 80th Cong., 1st Sess., A7 (1947). If any inference can be drawn

phrase to define the scope of congressional authority under the Commerce Clause. See also H. R. Rep. No. 312, 66th Cong., 1st Sess., 3–4 (1919) (justifying Congress' authority to enact the Dyer Act by reference to this Court's decisions holding that Congress has plenary power under the Commerce Clause to regulate interstate commerce).

Although the House Report accompanying the bill, as well as several Members of Congress during the debates, stated that the Act would prevent the transportation of stolen automobiles across state lines,[15] Congress' use of the more general

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from these changes, both in 1934 and in 1948, it is only that Congress intended no substantive change in the meaning of "interstate commerce."

[15] See H. R. Rep. No. 312, 66th Cong., 1st Sess., 1 (1919) (noting that "[t]hieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines"); *id.*, at 3 ("The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not be questioned"); *id.*, at 4 ("No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another"); 58 Cong. Rec. 5470 (1919) (remarks of Rep. Dyer) (stating that "this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State"); *id.*, at 5472 (remarks of Rep. Dyer) ("Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another"); *id.*, at 5473 (remarks of Rep. Reavis) (stating that he would support a broader bill that would make it a "felony to transport stolen property of any kind from one State to another"); *ibid.* (remarks of Rep. Igoe) ("The offense sought to be reached in the act is the transportation, the taking it across the line, taking it from one State to another"); *id.*, at 6433 (remarks of Sen. Cummins) (stating that the "bill is for the purpose of giving the Federal courts jurisdiction for the punishment of" thieves who carry stolen automobiles across state lines).

None of these statements, however, purports to limit the statutory definition of interstate commerce to the act of crossing state lines. Nor is there any basis to believe that Congress used the phrase "interstate commerce" in the statute interchangeably with " 'interstate transportation' . . . or some such phrase focusing on state lines." STEVENS, J., dissenting.

phrase "interstate commerce" and its reliance on this Court's constitutional decisions defining the scope of "interstate commerce" indicate that Congress intended the statutory phrase to be as broad as this Court had used that phrase in Commerce Clause decisions before 1919.[16] In those decisions, this Court had made clear that interstate commerce begins well before state lines are crossed, and ends only when movement of the item in question has ceased in the destination State.[17] We conclude, therefore, that in § 2314 Congress in-

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post, at 663–664. While Congress may have been concerned principally with thieves who cross state borders with stolen cars, it did not so limit the language of the statute. Instead, Congress drafted a more comprehensive statute that would reach criminals who use interstate channels to avoid detection and punishment.

The dissenting opinion's alternative explanation—that Congress used the expression interstate commerce "merely to indicate the source of its authority," *post*, at 665—is also unpersuasive. Although supporters of the bill were careful to justify its constitutionality, nothing in the statutory language or the legislative history indicates that Congress used the constitutionally significant term "interstate commerce" in the bill merely to point to its authority to enact such legislation. Rather, the most rational inference is that Congress used the term to specify the types of activities proscribed by the Act—thefts involving interstate commerce as that term had been interpreted by this Court.

[16] Some Circuits have even indicated that the statutory phrase "interstate commerce" is coextensive with congressional authority under the Commerce Clause. See *United States* v. *Roselli*, 432 F. 2d 879, 891 (CA9 1970) ("The sole reason for conditioning [§ 2314's] prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power"), cert. denied, 401 U. S. 924 (1971); *United States* v. *Ludwig*, 523 F. 2d 705, 707 (CA8 1975) (same), cert. denied, 423 U. S. 1076 (1976).

[17] See *Champion* v. *Ames*, 188 U. S. 321, 358 (1903) (illustrating that a regulatory statute enacted under the Commerce Clause can take the form of a prohibition, the Court stated that "it cannot be doubted that Congress, under its power to regulate commerce, may . . . provide for [cattle to be] inspected before transportation begins"); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 527 (1911) (goods are in "interstate . . . commerce when they have 'actually started in the course of transportation to another

tended to proscribe the transportation of a forged security at any and all times during the course of its movement in interstate commerce, and that the stream of interstate commerce may continue after a state border has been crossed. Consequently, the trial judge in this case correctly instructed the jury that McElroy's transportation of the forged check within Pennsylvania would violate § 2314 if the jury found that movement to be a "continuation of the movement that began out of state." Tr. 164A.[18]

Moreover, the purpose underlying § 2314 leads us to conclude that Congress did not intend to require federal prosecutors to prove that the securities had been forged before crossing state lines. In *United States* v. *Sheridan*, 329 U. S. 379, 384 (1946), this Court observed that in § 2314 Congress "contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent" (footnote omitted).

State, or [are] delivered to a carrier for transportation'") (quoting *Coe* v. *Errol*, 116 U. S. 517, 525 (1886)); *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 122–123 (1913); *Illinois Central R. Co.* v. *Fuentes*, 236 U. S. 157, 163 (1915) ("generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end").

The House Report on the Dyer Act cited *Champion* v. *Ames*, *supra*, to justify Congress' constitutional authority to enact the Dyer Act. H. R. Rep. No. 312, 66th Cong., 1st Sess., 4 (1919).

[18] Even though Congress did not address the meaning of "interstate commerce" in the 1934 and 1939 extensions of the Dyer Act, there is no reason to believe that Congress abandoned its original meaning. In fact, because the Supreme Court between 1919 and 1939 continued to define interstate commerce more broadly than merely as commerce crossing state lines, see, *e. g.*, *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366 (1922); *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95 (1929), there is ample reason to believe that Congress intended § 2314 to have the same reach as its predecessor section in the Dyer Act.

Given this broad purpose, we find it difficult to believe, absent some indication in the statute itself or the legislative history, that Congress would have undercut sharply that purpose by hobbling federal prosecutors in their effort to combat crime in interstate commerce. Under the petitioner's proposed construction, a patient forger easily could evade the reach of federal law, yet operate in the channels of interstate commerce.[19] As the Government points out in its brief,

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[19] The facts of the present case illustrate this point. The petitioner, who lived in Ohio at the time he forged the Union checks, see Tr. 16A, brought the stolen checks from Ohio into Pennsylvania. He forged them at an unknown time and place to purchase a boat and a car. Requiring prosecutors to prove on which side of the border the petitioner forged the checks, when in fact the petitioner had transported the forged checks in continuation of a longer interstate journey, serves no purpose. In addition, as the supporters of the Dyer Act recognized, federal authority may be necessary to investigate fully the crime and to compel witnesses from other States to testify. See 58 Cong. Rec. 5475 (1919) (remarks of Rep. Newton) ("all the witnesses from anywhere in the United States can be compelled to appear and testify [before the grand jury], and a full and complete investigation can be had in every case, and when a case is called for trial, the barrier of the State line having been swept away, the witnesses will be compelled to appear and testify in open court"). Absent federal jurisdiction, it may have been impossible, or at the least extraordinarily difficult, to compel Union and bank officials from Ohio to testify in a Pennsylvania state court that the checks had been stolen, when they had been stolen, when the bank account had been closed, that the signature on the checks had been forged, and that the petitioner had no authority to write those checks.

There is no foundation for the fear expressed in the dissenting opinion that our decision today is a broad expansion of federal jurisdiction in criminal law. *Post*, at 660. The implications of this case are limited by the facts and its holding that the forged check was transported in interstate commerce only because that transportation was a continuation of a longer journey that began out of state. If the entire transaction—obtaining and forging the checks, purchasing the car and boat, and returning the checks to the bank for collection—had occurred solely within Ohio, it seems clear that the checks would not have been "transport[ed] in interstate commerce." In light of today's limited holding, the dissent's suggestion that we are overburdening limited federal prosecutorial resources, *post*, at 674, is misplaced.

moreover, the petitioner's construction produces the anomalous result that no federal crime would have been committed in this case until the *victims* returned the forged checks to the out-of-state drawee bank for payment. Brief for United States 18, n. 11.[20] While Congress could have written the statute to produce this result, there is no basis for us to adopt such a limited reading.[21]

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[20] See also *Pereira* v. *United States*, 347 U. S. 1, 9 (1954) (holding that since the fraudulently obtained checks had to be sent to an out-of-state bank for collection, the petitioner was guilty of violating § 2314 because he "'caused' [the check] to be transported in interstate commerce").

[21] The cases cited by the petitioner in support of his position do not dissuade us from our conclusion, for none of the cases based its holding on an analysis of the language, legislative history, or purpose of § 2314. In *United States* v. *Owens*, 460 F. 2d 467, 469 (CA5 1972), for example, the court simply quoted the pertinent language of § 2314 and held, without analysis or citation to authority, that it "is obvious that to prove the commission of an offense under this portion of section 2314 the Government must show that the instrument traveled interstate in its forged or altered condition." See *United States* v. *Hilyer*, 543 F. 2d 41, 43 (CA8 1976) (citing only *Owens* for the proposition that § 2314 requires proof that the security was forged before crossing state lines); *United States* v. *Sparrow*, 635 F. 2d 794, 796 (CA10 1980) (en banc) (citing only *Owens* and *Hilyer* for its holding that "the plain meaning of [§ 2314] requires the prosecution to show that the security was in a forged or altered condition at the time of its interstate passage"), cert. denied, 450 U. S. 1004 (1981).

We note that our holding today is consistent with other cases construing similar federal statutes designed to combat theft in the channels of interstate commerce. In *United States* v. *Ajlouny*, 629 F. 2d 830 (CA2 1980), cert. denied, 449 U. S. 1111 (1981), the court reviewed a challenge to a conviction under the "foreign commerce" aspect of the first paragraph of § 2314 (transportation of stolen goods in interstate or foreign commerce). In that case, the defendant had been arrested shortly before he shipped stolen telephone equipment from New York to Doha, Qatar. The court rejected the defendant's claim that no federal offense had occurred because no international boundary had been crossed, holding that "Congress was not aiming only at stolen goods moving across a technical boundary line, but also wanted to reach shipments in the course of such a crossing." 629 F. 2d, at 837.

In *Barfield* v. *United States*, 229 F. 2d 936 (CA5 1956), the defendant challenged his conviction under 18 U. S. C. § 2312, which prohibits the in-

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The petitioner argues alternatively that even if a reading of § 2314 does not clearly support his interpretation, the provision is ambiguous and the ambiguity should be resolved by reading the provision narrowly to require the checks to have been forged before crossing the state line. For support, the petitioner cites *United States* v. *Bass*, 404 U. S. 336 (1971), where this Court considered a challenge to a conviction under 18 U. S. C. App. § 1202(a), which prohibits a convicted felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." The issue

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terstate transportation of stolen vehicles, using the same "interstate commerce" language as used in § 2314. See n. 2, *supra*. The court rejected the defendant's argument that the Government's failure to show that he had driven the car across a state border required acquittal. "[A]ny driving, whether wholly within the state of origin, state of destination, or from and to, if done as a substantial step in the furtherance of the intended interstate journey is, we think, within the act." 229 F. 2d, at 939. See *United States* v. *Lambert*, 580 F. 2d 740, 743 (CA5 1978).

Cases reviewing other statutes, with slightly different "interstate commerce" provisions, arrive at the same result that we reach today. In *United States* v. *Tobin*, 576 F. 2d 687 (CA5), cert. denied, 439 U. S. 1051 (1978), the defendants were convicted of receiving and conspiring to sell stolen goods "moving as, or which are a part of, or which constitute interstate . . . commerce" in violation of 18 U. S. C. § 2315. The court rejected the defendants' argument that the stolen goods had been taken out of interstate commerce by coming to rest, holding that "[s]o long as its movement within the destination state can be considered a continuation of the movement that began out of state the prerequisite of 18 U. S. C. § 2315 is satisfied." 576 F. 2d, at 692. See *United States* v. *Luman*, 624 F. 2d 152, 155 (CA10 1980) (18 U. S. C. § 2315); *United States* v. *Licavoli*, 604 F. 2d 613, 624–625 (CA9 1979) (18 U. S. C. § 2315), cert. denied, 446 U. S. 935 (1980); *United States* v. *Garber*, 626 F. 2d 1144, 1148 (CA3 1980) (construing similar language in 18 U. S. C. § 659, the court held that "[d]elays enroute do not deprive shipments of continued characterization as interstate or foreign so long as the goods have not yet reached their destination"), cert. denied, 449 U. S. 1079 (1981); *United States* v. *Maddox*, 394 F. 2d 297, 299–300 (CA4 1968) (18 U. S. C. § 659); *United States* v. *Hiscott*, 586 F. 2d 1271, 1274 (CA8 1978) (18 U. S. C. § 2313); *United States* v. *Goble*, 512 F. 2d 458, 469 (CA6 1975) (18 U. S. C. § 2313).

framed by the Court was whether "in commerce or affecting commerce" modified "possesses" as well as "transports," since the respondent, a convicted felon, had been charged with possession of a shotgun, but the Government had made no effort to show that he had possessed the firearm "in commerce or affecting commerce." The Court found both the language of the provision and its legislative history ambiguous on this question, and decided on two grounds to read the statute narrowly, that is, to read "in commerce or affecting commerce" as modifying "possesses" as well as "transports." The Court reasoned that ambiguity concerning the reach of a criminal statute should be resolved by reading the statute narrowly in order to encourage Congress to speak clearly, thus giving the populace "fair warning" of the line between criminal and lawful activity, and in order to have the legislature, not the courts, define criminal activity. *Id.*, at 347–348. Also, absent a clear statement of purpose from Congress, the Court was unwilling to read a federal criminal statute in a way that would encroach on a traditional area of state criminal jurisdiction.

The present case, however, does not raise significant questions of ambiguity, for the statutory language and legislative history of the Dyer Act indicate that Congress defined the term "interstate commerce" more broadly than the petitioner contends. We hold that Congress intended to use the term "interstate commerce" as this Court had been using it in Commerce Clause cases before 1919. As we observed in *United States* v. *Bramblett*, 348 U. S. 503, 509–510 (1955), although "criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature" (footnote omitted).[22]

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[22] We reject the petitioner's suggestion that our holding today reads § 2314 as if Congress intended to "expand the authority of the Federal Government over the entire field of criminal fraud." Brief for Petitioner 23. Rather, our holding is consistent with the expressed congressional purpose

III

Through § 2314, Congress has sought to aid the States in their detection and punishment of criminals who evade state authorities by using the channels of interstate commerce. Based on this congressional purpose, the trial judge in the present case correctly instructed the jury that they could find the petitioner guilty of violating § 2314 if they found that the forgeries occurred during the course of interstate commerce, which includes a "continuation of a movement that began out of state," even though movement of the forged checks was restricted to one State. Accordingly, we affirm the judgment of the court below.

So ordered.

JUSTICE STEVENS, dissenting.

The words "transportation in interstate or foreign commerce" appear in a host of federal criminal statutes.[1] These statutes prohibit the interstate transportation of stolen motor vehicles, forged checks, prostitutes, explosives, obscene materials, kidnap victims, counterfeit phonograph records, and numerous other items. In all of these statutes the predicate for federal jurisdiction might reasonably be identified in either of two ways: first, as I read the statutory language, it might require that the subject be transported

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to apprehend forgers who use state boundaries to evade detection and punishment by state authorities. Had the petitioner not used interstate channels to pass his forged checks, he would not have been subject to punishment under § 2314.

[1] See, *e. g.*, 18 U. S. C. § 844(d) (explosives); 18 U. S. C. § 924(b) (1976 ed., Supp. IV) (firearms); 18 U. S. C. § 1201(a)(1) (1976 ed., Supp. IV) (kidnaping); 18 U. S. C. § 1231 (strikebreaking); 18 U. S. C. § 1301 (lotteries); 18 U. S. C. § 1465 (obscenity); 18 U. S. C. §§ 2251, 2252 (1976 ed., Supp. IV) (sexual exploitation of children); 18 U. S. C. § 2312 (stolen motor vehicles and aircraft); 18 U. S. C. § 2314 (other stolen property); 18 U. S. C. § 2318 (1976 ed., Supp. IV) (counterfeit phonograph records); 18 U. S. C. § 2421 (prostitution); 18 U. S. C. §§ 2511(1)(b)(iii), 2512(1) (electronic eavesdropping).

across a state line; second, as the Court reads this language, it may merely require that the subject be transported during an interstate journey.

In this case the evidence indicates that petitioner transported stolen checks from Ohio into Pennsylvania. We must assume, because of insufficient contrary evidence, that petitioner did not forge the checks until he was on the Pennsylvania side of his interstate journey. The Court holds that this evidence proves a violation of 18 U. S. C. § 2314, which in pertinent part proscribes the transportation in interstate commerce of forged checks.[2] According to the Court, a forged check is transported in interstate commerce as long as the check was in a forged condition at some point during the defendant's journey from one State to another. Consistent with this rationale, it was not even necessary that the Government proved that the checks crossed state lines.[3] Under the Court's analysis, petitioner would have violated § 2314 if he had left his home in Ohio, picked up a forged check in Pittsburgh, and negotiated it in Beaver Falls.[4]

If the Court's reading of this language is consistently applied to all of the statutes in which the same jurisdictional predicate appears, this is an extremely important case. If the Court's holding is limited to the situation in which a check has been carried across a state line and then forged in the

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[2] Section 2314 also requires proof that the defendant knew that the transported checks were forged. This element is not at issue here.

[3] The instructions of the trial court required proof that the check had moved from Ohio to Pennsylvania, see *ante*, at 645–646, n. 6, but the Court's interpretation of the statute would apply equally to a forged check picked up in the destination State. For the Court the test is whether there was "movement" of the contraband "within the destination State." *Ante*, at 648. The Court of Appeals' position is unclear. See 644 F. 2d 274, 282, n. 1 (CA3 1981) (Garth, J., concurring and dissenting).

[4] Likewise, a transcontinental hitchhiker who stole a car in Pittsburgh and abandoned it in Philadelphia would have violated the Dyer Act.

destination State, the holding is not very significant. Although it would be illogical to limit the holding in that way, a review of the relevant legislative history will demonstrate that the holding should not be extended to its logical conclusion. That review also demonstrates, I believe, that today's holding does not faithfully reflect the intent of Congress.

I

"[T]he issue in the present case is the meaning that Congress ascribed to the phrase 'interstate commerce' in §2314." *Ante*, at 647, n. 9. More specifically, the question is "whether the statutory phrase 'interstate commerce' comprehends movement of a forged security [wholly] within the destination State," *ante*, at 648, or whether petitioner is correct that Congress intended "to limit the reach of that provision to those persons who transport forged securities across state lines," *ante*, at 647. For the answer to this question, the Court correctly looks to the legislative history of § 3 of the Dyer Act, the precursor of § 2314. The interstate commerce language that was enacted as § 3 of the Dyer Act in 1919 has been retained in § 2314; for our purposes, the subsequent enactments in 1934 and 1939 merely expanded the coverage of § 3 to other types of stolen property and to forged securities, respectively.

Section 3 of the Dyer Act proscribes, in accurate paraphrase, the transportation in interstate commerce of stolen motor vehicles. See 41 Stat. 325. The phrase, standing alone, admittedly is ambiguous. It is clarified by § 2(b) of the same statute, which provides that "[t]he term 'interstate . . . commerce' as used in this Act shall include transportation from one State . . . to another State." *Ibid.* Any lingering ambiguity is dispelled by the legislative history.

The problem that gave rise to the legislation, the House Judiciary Committee reported, was that "[t]hieves steal automobiles and take them from one State to another and oft-

times have associates in this crime who receive and sell the stolen machines." H. R. Rep. No. 312, 66th Cong., 1st Sess., 1 (1919) (hereafter H. R. Rep. No. 312). In a discussion of congressional power under the Commerce Clause, the Committee manifested its intention to proscribe only this problem: "The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not be questioned," *id.*, at 3; "[n]o good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another," *id.*, at 4. In introducing the bill to the House, Representative Dyer opened his remarks by stating that "this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State." 58 Cong. Rec. 5470 (1919). He described §§ 3 and 4 of the Act, the precursors of 18 U. S. C. §§ 2314 and 2315, as follows:

> "It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." 58 Cong. Rec. 5472 (1919).

Representative Igoe stated that "[t]he offense sought to be reached in the act is the transportation, the taking it across the line, taking it from one State to another." *Id.*, at 5473. Senator Cummins, in introducing the House bill to the Senate, described its purpose to be "to punish the transportation of stolen motor vehicles in interstate or foreign commerce." *Id.*, at 6433. He explained:

> "I want Senators to know what the bill is. The favorite place for such thefts is near a State line, where vehicles are carried quickly across the State line, and there is

very great difficulty in securing the punishment of the offender. The bill is for the purpose of giving the Federal courts jurisdiction for the punishment of such an offender." *Ibid.*[5]

Representative Bee, like Representative Reavis, objected to the bill because it "single[d] out automobiles" for special treatment. *Id.*, at 5473. Representative Reavis stated that he would "be very glad indeed to vote for a bill making it a felony to transport stolen property of any kind from one State to another." *Ibid.*

The Court's expansive interpretation of the interstate commerce phrase in § 3 of the Dyer Act is far broader than any that was expressed by the Committees and the Members of the 66th Congress. The Court offers several reasons for its reading of the statute, but none withstands analysis.

A

The Court first reasons that, by using the phrase "transportation in interstate commerce of stolen motor vehicles" in the statute, Congress must have intended to proscribe more than the "transportation across state lines of stolen motor vehicles" or the "interstate transportation of stolen motor vehicles." The Court's reasoning from the text, however, is flawed in two respects.

First, the House Report and the Members of Congress who described the Dyer Act proscription as the "interstate

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[5] Later, Senator Cummins further described the House bill:

"The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached." 58 Cong. Rec. 6434 (1919).

transportation of stolen motor vehicles," or some such phrase focusing on state lines, used these phrases interchangeably with the phrase "transportation in interstate commerce of stolen motor vehicles," which was the formulation included in the proposed and enacted bill. The point is illustrated by Representative Dyer's descriptions of the interstate commerce element of the bill. For example, the final paragraph of the House Report that he submitted begins with the sentence, "The purpose of the proposed law is to suppress crime in interstate commerce." H. R. Rep. No. 312, at 4. Two sentences later, however, the Report urges that Congress, pursuant to its power to regulate commerce, should "provide that such commerce should not be polluted by the carrying of stolen property from one State to another." *Ibid.* Representative Dyer opened his remarks to the House with the statement that "this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State." 58 Cong. Rec. 5470 (1919). It is inconceivable that Representative Dyer or any of the other legislators who used interchangeably the various phrases[6] nevertheless intended the statutory formulation "transportation in interstate commerce of stolen motor vehicles" to mean any more than "interstate transportation of stolen motor vehicles" or "transportation across state lines of stolen motor vehicles" or "transportation of stolen motor vehicles from one State to another."

The second flaw in the Court's textual analysis is its reference to 18 U. S. C. § 10 for the definition of "interstate commerce." See *ante*, at 648–649. Section 10 provides that "[t]he term 'interstate commerce', as used in this title, includes commerce between one State . . . and another State." It merits reiteration, however, that "interstate commerce" is defined much more narrowly in the Dyer Act and the Na-

[6] See, *e. g.*, *id.*, at 5472–5473 (Rep. Reavis); *id.*, at 5473 (Rep. Igoe); *id.*, at 5474–5476 (Rep. Newton); *id.*, at 6433–6434 (Sen. Cummins).

tional Stolen Property Act of 1934. Section 2(b) of the Dyer Act provides that the term "shall include *transportation* from one State . . . to another State." 41 Stat. 325 (emphasis added). Section 2(a) of the 1934 enactment provides that the term "shall *mean* transportation from one State . . . to another State." 48 Stat. 794 (emphasis added). When Congress revised the Federal Criminal Code in 1948, it consolidated several definitions of "interstate commerce" into § 10. The Reviser's Notes state only that, "[i]n addition to slight improvements in style, the word 'commerce' was substituted for 'transportation' in order to avoid the narrower connotation of the word 'transportation' since 'commerce' obviously includes more than 'transportation.'" Notes following 18 U. S. C. § 10. For purposes of divining the intent of Congress in enacting the Dyer Act in 1919, the National Stolen Property Act in 1934, and the amendments thereto in 1939, we must refer to the definition by which those Congresses understood the reach of those criminal statutes.

B

There is a logical explanation—albeit an unarticulated one—for Congress' use of the arguably broader formulation in the statute when its intent was so clearly less ambitious. This explanation is derived from the part of the legislative history in which the constitutionality of the proposed Dyer Act was justified by reference to this Court's expositions of the scope of congressional power under the Commerce Clause. The Court infers from one such part of the legislative history that "Congress intended the statutory phrase to be as broad as this Court had used the phrase in Commerce Clause decisions before 1919." *Ante*, at 653. If the legislative history is examined through 1919 lenses instead of from a distance of six decades, however, the only supportable conclusion is that Congress used the phrase "interstate commerce" merely to indicate the source of its authority to pro-

scribe conduct that had previously been regulated solely by the States.

In the Court's words, the House Report "justif[ied] Congress' authority to enact the Dyer Act by reference to this Court's decisions holding that Congress has plenary power under the Commerce Clause to regulate interstate commerce." *Ante*, at 652. From this discussion in the House Report, the Court draws the conclusion that Congress meant to adopt as the definition of the *statutory* term this Court's construction of the *constitutional* term "interstate commerce." That conclusion does not logically follow from its premise and is without any support in the legislative history.

The part of the House Report cited by the Court begins with this paragraph:

> "The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not be questioned, in view of laws of similar nature heretofore enacted by Congress and the decisions of the Supreme Court of the United States touching same." H. R. Rep. No. 312, at 3.

This statement establishes that (1) the objective of the statute was to proscribe the transportation of a stolen automobile from one State to another, and (2) the House Judiciary Committee was confident that this objective could be accomplished under the Commerce Clause, as interpreted by this Court. The Report's discussion of this Court's decisions justifies the Committee's confidence in the constitutionality of the Act. Indeed, the penultimate paragraph of the Report explains just how far Congress can act under the Commerce Clause;[7] in the paragraph's closing sentence, which the

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[7] "Congress has enacted various laws for the regulation of interstate commerce which have uniformly been sustained by the courts. Among them are those relating to the use of safety appliances, hours of labor of employees, monthly reports of accidents, arbitration of controversies between railroads and their employees, the exclusion of impure goods and lot-

Court quotes, *ante*, at 650, the Report states that even "[l]arceny of goods from railroad cars being transported in interstate commerce has . . . been declared a crime by act of Congress." H. R. Rep. No. 312, at 4. But the Committee had a much more limited objective in proposing the Dyer Act. In the closing paragraph of the Report, it expressly linked its discussion of this Court's Commerce Clause cases with the statutory objective: "No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another." *Ibid.*

The Committee's confidence in the constitutionality of the Act was not shared by all Members of Congress. Representative Newton described in detail the practice of automobile thieves of stealing cars and driving them across state lines where they could not be pursued by the police of the first State. See 58 Cong. Rec. 5474–5475 (1919). After summarizing the need for federal legislation,[8] he turned to the question of its constitutionality:

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tery tickets, employers' liability, etc. Specific reference may be made to the interstate commerce act, wherein interstate commerce railroads are forbidden to form combinations or pools for the maintenance of rates, and also the antitrust act of July 2, 1890, wherein every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States was declared a crime, and made punishable as such. Larceny of goods from railroad cars being transported in interstate commerce has also been declared a crime by act of Congress." H. R. Rep. No. 312, at 4.

[8] "That there is a crying need for relief from this rapidly growing evil there can be no question. That the States have been unable to effectively deal with the problem has been fully demonstrated. I have no doubt but that 90 per cent of the cars that are stolen and not recovered cross State lines before they are disposed of. The use which the automobile thief is making of interstate commerce takes him into a sphere which is beyond the reach of State control, and into a field where he can operate with security and where he will continue to do so until Congress asserts its power by the passage of a bill such as the one now under consideration." 58 Cong. Rec. 5475 (1919).

"But it has been seriously argued by Members of this House that Congress has no power to pass such a law; that such legislation is an invasion of the rights of the States. But if you will study the laws upon kindred subjects heretofore enacted by Congress and will read the decisions of the courts sustaining such laws I do not believe that a doubt will remain in the mind of even the most ardent States-rights advocate as to the powers of Congress upon this subject." *Id.*, at 5475.

Representative Newton discussed a number of court decisions and repeatedly compared the federal laws therein upheld with the bill Congress was considering:

"In the face of the decisons which I have just read, can there be any question but what an automobile which is stolen in one State and transported across a State line into another State for the purpose of yielding a profit to the person transporting the same constitutes 'interstate commerce'? . . .

. . . . .

"Thus it will be observed that no particular vehicle of transportation is necessary in order to make the article transported interstate commerce, nor is it necesary that the article should be transported for any specific purpose. All that is necessary for it to become interstate commerce is that it shall be transported from one State to another, even though it be live stock driven on foot.

. . . . .

"If the driving of diseased cattle from one State to another is interstate commerce, as held in the decision just cited, and as held by the Supreme Court of the United States in the case of Railroad *v.* Hus[e]n (95 U. S., 465), then the driving of a stolen automobile from one State to another certainly falls within the meaning of that term.

. . . . .

"If the transportation of a woman from one State to another, by means of an automobile, for prostitution, constitutes interstate commerce, then how can it be argued, with any show of color, that the driving of a stolen automobile from one State to another for profit is not interstate commerce?" *Id.*, at 5475–5476.

Given these statements in the legislative history and the absence of any indication that any legislator intended the Dyer Act to proscribe more than the transportation of stolen automobiles from one State into another, it is manifest that Congress used the term "interstate commerce" and referred to this Court's decisions construing the Commerce Clause simply to articulate the source of its authority to proscribe the interstate transportation of stolen automobiles. The Court's suggestion that Congress incorporated into the statute the constitutional definition of "interstate commerce" is quite implausible.

C

The final leg of the Court's analysis of the legislative history is the following colloquy between Representatives Anderson and Dyer:

"Mr. ANDERSON. I will ask the gentleman whether the committee meant the same thing in its definition of interstate commerce in section 2 as it meant in section 4?

"Mr. DYER. I think so. If the gentleman will point out wherein it differs, I shall be glad.

"Mr. ANDERSON. In the definition under section 2 interstate commerce means transportation from one State to another, while if you refer to section 4 you find there you have a vehicle or motor car constituting interstate or foreign commerce, and you scarcely have a sensible section.

"Mr. DYER. I will say to the gentleman that if there is any difference there, which I do not see, the matter

would be construed by the Supreme Court, which has passed many times upon what is meant by interstate and foreign commerce. I think it really is not necessary to put the definition in this bill. It was done at the request of some of the members of the committee. The Supreme Court has decided many times what is interstate commerce. I do not think myself that any definition is necessary." *Id.*, at 5472.

Since the Court places so much reliance upon Representative Dyer's answer, see *ante*, at 650–652, a careful parsing is necessary. Section 2(b) of the bill provided that "[t]he term 'interstate . . . commerce,' as used in this Act, shall include transportation from one State . . . to another State." 41 Stat. 325. Section 4 of the bill proscribed the receipt, concealment, storage, bartering, sale, or disposition of any stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate . . . commerce." *Ibid.* Representative Anderson's confusion is understandable: § 2 defined interstate commerce in terms of interstate transportation; § 4, however, seemed to indicate that the automobile itself constituted interstate commerce, apart from the transportation of it.[9] Representative Dyer obviously did not understand the confusion because he perceived no difference between the two sections insofar as the meaning of "interstate commerce" was concerned. He had no doubt that this Court knew what the term meant and that § 4 would be construed correctly; indeed, he saw no need for the statutory definition of "interstate commerce." Even if it could be said that Representative Dyer was willing to defer to this Court for the definition of the interstate commerce element of § 4, that is not what Congress did. The Dyer Act as proposed and as enacted in-

[9] This is the section that Representative Dyer had just previously described as providing for the punishment of "the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." *Id.*, at 5472.

cluded the definition of "interstate commerce" as transportation from one State to another. Moreover, § 4, which contained the confusing reference to interstate commerce, is the precursor of § 2315, not the section the Court interprets today. The precursor of § 2314 is § 3 of the Dyer Act, which has nothing to do with Representative Anderson's confusion and Representative Dyer's answer.

Interestingly, another colloquy, this one between Representatives Hastings and Saunders, also indicates the confusion about the meaning of § 4 of the bill:

> "Mr. HASTINGS. I want to direct the gentleman's attention to section 4. Suppose an automobile is stolen, say, in the State of Virginia at some one point and is transported to some other point in the State of Virginia and sold to some one there who knows that property to have been stolen, would that be a Federal offense under section 4?
>
> "Mr. SAUNDERS of Virginia. I think not. How would it be? Up to that point what has been done has not reached the dignity of a Federal offense. The Federal offense begins when there is a movement in interstate commerce.
>
> "Mr. HASTINGS. Section 4 provides that anyone receiving stolen property knowing it to have been stolen, and it does not require it to have gone across State lines, as you will perceive if you read section 4 closely.
>
> "Mr. SAUNDERS of Virginia. The gentleman did not read the language in line 10, which says:
>
> > Moving as, or which is a part of, or which constitutes interstate or foreign commerce.
>
> "And that answers the difficulty of the gentleman from Oklahoma." 58 Cong. Rec. 5477 (1919).

Immediately after this colloquy, Representative Dyer asked for a vote, and the House passed the bill. If we were construing § 2315, which is the successor to § 4 of the Dyer Act,

then this colloquy would seem to indicate that § 4 requires the automobile to have crossed state lines, notwithstanding the confusing reference to "interstate commerce" in that section and Representative Dyer's answer to Representative Anderson's observation. In any event, we are not construing § 2315, but § 2314, and the definition of "interstate commerce" included in the Dyer Act, as well as the statute's legislative history, clearly indicates that § 3, the precursor of § 2314, proscribed only the transportation across state lines of stolen automobiles.

II

The National Stolen Property Act, enacted in 1934, merely extended the Dyer Act to the transportation in interstate commerce of other types of stolen property.[10] The Act was passed with little debate, but its legislative history confirms the points made above. As they did in 1919, the Committees and Members of Congress used the phrase "transportation in interstate commerce of stolen property" interchangeably with such phrases as "interstate transportation of stolen property" or "transportation across state lines of stolen property." The Senate Judiciary Committee Report described the Dyer Act as "concerned [with] interstate transportation of stolen motor vehicles." S. Rep. No. 538, 73d Cong., 2d Sess., 2 (1934). The House Judiciary Committee Report stated that "[t]his bill is designed to punish interstate transportation of stolen property, securities, or money." H. R. Rep. No. 1462, 73d Cong, 2d Sess., 2 (1934). It also noted

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[10] In the 1934 National Stolen Property Act, Congress adopted a slightly different definition of "interstate commerce" than the one included in the 1919 Dyer Act. Section 2(b) of the Dyer Act provides that the term shall *include* transportation from one State to another State, whereas § 2(a) of the 1934 enactment provides that the terms shall *mean* transportation from one State to another State. There is no reason to believe that one definition was intended to be any broader than the other. But see the Court's curious discussion, *ante*, at 650–652, n. 14.

that "[p]revious Congresses have considered bills providing punishment for interstate shipment of stolen property." *Ibid.* Senator Ashurst told the Senate: "Gangsters who now convey stolen property, except vehicles, across the State line, with that immemorial gesture of derision, thumb their nose at the officers. This bill extends the provisions of the [Dyer Act] to other stolen property described in the bill." 78 Cong. Rec. 6981 (1934). Also like the legislative history of the Dyer Act, the Reports in 1934 substantiated the constitutionality of the enactment, this time by reference to the decisions upholding the Dyer Act. See S. Rep. No. 538, *supra*, at 2; H. R. Rep. No. 1462, *supra*, at 2.

The Reports made an additional point that merits consideration. The Department of Justice, in a memorandum reprinted in the Senate Report, explained the troubles that previous attempts at extending the Dyer Act to other stolen property had faced:

> "The explanation for the opposition to federalizing such crimes was in the concern which had developed at that time over the burdening of the Federal machinery for administering criminal justice. It was for this reason also that the Senate failed to pass a similar bill in 1930. The heavy burden placed on the Federal Government by the Dyer Act, which concerned interstate transportation of stolen motor vehicles, had then become apparent." S. Rep. No. 538, *supra*, at 2.

The Senate bill therefore limited federal jurisdiction to cases involving stolen property worth $1,000 or more. The House increased the limit to $5,000, with this explanation:

> "It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations

fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General." H. R. Rep. No. 1462, *supra*, at 2.

The Senate acceded to the increase. The point to be made is that Congress recognized that federal law enforcement authorities had limited resources. This recognition makes it all the more likely that Congress did not intend in 1934 to extend its proscription beyond the interstate transportation of stolen property.

III

Quoting from *United States* v. *Sheridan*, 329 U. S. 379, 384, the Court declares that "in [enacting] § 2314 Congress 'contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent.'" *Ante*, at 654. Ironically, this quote actually refutes the Court's position. The Court assumes, as it must, that the state offense committed by petitioner—forging a check—was committed in Pennsylvania rather than in Ohio, from which petitioner commenced his interstate journey. This is not a case, therefore, in which the defendant's offense was complete under state law before he crossed state lines to make his getaway. Rather, this is a case in which the defendant crossed state lines and then committed the underlying state offense.[11] It is even more ironic that, although the issue of the meaning of the interstate commerce phrase of § 2314 was not before the Court in *Sheridan*, the Court thrice referred to that element as the "interstate transportation" of forged securities. See 329 U. S., at 384, 385, 387. Remarkably, the Court today places so much significance upon the statutory formulation of the in-

[11] The evidence does not indicate where petitioner traveled after the forgeries.

terstate commerce element of § 2314 even though in referring to that element the Committees and Members of the 1919 and 1934 Congresses, as well this Court in *Sheridan*, repeatedly used the formulation that the Court rejects today as too narrow.

IV

The petitioner's argument that he was prosecuted and convicted under the wrong statute may generate little sympathy.[12] Our primary concern, however, is not with the fate of this defendant. Rather, our concern is to identify the scope of the Federal Government's responsibility for law enforcement. That scope is a matter for Congress to determine. In this case, it is clear to me that the Court has allowed the prosecutor to encroach into an area of state responsibility and to cross a line that Congress has drawn. I therefore respectfully dissent.

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[12] Petitioner concedes that he violated 18 U. S. C. § 2315, the successor to § 4 of the Dyer Act. See Tr. of Oral Arg. 11. Petitioner might also have violated other paragraphs of § 2314. See 644 F. 2d, at 285 (Higginbotham, J., concurring in part and dissenting in part); Tr. of Oral Arg. 18.

AMERICAN MEDICAL ASSOCIATION ET AL. *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1690. Argued January 11, 1982—Decided March 23, 1982

638 F. 2d 443, affirmed by an equally divided Court.

Newton N. Minow argued the cause for petitioners. With him on the briefs were *Jack R. Bierig, David W. Carpenter, William J. Doyle,* and *Linda L. Randell.*

Howard E. Shapiro argued the cause for respondent. With him on the brief were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Shapiro, Elliott Schulder, March Coleman,* and *L. Barry Costilo.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

**Peter M. Sfikas* filed a brief for the American Dental Association as *amicus curiae* urging reversal.

A brief for the State of Ohio et al. as *amici curiae* urging affirmance was filed by *William J. Brown,* Attorney General of Ohio, and *Eugene F. McShane, Charles D. Weller,* and *Clifton E. Johnson,* Assistant Attorneys General; *Robert K. Corbin,* Attorney General of Arizona; *J. D. MacFarlane,* Attorney General of Colorado, and *Thomas P. McMahon,* Assistant Attorney General; *Carl R. Ajello,* Attorney General of Connecticut, and *Robert M. Langer* and *John R. Lacey,* Assistant Attorneys General; *Thomas J. Miller,* Attorney General of Iowa, and *John R. Perkins,* Assistant Attorney General; *Stephen H. Sachs,* Attorney General of Maryland, and *Charles O. Monk II* and *Naomi F. Samet,* Assistant Attorneys General; *Warren Spannaus,* Attorney General of Minnesota, and *Stephen P. Kilgriff,* Special Assistant Attorney General; *Paul L. Douglas,* Attorney General of Nebraska, and *Dale A. Comer,* Assistant Attorney General; *Jeff Bingaman,* Attorney General of New Mexico, and *James J. Wechsler* and *Richard H. Levin,* Assistant Attorneys General; *Robert Abrams,* Attorney General of New York, and *Lloyd Constantine,* Assistant Attorney

JUSTICE BLACKMUN took no part in the consideration or decision of this case.

General; *Rufus L. Edmisten*, Attorney General of North Carolina, *H. A. Cole, Jr.*, Special Deputy Attorney General, and *Fred R. Gamin*, Assistant Attorney General; *Leroy S. Zimmerman*, Attorney General of Pennsylvania, and *Carl S. Hisiro*, Deputy Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Special Assistant Attorney General; and *Chauncey H. Browning*, Attorney General of West Virginia, and *Charles G. Brown*, Deputy Attorney General.

UNITED TRANSPORTATION UNION *v.* LONG ISLAND RAIL ROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1925. Argued January 20, 1982—Decided March 24, 1982

Respondent Railroad, formerly under private ownership, was acquired by New York State in 1966 and is engaged in interstate commerce. Some 13 years later, petitioner Union, representing the Railroad's employees, and the Railroad failed to reach an agreement after conducting collective-bargaining negotiations pursuant to the Railway Labor Act, and mediation efforts also failed to produce agreement. This triggered a 30-day cooling-off period under that Act, at the expiration of which the Act permits a union to resort to a strike. Anticipating that New York would challenge the Railway Labor Act's applicability to the Railroad, the Union sued in Federal District Court, seeking a declaratory judgment that the labor dispute was covered by that Act and not the Taylor Law, the New York law prohibiting strikes by public employees. The Railroad then filed suit in a New York state court, seeking to enjoin an impending strike by the Union under the Taylor Law. Before the state court acted, the Federal District Court held that the Railroad was subject to the Railway Labor Act and that that Act, rather than the Taylor Law, was applicable. The District Court rejected the Railroad's argument that application of the Railway Labor Act to a state-owned railroad was inconsistent with *National League of Cities* v. *Usery*, 426 U. S. 833, wherein it was held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments. The Court of Appeals reversed, holding that the operation of the Railroad was an integral state governmental function, that the Railway Labor Act displaced "essential governmental decisions" involving that function, and that the State's interest in controlling the operation of the Railroad outweighed the federal interest in having the federal Act apply.

Held: Application to a state-owned railroad of Congress' acknowledged authority to regulate labor relations in the railroad industry does not so impair a state's ability to carry out its constitutionally preserved sovereign function as to come in conflict with the Tenth Amendment. Pp. 682-690.

(a) One of the requirements under *National League of Cities*, *supra*, at 852, for a successful claim that congressional commerce power is invalid is that a state's compliance with federal law would directly impair its ability to "structure integral operations in areas of traditional govern-

mental functions." Operation of a railroad engaged in interstate commerce is clearly not an integral part of traditional state activities generally immune from federal regulation. And federal regulation of state-owned railroads, whether freight or passenger, simply does not impair a state's ability to function as a state. Pp. 683–686.

(b) To allow individual states, by acquiring railroads, to circumvent the federal system of railroad collective bargaining, or any of the other elements of federal regulation of railroads, would destroy the longstanding and comprehensive uniform scheme of federal regulation of railroads and their labor relations thought essential by Congress and would endanger the efficient operation of the interstate rail system. Moreover, a state acquiring a railroad does so knowing that the railroad is subject to such scheme of federal regulation. Here, New York knew of and accepted federal regulation, and, in fact had operated under it for 13 years without claiming any impairment of its traditional sovereignty. Pp. 686–690.

634 F. 2d 19, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Edward D. Friedman argued the cause for petitioner. With him on the briefs were *Robert Hart* and *Harold A. Ross*.

Lewis B. Kaden argued the cause for respondents. With him on the brief were *Mary P. Bass* and *Thomas M. Taranto*.

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Geller, T. Timothy Ryan, Jr., Lois G. Williams, Joseph Woodward,* and *Ronald M. Etters*.*

**J. Albert Woll, Laurence Gold,* and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William T. Coleman, Jr., Donald T. Bliss,* and *Zoë E. Baird* for the American Public Transit Association; by *Henry W. Underhill, Jr., Benjamin L. Brown, John Dekker, James B. Brennan, George Agnost, Roger F. Cutler, Lee E. Holt, George F. Knox, Jr., Walter M. Powell, Allen G. Schwartz, J. Lamar Shelley, John W. Witt, Max P. Zall, Conard B. Mattox, Jr.,* and

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce.

I

The Long Island Rail Road (the Railroad), incorporated in 1834, provides both freight and passenger service to Long Island.[1] In 1966, after 132 years of private ownership and a period of steadily growing operating deficits, the Railroad was acquired by New York State through the Metropolitan Transportation Authority.

Thereafter, the Railroad continued to conduct collective bargaining pursuant to the procedures of the Railway Labor Act. 44 Stat. (part 2) 577, as amended, 45 U. S. C. § 151 *et seq.* The United Transportation Union, petitioner in this case, represents the Railroad's conductors, brakemen, switchmen, firemen, motormen, collectors, and related train crew employees. In 1978, the Union notified the Railroad that it desired to commence negotiations and the parties began collective bargaining as provided by the Act. They failed to reach agreement during preliminary negotiations

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Charles S. Rhyne for the National Institute of Municipal Law Officers; and by *Ross D. Davis* for the National League of Cities.

Martin L. Barr, Jerome Thier, and *Anthony Cagliostro* filed a brief for the New York State Public Employment Relations Board as *amicus curiae.*

[1] The Railroad's western terminus is Pennsylvania Station in Manhattan; there it connects with lines of railroads which serve other parts of the country. The eastern terminus is at Montauk Point, at the tip of Long Island, but most of its main and branch line traffic originates in the western half of Long Island, in the boroughs of Brooklyn and Queens, and in the suburbs of Nassau and western Suffolk Counties. By far the bulk of the Railroad's business is carrying commuters between Long Island's suburban communities and their places of employment in New York City. However, the Railroad supplies Long Island's only freight service; it does a significant volume of freight business, with 1979 freight revenue of over $12 million.

and, in April 1979, the Railroad and the Union jointly petitioned the National Mediation Board for assistance. Seven months of mediation efforts by the Board failed to produce agreement, however, and the Board released the case from mediation. This triggered a 30-day cooling-off period under the Act; absent Presidential intervention, the Act permits the parties to resort to economic weapons, including strikes, upon the expiration of the cooling-off period.

The Union anticipated the State's challenge to the applicability of the Act to the Railroad; on December 7, 1979, one day before the expiration of the 30-day cooling-off period, it sued in federal court seeking a declaratory judgment that the dispute was covered by the Railway Labor Act and not the Taylor Law, New York's law governing public employee collective bargaining and prohibiting strikes by public employees.[2] The next day, the Union commenced what was to be a brief strike. Pursuant to the Act, the President of the United States intervened on December 14, thus imposing an additional 60-day cooling-off period which was to expire on February 13, 1980.[3] A few days before the expiration of the 60-day period, the State converted the Railroad from a private stock corporation to a public benefit corporation, apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law.

The Railroad then filed suit in state court on February 13, 1980, seeking to enjoin the impending strike under the Taylor Law. Before the state court acted, the United States District Court for the Eastern District of New York heard and decided the Union's suit for declaratory relief, holding that the Railroad was a carrier subject to the Railway Labor Act,

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[2] On January 17, 1980, the Railroad responded to the Union's suit for declaratory judgment by asserting that no justiciable controversy existed because the Railroad did not believe the Taylor Law applied and therefore had no intention to invoke its provisions.

[3] The Presidential intervention also triggered the creation of a Presidential Emergency Board to investigate and report on the matter.

that the Act, rather than the Taylor Law, was applicable, and that declaratory relief was in order. 509 F. Supp. 1300 (1980).

In a footnote the District Court rejected the argument now presented to this Court that application of the Act to a state-owned railroad was inconsistent with *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). 509 F. Supp., at 1306, n. 4. The District Court noted that in *National League of Cities*, the Supreme Court "specifically held that the operation of a railroad in interstate commerce is not an integral part of governmental activity" and affirmed the rulings in *California* v. *Taylor*, 353 U. S. 553 (1957), and *United States* v. *California*, 297 U. S. 175 (1936), which held that the Railway Labor Act and the Safety Appliance Act could be applied to state-owned railroads. 509 F. Supp., at 1306, n. 4.

The Court of Appeals reversed, holding that the operation of the Railroad was an integral state governmental function and that the federal Act displaced "essential governmental decisions" involving that function. 634 F. 2d 19 (CA2 1980). The court applied a balancing approach and held that the State's interest in controlling the operation of its railroad outweighed the federal interest in having the federal Act apply.

We granted certiorari, 452 U. S. 960 (1981), and we reverse.

II

There can be no serious question that, as both the District Court and the Court of Appeals held, the Railroad is subject to the terms of the Railway Labor Act,[4] or that the Com-

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[4] The Railroad acknowledges in its brief that its freight service, which is admittedly engaged in interstate commerce, "eliminat[es] any dispute regarding its coverage by the RLA." Brief for Respondents 23.

In the Court of Appeals, the Railroad maintained that Congress did not intend the Act to apply to state-owned passenger railroads. 634 F. 2d, at 23. Whatever merit that claim may have had, it is no longer tenable. After that court rendered its decision, Congress amended the Act to add § 9a, 95 Stat. 681, 45 U. S. C. A. § 159a (Dec. 1981 Pamphlet). Section 9a

merce Clause grants Congress the plenary authority to regulate labor relations in the railroad industry in general.[5] This dispute concerns the application of this acknowledged congressional authority to a state-owned railroad; we must decide whether that application so impairs the ability of the State to carry out its constitutionally preserved sovereign function as to come into conflict with the Tenth Amendment.[6]

A

The Railroad claims immunity from the Railway Labor Act, relying on *National League of Cities* v. *Usery, supra,* where we held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments.[7] The Fair Labor Standards Act generally requires covered employers to pay employees no less than a minimum hourly wage and to pay them at one and one-half times their regular hourly rate for all time worked in any workweek in excess of 40 hours. Prior to 1974, the Act excluded most governmental employers. However in that year Congress amended the law to extend its provisions in somewhat modified form to "public agencies," including state governments and their political subdivisions.[8] We held that the 1974 amendments were invalid "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional governmental functions* . . . ." 426 U. S., at 852. (Emphasis supplied.)

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establishes special procedures to be applied to any dispute "between a publicly funded and publicly operated carrier providing rail commuter service . . . and its employees."

[5] See *Texas & N. O. R. Co.* v. *Railway & Steamship Clerks,* 281 U. S. 548 (1930).

[6] The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[7] The Fair Labor Standards Act is codified at 29 U. S. C. § 201 *et seq.*

[8] 88 Stat. 55. The 1974 amendments modified several of the definitions contained in 29 U. S. C. § 203.

Only recently we had occasion to apply the *National League of Cities* doctrine in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981). In holding that the Surface Mining and Reclamation Act of 1977, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. IV), did not violate the Tenth Amendment by usurping state authority over land-use regulations, we set out a three-prong test to be applied in evaluating claims under *National League of Cities:*

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the 'States as States.' [426 U. S.], at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' *Id.*, at 852." 452 U. S., at 287–288.[9]

The key prong of the *National League of Cities* test applicable to this case is the third one, which examines whether "the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"

B

The determination of whether a federal law impairs a state's authority with respect to "areas of traditional [state] functions" may at times be a difficult one. In this case, however, we do not write on a clean slate. As the District Court

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[9] However, even if these three requirements are met, the federal statute is not automatically unconstitutional under the Tenth Amendment. The federal interest may still be so great as to "justif[y] state submission." 452 U. S., at 288, n. 29. Cf. *Case* v. *Bowles*, 327 U. S. 92 (1946).

noted, in *National League of Cities* we explicitly reaffirmed our holding in *United States* v. *California*, 297 U. S. 175 (1936), and in two other cases involving federal regulation of railroads:[10]

> "The holding of *United States* v. *California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . . .' 297 U. S., at 182." 426 U. S., at 854, n. 18.

It is thus clear that operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*. See also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 422–424 (1978) (concurring opinion).[11] The Long Island is concededly a railroad engaged in interstate commerce.

The Court of Appeals undertook to distinguish the three railroad cases discussed in *National League of Cities*, noting

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[10] *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964); *California* v. *Taylor*, 353 U. S. 553 (1957).

[11] "[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause. . . .

. . . . .

"The *National League of Cities* opinion focused its delineation of the 'attributes of sovereignty' . . . on a determination as to whether the State's interest involved 'functions essential to separate and independent existence.' [426 U. S., at 845], quoting *Coyle* v. *Oklahoma*, 221 U. S. 559, 580 (1911). It should be evident, I would think, that the running of a business enterprise is not an integral operation in the area of traditional government functions. . . . Indeed, the reaffirmance of the holding in *United States* v. *California*, *supra*, by *National League of Cities*, *supra*, at 854, n. 18, strongly supports this understanding." 435 U. S., at 422–424 (BURGER, C. J., concurring in part and in judgment).

that they dealt with freight carriers rather than primarily passenger railroads such as the Long Island. That distinction does not warrant a different result, however. Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments.[12] It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

III

In concluding that the operation of a passenger railroad is not among those governmental functions generally immune from federal regulation under *National League of Cities*, we are not merely following dicta of that decision or looking only to the past to determine what is "traditional." In essence, *National League of Cities* held that under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the states in our federal system. This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather it was meant to require an inquiry into whether the federal regulation affects basic state preroga-

[12] At the time of this suit, there were 17 commuter railroads in the United States; only 2 of those railroads were publicly owned and operated, both by the Metropolitan Transportation Authority. American Public Transit Assn., Transit Fact Book 74–75 (1979). Those two public railroads—the Long Island and the Staten Island—were originally private railroads. The Staten Island was founded in 1899 and acquired by the Metropolitan Transportation Authority in 1971. Moody's Transportation Manual 97 (1979).

tives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence." 426 U. S., at 851.

Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. Railroads have been subject to comprehensive federal regulation for nearly a century.[13] The Interstate Commerce Act—the first comprehensive federal regulation of the industry—was passed in 1887.[14] A year earlier we had held that only the Federal Government, not the states, could regulate the interstate rates of railroads. *Wabash, St. L. & P. R.* Co. v. *Illinois*, 118 U. S. 557 (1886). The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888;[15] the provisions of that Act were invoked by President Cleveland in reaction to the Pullman strike of 1894. Federal mediation of railroad labor disputes was first provided by the Erdman Act of 1898[16] and strengthened by the Newlands Act of 1913.[17] In 1916, Congress mandated the 8-hour day in the railroad industry.[18] After federal operation of the railroads during World War I, Congress passed the Transportation Act of 1920,[19] which further enhanced federal involvement in

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[13] The initial exercise of the federal authority over railroads occurred before the completion of the first transcontinental railroad. See the Pacific Railroad Act of 1862. 12 Stat. 489. Of course, federal regulation of interstate transportation goes back many more years than that. See the 1793 Act regulating coastal trade discussed in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824).

[14] 24 Stat. 379.

[15] Ch. 1063, 25 Stat. 501.

[16] 30 Stat. 424.

[17] Ch. 6, 38 Stat. 103.

[18] Adamson Act of 1916, ch. 436, 39 Stat. 721.

[19] 41 Stat. 456.

railroad labor relations. Finally, in 1926, Congress passed the Railway Labor Act, which was jointly drafted by representatives of the railroads and the railroad unions.[20] The Act has been amended a number of times since 1926, but its basic structure has remained intact. The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry.

Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. Congress determined that the most effective means of preventing such disruptions is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees.

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[20] Railway Labor Act of 1926, 44 Stat. (part 2) 577, as amended, 45 U. S. C. § 151 *et seq.* The purposes of the Railway Labor Act are set out in § 2 of the Act, 45 U. S. C. § 151a:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Rather than absolutely prohibiting strikes, Congress decided to assure equitable settlement of railroad labor disputes, and thus prevent interruption of rail service, by providing mediation and imposing cooling-off periods, thus creating "an almost interminable" collective-bargaining process. *Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142, 149 (1969). "[T]he procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway & Steamship Clerks* v. *Florida E. C. R. Co.*, 384 U. S. 238, 246 (1966).[21] To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

In addition, a state acquiring a railroad does so knowing that the railroad is subject to this longstanding and comprehensive scheme of federal regulation of its operations and its

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[21] Under the recent amendments to the Act, adding a new § 9a, 95 Stat. 68, 45 U. S. C. A. § 159a (Dec. 1981 Pamphlet), the process has been made even more "long and drawn out" insofar as it applies to publicly owned commuter rail lines such as the Long Island. The law now provides for a "cooling-off period" of up to 240 days after failure of mediation. Any party to the dispute, or the Governor of any state through which the rail service operates, may request appointment of a Presidential Emergency Board to investigate and report on the dispute. If the dispute is not settled within 60 days after creation of the Emergency Board, the National Mediation Board must hold a public hearing at which each party must appear and explain any refusal to accept the Emergency Board's recommendations. The law then requires appointment of a second Emergency Board at the request of any party or Governor of an affected state. That Emergency Board must examine the final offers submitted by each party and must determine which is the most reasonable. Finally, if a work stoppage occurs, substantial penalties are provided against the party refusing to accept the offer determined by the Emergency Board to be most reasonable.

labor relations. See *California* v. *Taylor*, 353 U. S., at 568. Here the State acquired the Railroad with full awareness that it was subject to federal regulation under the Railway Labor Act. At the time of the acquisition, a spokesman stated:

> "We just have a new owner and a new board of directors. We're under the Railway Labor Act, just as we've always been. The people do not become state employes, they remain railroad employes and retain all the benefits and drawbacks of that."

The parties proceeded along those premises for the next 13 years, with both sides making use of the procedures available under the Railway Labor Act, and with Railroad employees covered by the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employers' Liability Act. Conversely, Railroad employees were not eligible for any of the retirement, insurance, or job security benefits of state employees.

The State knew of and accepted the federal regulation; moreover, it operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty. Indeed, the State's initial response to this suit was to acknowledge that the Railway Labor Act applied. It can thus hardly be maintained that application of the Act to the State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities* v. *Usery*, 426 U. S., at 851.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

UNDERWRITERS NATIONAL ASSURANCE CO. v. NORTH CAROLINA LIFE & ACCIDENT & HEALTH INSURANCE GUARANTY ASSN. ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 80-1496. Argued November 9, 1981—Decided March 24, 1982

Petitioner, an Indiana stock insurance corporation, as required by law to do business in North Carolina, was a member of respondent North Carolina Life and Accident and Health Insurance Guaranty Association (North Carolina Association), which, under a North Carolina statute, is ultimately responsible for fulfilling the policy obligations of members that become insolvent or otherwise fail to meet their policy obligations. Because of its questionable financial condition, petitioner was required by respondent North Carolina Commissioner of Insurance to post a $100,000 deposit for the benefit of its North Carolina policyholders. Subsequently, rehabilitation proceedings were brought against petitioner in an Indiana state court (Rehabilitation Court), in which the North Carolina Association intervened and in which the court certified a class consisting of all past and present policyholders. The Rehabilitation Court ultimately ruled in 1978 that all prerehabilitation claims to the deposit were compromised, settled, and dismissed by the court's 1976 order which adopted a rehabilitation plan and which ruled that the court had jurisdiction over the subject matter and over the parties. In the meantime, when a dispute arose between petitioner and the North Carolina Association as to the rehabilitation plan's effect on use of the North Carolina deposit, the North Carolina Association filed suit in a North Carolina state court, seeking a declaratory judgment that it was entitled to use the deposit to fulfill the prerehabilitation contractual obligations to North Carolina policyowners that had been compromised in the rehabilitation proceeding. Holding that the North Carolina statutes governing the North Carolina Association and the $100,000 deposit deprived the Rehabilitation Court of subject-matter jurisdiction to determine rights in the deposit, the North Carolina court refused to honor the Rehabilitation Court's prior ruling as to claims to the deposit. The North Carolina Court of Appeals affirmed.

Held: Under the Full Faith and Credit Clause, a judgment of a court in one State is conclusive upon the merits in another State only if the court in the first State had power to pass on the merits—that is, had jurisdic-

tion over the subject matter and the relevant parties. Cf. *Durfee* v. *Duke*, 375 U. S. 106. In this case, the North Carolina courts violated the Full Faith and Credit Clause by refusing to treat the Rehabilitation Court's prior judgments as res judicata. Pp. 703–716.

(a) Regardless of the validity, under North Carolina law, of the North Carolina courts' holding that the Rehabilitation Court did not have subject-matter jurisdiction to determine the rights in the deposit, it is not an appropriate ground for refusing to accord the Indiana judgments full faith and credit. The principles of res judicata apply to questions of jurisdiction, and "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee* v. *Duke*, *supra*, at 111. The record here establishes that the Rehabilitation Court fully and fairly considered whether it had subject-matter jurisdiction to settle the prerehabilitation claims of the parties before it to the North Carolina deposit. As an intervening party, the North Carolina Association was obliged to advance its argument that the court did not have authority to settle prerehabilitation claims to the deposit when it was given the opportunity to do so. Pp. 705–710.

(b) The North Carolina courts' refusal to give the Indiana judgments full faith and credit cannot be supported on the asserted ground that the Rehabilitation Court lacked *in personam* jurisdiction over North Carolina policyowners because no policyowner actually appeared in the rehabilitation proceedings and because the class representatives could not adequately represent the policyowners in both deposit and nondeposit States. Respondents have not identified any current interest in the North Carolina deposit that a policyowner might have, independent of the interests asserted by the North Carolina Association. North Carolina law requires the Association to provide North Carolina policyowners with prerehabilitation coverage even if it cannot use the deposit to finance this obligation. Therefore, these policyowners have no current interest in whether the Association is allowed to liquidate the deposit. Pp. 711–713.

(c) Nor can refusal to give full faith and credit to the Rehabilitation Court's judgments be supported on the asserted ground that the court lacked *in personam* jurisdiction over North Carolina officials. Although the Rehabilitation Court did not attempt to exercise jurisdiction over the North Carolina trustees of the deposit, it did purport to exercise jurisdiction over the trust corpus; its 1978 order specified that the 1976 rehabilitation plan determined that the deposit was an asset of petitioner, subject to the court's jurisdiction. Regardless of whether this conclu-

sion might have been erroneous as a matter of North Carolina law, the jurisdictional issue was fully and fairly litigated and finally determined by the Rehabilitation Court, and the North Carolina courts were required to honor the Rehabilitation Court's determination. A court of competent jurisdiction can settle the claims of two competing parties to specific property even though a third party may claim an interest in the same res. Pp. 713–715.

(d) There may be merit, as a matter of insurance law, in respondent's arguments that honoring the Rehabilitation Court's determination that the deposit was an asset of petitioner would negate North Carolina's comprehensive statutory scheme to ensure protection of North Carolina policyowners and that a State has a right to segregate assets of a foreign insurance company to be used for the sole benefit of that State's policyowners. However, the only forums in which respondents may challenge the Rehabilitation Court's assertion of jurisdiction on such grounds are in Indiana, not North Carolina. Pp. 715–716.

48 N. C. App. 508, 269 S. E. 2d 688, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which POWELL and STEVENS, JJ., joined, *post*, p. 716.

Theodore R. Boehm argued the cause for petitioner. With him on the briefs was *Charles T. Richardson*.

William S. Patterson argued the cause for respondents. With him on the brief were *Rufus L. Edmisten*, Attorney General of North Carolina, *Richard L. Griffin*, Assistant Attorney General, *Charles D. Case*, and *Eugene Gressman*.

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, the North Carolina Court of Appeals held that an Indiana court was without jurisdiction to adjudicate the rights of various parties in a $100,000 deposit held in trust by certain North Carolina officials. Because it found that the Indiana court did not have jurisdiction, the North Carolina court refused to recognize the Indiana court's prior ruling that all claims to the deposit were compromised, settled, and dismissed by the final order entered by that court during a

rehabilitation proceeding. We granted certiorari to decide whether, by refusing to treat the prior Indiana court judgment as res judicata, the North Carolina court has violated the Full Faith and Credit Clause of the Constitution and its implementing federal statute. 451 U. S. 982 (1981). For the reasons stated below, we reverse the decision of the North Carolina Court of Appeals.

I

Petitioner Underwriters National Assurance Co. (Underwriters) is an Indiana stock insurance corporation specializing in life and disability insurance for certain high-income professional groups. In 1973 Underwriters was licensed to do business in 45 States, including North Carolina, and was administering over 50,000 policies. To qualify to do business in North Carolina, Underwriters was required to join respondent North Carolina Life and Accident and Health Insurance Guaranty Association (North Carolina Association), a state-created association of all foreign and domestic insurance companies operating in North Carolina. See Life and Accident and Health Insurance Guaranty Association Act, N. C. Gen. Stat. § 58–155.65 *et seq.* (1975) (Guaranty Act). Under the terms of the Guaranty Act, the North Carolina Association is ultimately responsible for fulfilling the policy obligations of any member that becomes insolvent or otherwise fails to honor its obligations to North Carolina policyholders. N. C. Gen. Stat. § 58–155.72(4) (Supp. 1981).

In June 1973, after determining that Underwriters' financial condition was questionable, the North Carolina Commissioner of Insurance informed Underwriters that it must post a $100,000 deposit "for the sole benefit of North Carolina policyholders," to continue to do business in that State. Shortly thereafter, Underwriters deposited with the State a $100,000 bond registered to the "Treasurer of the State of North Carolina in trust for the Underwriters National Assur-

ance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina General Statutes." See N. C. Gen. Stat. § 58-182 *et seq.* (1975) (Deposit Act).

The North Carolina Commissioner's fears about Underwriters' financial condition proved to be well founded. Approximately one year after Underwriters posted this bond, the Indiana Department of Insurance commenced rehabilitation proceedings against petitioner on the ground that its reserves were inadequate to meet its future policy obligations. By order dated August 5, 1974, the Superior Court for Marion County (Rehabilitation Court)[1] appointed the Indiana Commissioner of Insurance as Rehabilitator and directed him to "take possession of the business and assets of Underwriters . . . and conduct the business thereof and appoint such personnel as may be necessary to rehabilitate Underwriters." Notice of this action was sent to all state insurance commissioners, including respondent North Carolina Commissioner. The North Carolina Commissioner immediately informed the North Carolina Association that Underwriters was undergoing rehabilitation in Indiana, and that title to all assets of Underwriters had been transferred to the Indiana Rehabilitator.

Shortly after entering the order of rehabilitation, the Rehabilitation Court enjoined the commencement or prosecution of any suit against Underwriters or the Rehabilitator. This injunction stayed several policyholder actions that had been filed against Underwriters, and required that any person who desired to institute or to prosecute any such action

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[1]The Indiana Rehabilitation Court is a court of general jurisdiction. In addition, the Rehabilitation Court is authorized by statute to oversee the actions of the Rehabilitator in formulating a plan of rehabilitation, to enter injunctions to prevent interference with either the Rehabilitator or the rehabilitation proceeding, and to enter the final order of rehabilitation. See Ind. Code § 27-1-4-1 *et seq.* (1976).

join the Indiana rehabilitation proceeding.[2] The plaintiffs in the stayed actions were subsequently given permission to intervene in the rehabilitation proceeding. In October 1975, the Rehabilitation Court certified a class consisting of all past and present policyholders, and appointed intervening plaintiffs from the stayed actions as class representatives.[3]

The Rehabilitation Court sent notice of the rehabilitation proceeding to all policyholders, informing them that the class had been certified, and that all members not requesting exclusion would be bound by the judgment of the Rehabilitation Court. The notice concluded by stating that "[t]he entire court file" was available to any class member.[4]

Over the next two and one-half years, the Rehabilitation Court supervised the efforts of the Rehabilitator and other interested parties to return Underwriters to a sound financial footing. After extensive negotiations between Underwriters, the class representatives, and other interested parties, the Rehabilitator submitted a Proposed Plan to the Rehabilitation Court in April 1976. In order to preserve the financial

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[2] Three class actions and one individual lawsuit were stayed as a result of the Rehabilitation Court's order. *Schultz* v. *Underwriters National Assurance Co.*, Civ. Action No. 74 C 2550 (ND Ill.) (class action on behalf of all Illinois policyowners); *Honeycutt* v. *Underwriters National Assurance Co.*, Civ. Action No. 482-74-A (ED Va.) (class action on behalf of all Virginia policyowners); *Hall* v. *Underwriters National Assurance Co.*, Civ. Action No. 75-L-1589-NE (ND Ala.) (class action on behalf of all policyowners in Madison County, Ala.); *Meyer* v. *Guarantee Reserve Life Ins. Co.*, Cause No. 786-532 (Super. Ct. of King County, Wash.). These lawsuits alleged, *inter alia*, that Underwriters had fraudulently misled policyowners as to the financial condition of the company.

[3] The court certified the class under Indiana Trial Rule 23(B)(3). Indiana Trial Rules are identical to the Federal Rules of Civil Procedure with respect to class actions.

[4] The court file included a document listing Underwriters' assets. The North Carolina Association concedes that this document included the $100,000 deposit as a general asset of Underwriters. Brief for Respondents 11-12.

health of the company and to provide continuing coverage for policyholders, the Rehabilitator proposed that the Rehabilitation Court reform the policies to require increased premiums and reduced benefits.[5] Of particular interest to this litigation, the Proposed Plan stated that Underwriters "[will have] no liability to any guaranty association which itself has obligations to [Underwriters'] policyowners." Proposed Rehabilitation Plan, I(J), Exhibit Binder 79 (E. B.). Part X(C) of the Proposed Plan further provided:

> "The guaranty associations in some states *may have obligations to [Underwriters'] policyowners as a result of the [Underwriters] rehabilitation proceeding.* Moreover, to the extent such guaranty associations do have obligations, there is a possibility that those guaranty associations may seek to recover from [Underwriters] sums paid to [Underwriters'] policyowners. *The Rehabilitation Plan should resolve [Underwriters'] contingent liability to any guaranty association* by determining that [Underwriters] has no further obligation or liability to any guaranty association." *Id.*, at 89 (emphasis added).

By direction of the Rehabilitation Court, the Rehabilitator mailed a copy of this Proposed Plan to all interested parties, including all state guaranty associations and insurance commissioners. The Rehabilitator subsequently sent to the guaranty associations notice of a hearing to consider various rehabilitation plans, including that of the Rehabilitator.

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[5] Underwriters had underwritten a large block of "noncancelable" disability insurance policies. These policies not only were guaranteed to be renewable at the same premium regardless of experience, but also entitled the policyowner to a refund of 80% of the premiums paid if no disability claims were asserted in a 10-year period. The Proposed Plan eliminated the 80% refund, and converted the policies from "noncancelable" to "guaranteed renewable," meaning that the policy was renewable at the policyowner's option, but the company could increase the premium.

This notice explicitly informed the guaranty associations that although eight associations, including the North Carolina Association, "may have obligations to . . . policyowners as a result of the [Underwriters] rehabilitation proceeding," no association had either intervened in the proceeding, or made suggestions for changes in the Plan. The notice directed that if a guaranty association desired to present any information or contentions relevant to the rehabilitation of Underwriters, it must intervene in the proceeding and present its arguments at the June 9, 1976, hearing. Unless the associations either intervened, or stated in writing that they had no obligations to policyowners and that they waived all claims against Underwriters and the Rehabilitator, a summons would issue to bring the associations before the Rehabilitation Court. *Id.*, at 59–61.

On June 8, 1976, these eight guaranty associations, including the North Carolina Association, intervened in the Indiana rehabilitation proceeding. In their motion to intervene, the guaranty associations stated that Part X(C) of the Proposed Plan was "unacceptable," and that through negotiations, the associations and the Rehabilitator had agreed on a modification that would "protect the rights of the Guaranty Associations." In relevant part,[6] the guaranty associations proposed that Part X(C) be changed to read as follows:

> "[Underwriters shall have] no further obligation or liability to any guaranty association other than the obligation to recognize as valid the assignment of the policyowner's rights to the guaranty association and to treat the guaranty association as it would have treated the policyowner; *provided, however,* if any guaranty association makes any payment to or on behalf of any policyowner which is not fully reimbursed pursuant to the foregoing

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[6] The guaranty associations also requested that the court modify the plan in ways not relevant to the instant proceeding.

provisions, *that association shall receive from [Underwriters] each year until fully reimbursed a portion of [Underwriters'] statutory net gain from operations* after dividends to policyowners, federal income taxes and the payments to be made under Part XI equal to the annual premium in force for basic coverage in the state of that association on August 5, 1974, divided by the total annual premiums in force for basic coverage of [Underwriters] on August 5, 1974." *Id.*, at 105 (emphasis added).

After a full hearing in which the North Carolina Association participated, the Rehabilitation Court tentatively approved the Proposed Plan, including the above modification. The court directed the Rehabilitator to send notice to all interested persons that on October 14, 1976, a final hearing would be held on the Plan and the settlement of all claims against Underwriters. The notice sent by the Rehabilitator to Underwriters, the North Carolina Commissioner of Insurance, and all other interested parties specified that "[t]he Proposed Rehabilitation Plan provides in part XIII that upon [its] final approval . . . , all claims against [Underwriters] by policyowners or others are compromised and dismissed." At the request of the eight guaranty associations, the Rehabilitation Court subsequently approved a special mailing to policyholders in their respective States explaining that the guaranty associations were statutorily obligated under certain circumstances to continue to provide the benefits compromised by the Indiana court under the Rehabilitation Plan.

In November 1976, after holding final hearings in which the North Carolina Association participated, the Rehabilitation Court approved a Plan of Rehabilitation, which was, with respect to issues relevant here, identical to the Proposed Plan. In its order adopting this Plan, the Rehabilitation Court stated that it had "jurisdiction over the subject matter and over the parties, including . . . all [Underwriters]

policyowners [and] state insurance guaranty associations." App. 38. Further, the court specified that "[t]o the extent that any claim, objection or proposal which was or *could have been* presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied." *Id.*, at 40 (emphasis added). The court went on to state that "[t]his Order is final as to all matters occurring prior to the date of this Order." Finally, the Rehabilitation Court retained jurisdiction "to resolve all questions as to interpretation . . . of the Plan," and "to modify . . . the Plan in any respect in the light of future developments." *Id.*, at 42. Notice of the court's order adopting the final plan was sent to all interested parties, including all policyowners, state insurance commissioners, and the eight guaranty associations. No appeal was taken from this order, and Underwriters was released from rehabilitation in February 1977.

On June 8, 1977, Underwriters and the eight guaranty associations, including the North Carolina Association, invoked the Rehabilitation Court's continuing jurisdiction to request that it approve a "Service Contract," under which Underwriters would continue to service policyowners residing in these States at prerehabilitation levels in return for a fee paid by the associations. The Rehabilitation Court approved the proposed contract and directed that Underwriters and the associations execute this agreement "in substantially the form" presented to the court.[7] Pursuant to this order, Underwriters and seven of the guaranty associations executed the Service Contract without incident. Before the North Carolina Association executed its Service Contract, however, it made an addition to the document previously presented to the court. Specifically referring to Underwriters' $100,000

[7] At the joint request of Underwriters and the associations, the Rehabilitation Court had approved the concept of a service contract prior to the adoption of the final Plan of Rehabilitation. Brief for Petitioner 11.

deposit in North Carolina for the first time since it had intervened in the rehabilitation proceeding 16 months before, the North Carolina Association added the following paragraph to the Service Contract approved by the court:

> "It is expressly agreed, however, that the Guaranty Association and Underwriters explicitly reserve all their rights and remedies in connection with any deposits made by Underwriters with the Commissioner of Insurance of North Carolina, including deposits understood to total One Hundred Thousand Dollars ($100,000.00), which rights and remedies are governed by North Carolina law." E. B. 34.

Underwriters signed the revised agreement, but it made clear in a cover letter accompanying the signed agreement its understanding that the above paragraph was intended only to preserve any *future* rights that the North Carolina Association may have in the $100,000 deposit. Any other interpretation of this paragraph, the letter concluded, would be unacceptable because the "Plan of Rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits" prior to rehabilitation. *Id.*, at 35.

The North Carolina Association responded to this letter by filing suit against Underwriters, the North Carolina Commissioner of Insurance, and the State Treasurer, in the Superior Court of Wake County, N. C. The complaint prayed for a declaratory judgment that the North Carolina Association was entitled to use the $100,000 deposit to fulfill the prerehabilitation contractual obligations to North Carolina policyowners that had been compromised in the rehabilitation proceeding. The North Carolina Commissioner and Treasurer filed a cross-claim against Underwriters, also requesting that the deposit be liquidated for the benefit of the North Carolina Association and North Carolina policyholders. Underwriters answered, asserting that the Indiana judgment

was res judicata as to any prerehabilitation claims against the deposit, and therefore was entitled to full faith and credit in the North Carolina courts.

Invoking the Rehabilitation Court's continuing jurisdiction to resolve all questions involving the interpretation of the Plan, Underwriters filed a petition for instructions in July 1978. The Rehabilitation Court granted the petition, and sent notice to the North Carolina Association, the North Carolina Commissioner and Treasurer, and to all other parties to the rehabilitation proceeding. On September 22, 1978, the Rehabilitation Court held a hearing, at which both Underwriters and the North Carolina Association appeared and presented their respective full-faith-and-credit claims. In an opinion dated November 22, 1978, the Rehabilitation Court held that the 1976 Rehabilitation Plan "fully adjudicated and determined that the North Carolina deposit was an asset of . . . Underwriters, and any claim existing as of the date of adoption of the Plan . . . was compromised, settled and dismissed by the final Order and the Plan." App. to Pet. for Cert. 38A. In reaching this conclusion, the Rehabilitation Court specifically noted that the North Carolina Association had never made any claim to the deposit, even though the $100,000 had been included, without objection, in the general assets of Underwriters listed in Part V of the Plan. See n. 4, *supra*. The court went on to state that, although it probably had the power to enjoin the North Carolina Association from proceeding in North Carolina, it declined to do so because it believed that the North Carolina state court would recognize its judgment as binding.[8]

After receiving the Rehabilitation Court's ruling, Underwriters moved for summary judgment in the North Carolina state trial court, as did the respondents, the North Carolina Association and the North Carolina officials. The trial court

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[8] The North Carolina Association has appealed this ruling, but the Indiana Court of Appeals stayed consideration of its appeal pending this Court's resolution of this case.

entered summary judgment in favor of the respondents, reasoning that it was the only court with the "requisite subject matter jurisdiction to determine the rights of North Carolina policyholders in the special deposits made by [Underwriters] for their protection." App. to Pet. for Cert. 25A. While noting that the Indiana court did not have *in personam* jurisdiction over the North Carolina officials or over the North Carolina policyholders, the court held that "[a]n appearance in the Indiana insolvency proceeding by any of the parties having an interest in the deposit . . . could not constitute a waiver of the Indiana Court's lack of subject matter jurisdiction with regard to the deposit." *Ibid.* As a result, the North Carolina trial court refused to honor the judgment of the Rehabilitation Court. The trial court directed the Commissioner of Insurance to liquidate the deposit to reimburse the North Carolina Association for satisfying the prerehabilitation claims of North Carolina policyholders.

On appeal, the North Carolina Court of Appeals affirmed, substantially for the reasons expressed by the trial court. 48 N. C. App. 508, 269 S. E. 2d 688 (1980). The Court of Appeals emphasized that the North Carolina Association sought to protect "statutory," as opposed to "contractual," rights; that title and rights to the $100,000 were vested by law in the State Commissioner and Treasurer, thus depriving the Rehabilitation Court of subject matter jurisdiction over the deposit; and that the Rehabilitation Court did not have *in personam* jurisdiction over these officials. *Id.*, at 517, 269 S. E. 2d, at 694. The Court of Appeals concluded that the deposit could never be an asset of Underwriters, and that the Rehabilitation Court's decision to the contrary was not entitled to full faith and credit. The North Carolina Supreme Court declined to grant discretionary review. 301 N. C. 527, 273 S. E. 2d 453 (1980).

II

The concept of full faith and credit is central to our system of jurisprudence. Ours is a union of States, each having its

own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany belitigation of the same issue. See *Sherrer* v. *Sherrer*, 334 U. S. 343, 355 (1948); *Riley* v. *New York Trust Co.*, 315 U. S. 343, 348–349 (1942). Recognizing that this risk of relitigation inheres in our federal system, the Framers provided that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. Const., Art. IV, § 1. This Court has consistently recognized that, in order to fulfill this constitutional mandate, "the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." *Hampton* v. *McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C. J.); *Riley* v. *New York Trust Co.*, *supra*, at 353.[9]

To be sure, the structure of our Nation as a union of States, each possessing equal sovereign powers, dictates some basic limitations on the full-faith-and-credit principles enumerated above. Chief among these limitations is the caveat, consistently recognized by this Court, that "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Durfee* v. *Duke*, 375 U. S. 106, 110 (1963).[10]

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[9] This construction is also compelled by 28 U. S. C. § 1738, the statutory codification of this constitutional guarantee. This provision requires that "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

[10] This limitation flows directly from the principles underlying the Full Faith and Credit Clause. It is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over

Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given. See *Nevada* v. *Hall*, 440 U. S. 410, 421 (1979).

The North Carolina courts relied on this limitation in refusing to give full faith and credit to either the 1976 judgment or the 1978 judgment of the Rehabilitation Court. Respondents argue, and the North Carolina courts held, that the Rehabilitation Court was powerless to determine that the North Carolina deposit was an asset of Underwriters. Specifically, respondents contend that the Rehabilitation Court lacked both jurisdiction over the subject matter and jurisdiction over the relevant parties.

A

The North Carolina courts held that the Guaranty Act and the Deposit Act deprived the Rehabilitation Court of the subject matter jurisdiction to determine rights in the $100,000 deposit. Regardless of the validity of this holding as a matter of North Carolina law,[11] it is not an appropriate ground for

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the relevant parties. One State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same "credit, validity and effect" that it would receive in a court of the rendering State.

[11] Respondents argue that because North Carolina courts have exclusive jurisdiction to determine rights in the deposit, they were not required to recognize the Indiana judgment. Even if we accept the argument that North Carolina courts have exclusive jurisdiction over the subject matter of this litigation, the rule of jurisdictional finality established in *Durfee* v. *Duke*, 375 U. S. 106 (1963), would still apply. See *infra*, at 706. Respondents attempt to analogize this claim of exclusive jurisdiction to the exclusive jurisdiction each State has to control the administration of real property within its borders. See *Fall* v. *Eastin*, 215 U. S. 1 (1909); *Clarke* v. *Clarke*, 178 U. S. 186 (1900). Respondents fail to recognize, however, that the *Durfee* Court explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction. 375 U. S., at 115.

refusing to accord the Indiana judgments full faith and credit under the facts of this case. In relying on this ground, the courts below failed to recognize the limited scope of review one court may conduct to determine whether a foreign court had jurisdiction to render a challenged judgment.[12]

This Court has long recognized that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166 (1932). See also *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (1939); *Davis* v. *Davis*, 305 U. S. 32 (1938). Any doubt about this proposition was definitively laid to rest in *Durfee* v. *Duke*, *supra*, at 111, where this Court held that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."[13] The North Carolina courts, therefore, should have determined in the first instance whether the Rehabilitation Court fully and fairly considered the question of subject matter jurisdiction over the North Carolina deposit,

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[12] Respondents argue that the North Carolina court's determination of its own jurisdiction, as well as its determination that the Rehabilitation Court was without jurisdiction, are now entitled to this same limited scope of review. See Brief for Respondents 40. Although this argument would have force if Underwriters were collaterally attacking the North Carolina court's decision on jurisdiction, see *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (1939), it has no application to this litigation: Underwriters is seeking direct review of the North Carolina court's judgment. Consequently, Underwriters need only argue that the North Carolina court erred in concluding that the Rehabilitation Court did not fully and fairly determine that it had jurisdiction to adjudicate rights in the deposit.

[13] The need for finality within our federal system, see *supra*, at 703–704, applies with equal force to questions of jurisdiction. As this Court stated in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938): "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

with respect to prerehabilitation claims of the parties before it. If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts.

From our examination of the record, we have little difficulty concluding that the Rehabilitation Court fully and fairly considered whether it had subject matter jurisdiction to settle the prerehabilitation claims of the parties before it to the North Carolina deposit. As we noted earlier, in addition to being a state court of general jurisdiction, the Rehabilitation Court also has special duties with respect to the rehabilitation of insurance companies. See n. 1, *supra*. In its November 1976 order approving the Rehabilitation Plan, the Rehabilitation Court made it clear that it was asserting both subject matter jurisdiction over all prerehabilitation claims against Underwriters, including those of the guaranty associations, and personal jurisdiction over the North Carolina Association and Underwriters. See App. 39, 53. Furthermore, as our recitation of the events leading up to the Rehabilitation Court's 1976 order indicates, that court was aware of potential claims that the North Carolina Association might assert against Underwriters. In order to ensure that all such claims were definitively resolved during the rehabilitation proceeding, the Rehabilitation Court notified the Association that it *must* either intervene in the rehabilitation proceeding to make objections to, or suggest changes in, the Proposed Plan of Rehabilitation, or specifically waive all such claims. See *supra*, at 698. Finally, the record indicates that, after the North Carolina Association intervened in the rehabilitation proceeding, it negotiated certain changes in Part X(C) of the Proposed Plan of Rehabilitation, concerning Underwriters' liability to the guaranty associations for payments made to Underwriters' policyowners.[14] See *supra*, at 698–699.

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[14] The North Carolina Association argues that Part X(C) of the Proposed Plan explicitly recognizes its right to assert prerehabilitation claims

The North Carolina Association relies on the failure of the Rehabilitation Court either to specify that it was extinguishing the Association's right to use the $100,000 deposit to satisfy prerehabilitation obligations, or to address the argument that only North Carolina courts have subject matter jurisdiction to settle rights to the deposit. This reliance is misplaced. First, any doubts that the North Carolina Association may have had concerning the extent to which the Rehabilitation Court purported to exercise its jurisdiction over the Association's rights to the deposit were definitively settled by that court's 1978 ruling. *Supra*, at 702. After considering the arguments now advanced by the North Carolina Association, the Rehabilitation Court ruled that its 1976 order had "fully adjudicated and determined that the North Carolina deposit was an asset of . . . Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association . . . was compromised, settled and dismissed by the final Order and the Plan."[15] App. to Pet. for Cert. 38A.

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against Underwriters. In its 1978 order, however, the Rehabilitation Court held that the claims asserted by the North Carolina Association in the North Carolina litigation would violate the Plan. App. to Pet. for Cert. 38A. Whether or not this ruling is correct is a matter to be decided by the Indiana courts on direct review, not in the North Carolina courts or in this Court on collateral attack.

[15] Respondent argues that this 1978 order was not a *de novo* reexamination of the jurisdictional question, and therefore is of no independent significance. This argument misperceives the question addressed in the 1978 proceeding. In its 1976 order, the Rehabilitation Court retained jurisdiction over parties to the proceeding to resolve questions of interpretation, implementation, and application of the Plan. App. 42. The question whether the 1976 order included the North Carolina deposit as a general asset, thereby compromising any claim that the North Carolina Association might otherwise have had to the deposit, is clearly a question of interpretation and implementation of the Plan. The 1978 order specifying that the Rehabilitation Plan disposed of the North Carolina Association's prerehabilitation rights in the deposit is a binding judgment on the interpreta-

Second, it is undisputed that the Rehabilitation Court had listed the North Carolina deposit as a general asset of Underwriters to be included in the Plan of Rehabilitation.[16] By listing the deposit as a general asset, the Rehabilitation Court announced its intention to assert jurisdiction over prerehabilitation claims to the deposit.[17] As an intervening

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tion of the Plan rendered by a court that had retained jurisdiction over the issue. Although the North Carolina Association still may attack the 1978 order on direct appeal, see n. 8, *supra*, that order is entitled to full faith and credit in the North Carolina courts. See 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.416[3] (1980).

[16] Respondents argue that the deposit was incorrectly included as a general asset of Underwriters, rather than as a special asset reserved exclusively for the benefit of North Carolina policyowners. The propriety of including the deposit as a general asset, however, is irrelevant to the question whether the deposit was brought to the attention of the Rehabilitation Court. As we have consistently held, the fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue. See *American Express Co.* v. *Mullins*, 212 U. S. 311 (1909). If the North Carolina Association wished to argue that the Rehabilitation Court should not have included the deposit as a general asset, and consequently should have declined to exercise jurisdiction over the deposit, it should have done so in the rehabilitation proceeding. Having failed to do so, its only recourse is to assert these legal arguments on direct review before the Indiana courts; it cannot raise these contentions in a collateral attack on the judgment.

[17] The document listing the North Carolina deposit as a general asset of Underwriters was called to the North Carolina Association's attention by the North Carolina Commissioner of Insurance as early as March 11, 1975. See E. B. 26. The Association argues that it was misled into believing that the deposit was not before the Rehabilitation Court because the deposit had been listed as a general asset of Underwriters, and not as a deposit held in trust for the sole benefit of North Carolina policyowners. However, the very fact that the $100,000 may have been erroneously included as a general asset subject to rehabilitation should have alerted the Association that the Indiana court was purporting to exercise jurisdiction over the deposit, and that, once a final plan of rehabilitation was approved, the Association's claim to use the North Carolina deposit to satisfy prere-

party to the rehabilitation proceeding, the North Carolina Association was obliged to advance its argument that the Rehabilitation Court did not have the authority to settle prerehabilitation claims to the deposit when it was given the opportunity to do so. A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding. See *Sherrer* v. *Sherrer*, 334 U. S., at 352. The Indiana Rehabilitation Court gave the North Carolina Association sufficient notice that any prerehabilitation claim that it had against the North Carolina deposit, including its argument that the Rehabilitation Court was without jurisdiction to extinguish its claim to the deposit, had to be advanced in the rehabilitation proceeding. No such claim having been made, the Rehabilitation Court finally determined the issue when it approved the Plan, and ruled that all claims inconsistent with the Plan,[18] which could have been presented in the rehabilitation proceeding, were "overruled and relief to that extent denied." App. 40. The issue having been fully and fairly considered by the Indiana court, its final determination was entitled to full faith and credit in North Carolina.[19]

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habilitation obligations might be extinguished. Therefore, the North Carolina Association was obliged to object to this listing, which it believed to be erroneous, or to suffer the consequences.

[18] The North Carolina Association's claim to the deposit is "inconsistent with the plan" because the deposit was included as a general asset of Underwriters, and therefore was included in the pool of resources upon which continued coverage to all policyowners was based.

[19] The concurring opinion argues that the foregoing discussion of the Rehabilitation Court's assertion of jurisdiction over the deposit is unnecessary to the disposition of this case once it has been established that the court had personal jurisdiction over Underwriters and the North Carolina Association. See *post*, at 718. This argument misperceives both the nature of the jurisdiction asserted by the Rehabilitation Court and the North Carolina Association's challenge to that assertion of jurisdiction. Respondents do not dispute that the Rehabilitation Court had jurisdiction to settle

B

Alternatively, respondents argue that the judgment of the Rehabilitation Court was not entitled to full faith and credit because that court lacked *in personam* jurisdiction over the North Carolina policyowners and the state officials. Although under different circumstances these questions might give us pause, it is clear that the Rehabilitation Court had personal jurisdiction over all parties necessary to its determination that the North Carolina Association could not satisfy prerehabilitation claims out of the North Carolina deposit.

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all claims of the parties before it to the assets of Underwriters as part of its attempt to rehabilitate the company. They argue that the Rehabilitation Court's final resolution of claims against *Underwriters* does not preclude their action in North Carolina, however, because the North Carolina deposit *is not an asset of Underwriters*. Consequently, cases such as *Riehle v. Margolies*, 279 U. S. 218 (1929), and *Morris* v. *Jones*, 329 U. S. 545 (1947), are inapposite to the present situation. In those cases, as the concurrence correctly notes, this Court held that a court need not have jurisdiction over a debtor's property to determine whether a creditor had a legitimate claim against the debtor so long as it had personal jurisdiction over the creditor and the debtor. Those decisions do not hold, however, that a court with personal jurisdiction over the debtor and the creditor can adjudicate the creditor's claim against property *not belonging to the debtor*.

Given the nature of the North Carolina Association's claim, the Rehabilitation Court's 1976 order must be given full faith and credit in the North Carolina courts so as to bar the Association's claims only if the Rehabilitation Court determined, rightly or wrongly, that the $100,000 deposit *was* an asset of Underwriters, and that it therefore had the power to compromise the prerehabilitation claims of the parties before it to that asset. As we indicate in text, this was precisely the reasoning used by the Rehabilitation Court in 1978 when it held that the 1976 Plan had compromised the North Carolina Association's claim to the deposit. The only basis asserted by the Rehabilitation Court, which had specifically retained jurisdiction to resolve all questions of interpretation of the Plan, for barring the North Carolina Association from proceeding against the deposit was that the Plan "fully adjudicated and determined that the North Carolina deposit *was an asset of . . . Underwriters*." App. to Pet. for Cert. 38A (emphasis added).

Respondents argue that the Rehabilitation Court did not have jurisdiction over the policyowners because no policyowner actually appeared in the rehabilitation proceeding, and because the class representatives could not adequately represent the interests of policyowners in both deposit and nondeposit States.[20] As a preliminary matter, we note that no North Carolina policyowner has complained about the Rehabilitation Plan, nor did any policyowner directly participate in either the North Carolina litigation or the proceedings before this Court.[21] Furthermore, the North Carolina Association has not identified *any* interest in the North Carolina deposit that a policyowner might have, independent of the interests asserted here by the Association. The class representatives in the rehabilitation proceeding were instructed by the Rehabilitation Court to represent the interests of all past and present policyowners. See n. 20, *supra*. Although the North Carolina Association asserts that these representatives were inadequate, it never explains *why* the policyowners, as compared to the Association, would care whether the deposit was considered a general asset of Underwriters, unavailable for the Association's use in satisfying prerehabilitation claims. North Carolina law requires the Association to provide North Carolina policyowners with prerehabilitation coverage even if it cannot use the deposit to finance this obligation. See N. C.

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[20] The Rehabilitation Court sent the North Carolina policyowners notice that they were included in the class of policyowners in the rehabilitation proceeding. None of the North Carolina policyowners opted out of this class. In the rehabilitation proceeding, the interests of the policyowners were advocated by the class representatives.

[21] The North Carolina Association argues that the failure of the policyowners to appear in this litigation is not significant, because the Association is the legal representative of the policyowners, empowered to assert any claim that those policyowners might have against either Underwriters or the deposit. We accept this argument for purposes of this decision.

Gen. Stat. § 58–155.72(4) (Supp. 1981). Therefore, these policyowners have no current interest in whether the North Carolina Association is allowed to liquidate the $100,000 deposit. The North Carolina courts' refusal to give the Indiana judgment full faith and credit, accordingly, cannot be supported by the alleged inadequate representation of this unidentified policyowner interest.

The argument that the Rehabilitation Court did not have jurisdiction over the North Carolina officials is more complex.[22] The North Carolina Court of Appeals found that the Rehabilitation Court did not have jurisdiction over the trust property or over the statutory trustees. Citing this Court's decision in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), respondents argue that absent jurisdiction over the trust corpus or the trustee, the Rehabilitation Court was powerless to adjudicate rights in the North Carolina deposit. Therefore, respondents argue, the judgment of the Rehabilitation Court is not entitled to full faith and credit, even as to parties admittedly subject to its jurisdiction.

Respondents' reliance on *Hanson* v. *Denckla*, *supra*, is misplaced. In *Hanson*, this Court considered both a Florida judgment on direct review, and a Delaware judgment refusing to accord full faith and credit to the Florida judgment. Because the Florida judgment was before the Court on direct review, the Court was free to determine whether that court's exercise of jurisdiction over the trust or the trustee was appropriate. This Court determined that the Florida courts were without jurisdiction over either the trust or the trustee

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[22] The North Carolina Association argues that the State of North Carolina has intentionally made these North Carolina officials necessary but unreachable parties in order to ensure that its courts will have exclusive jurisdiction over all claims concerning rights in any North Carolina deposit. Underwriters contends that, if this is true, the North Carolina statutory scheme violates the Commerce Clause. Because of our resolution of this case, we find it unnecessary to reach this issue.

who, under Florida law, was a necessary party to a suit to determine the validity of the trust. As a result, of course the Delaware courts were under no obligation to accord full faith and credit to a judgment rendered in a court without jurisdiction.

In this case, however, the Rehabilitation Court's conclusion that it had jurisdiction to compromise the claims of the parties before it to the North Carolina deposit is not presented to this Court on direct review, and we express no opinion on the propriety of this conclusion. Although the Rehabilitation Court did not attempt to exercise jurisdiction over the North Carolina trustees, that court *did* purport to exercise jurisdiction over the trust corpus.[23] The 1978 order specifies that the 1976 Rehabilitation Plan determined that the North Carolina deposit was an asset of Underwriters, subject to the jurisdiction of the Rehabilitation Court. This conclusion may well have been erroneous as a matter of North Carolina law. See *State ex rel. Ingram* v. *Reserve Insurance Co.*, 303 N. C. 623, 629, 281 S. E. 2d 16, 20 (1981). Erroneous or not, however, this jurisdictional issue was fully and fairly litigated and finally determined by the Rehabilitation Court. Under *Durfee* v. *Duke*, 375 U. S. 106 (1963), and its progeny, once the Rehabilitation Court determined that the North Carolina Association could not liquidate the deposit to settle prerehabilitation claims, the North Carolina courts were required to honor that determination, even though the Rehabilitation Court did not assert personal juris-

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[23] Because we find that the Rehabilitation Court did purport to exercise jurisdiction over the trust, we do not have to address respondents' argument that Indiana law, like the Florida law at issue in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), requires jurisdiction over the trust or the trustee before rights in a statutory trust can be compromised. The concurring opinion, by arguing that personal jurisdiction over Underwriters and the North Carolina Association was sufficient to prevent the Association from litigating its claim to the deposit in North Carolina, seems to imply that *Hanson* is no longer dispositive on this point.

diction over the trustees. See *supra*, at 706–707. It is beyond dispute that a court of competent jurisdiction can settle the claims of two competing parties to specific property even though a third party may claim an interest in the same res. See *Morris* v. *Jones*, 329 U. S. 545 (1947). The Rehabilitation Court held that the Rehabilitation Plan extinguished the claim that the North Carolina Association is now asserting, and the North Carolina courts erred in refusing to give that court's judgment full faith and credit.

C

Respondents argue that requiring North Carolina to give full faith and credit to the Rehabilitation Court's determination that the deposit was an asset of Underwriters, would negate that State's comprehensive statutory scheme to ensure the protection of North Carolina policyowners. Respondents contend that the courts and commentators are virtually unanimous in their support of a State's right to segregate assets of a foreign insurance company to be used for the sole benefit of that State's policyowners. See 2 G. Couch, Insurance Law § 22:96 (2d ed. 1959); 5 J. Joyce, Law of Insurance § 3595 (2d ed. 1918). Cf. *Blake* v. *McClung*, 172 U. S. 239, 257 (1898). It would not be equitable, respondents conclude, to require North Carolina to honor such a clearly erroneous result. While these arguments may have merit as a matter of insurance law, the only forums in which respondents may challenge the Rehabilitation Court's assertion of jurisdiction on these legal and equitable grounds are in Indiana.[24] The North Carolina Association's decision to assert these arguments in a separate proceeding in North Carolina has resulted in two state courts reaching mutually inconsistent judgments on the same issue. This is precisely the situation the Full Faith and Credit Clause was designed to prevent.

[24] Indeed, in the Indiana appellate court's review of the 1978 order, the North Carolina Association may still have an opportunity to challenge the Rehabilitation Court's conclusion that it had jurisdiction over the deposit.

Because we find that North Carolina was obligated to give full faith and credit to the judgment of the Rehabilitation Court, we reverse the decision of the North Carolina Court of Appeals and remand for further proceedings not inconsistent with this opinion.[25]

It is so ordered.

JUSTICE WHITE, with whom JUSTICES POWELL and STEVENS join, concurring in the judgment.

I agree with much of the discussion in the majority opinion on the scope and function of the principles of res judicata. I also agree with the majority that "it is clear that the Rehabilitation Court had personal jurisdiction over all parties necessary to its determination that the North Carolina Association could not satisfy prerehabilitation claims out of the North Carolina deposit." *Ante*, at 711.

The only parties over which the Indiana court needed jurisdiction in order to prohibit the Association from moving against the North Carolina deposit were the Association and Underwriters National Assurance Co. (UNAC). It had

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[25] Underwriters urges us also to dismiss the cross-claim filed by the Commissioner of Insurance and the Treasurer of North Carolina because these state officials are mere "stakeholders" with no real interest in the deposit. Respondents reply that, as statutory trustees, these officials have a vital interest in the administration of deposits under their control. We have concluded that the North Carolina Association may not relitigate its claim to use the deposit to satisfy its obligations to North Carolina policyowners by arguing that the absence of the North Carolina officials deprived the Rehabilitation Court of jurisdiction. On the other hand, we recognize that, as a matter of state law, the North Carolina officials may have an interest in the deposit, independent of that asserted by the North Carolina Association, which was not considered by the Rehabilitation Court. In this Court, the respondent officials merely joined the arguments made by the North Carolina Association, and did not identify any independent claim that they might make against the deposit. Because this is purely a question of state law, on remand the North Carolina courts may determine whether, consistent with this opinion, these officials have any independent interest in the North Carolina deposit that was not determined in the Indiana proceeding.

jurisdiction over the latter in a rehabilitation proceeding, because Indiana was the State of incorporation; it had jurisdiction over the Association because, as the majority opinion amply demonstrates in Part I, the Association appeared before the court as a party and participated in the Rehabilitation Plan. With jurisdiction over UNAC and the Association, the Indiana court clearly had the authority to adjudicate the amount and character of the claim that the Association had against Underwriters, including its claim against the North Carolina deposit.

This is true regardless of the jurisdiction the Indiana court may or may not have had over any other parties with potential interests in the controversial deposit. There are at least two such parties: the trustees and the North Carolina policyholders. In my view, the Indiana court did not have jurisdiction to determine the interests of either of these parties in the controverted fund. Neither of these parties appeared before the Indiana court, and I am quite unconvinced that the Indiana court had jurisdiction over the North Carolina deposit in the sense that it could adjudicate the validity of or scale down the lien on that fund held by nonappearing North Carolina policyholders and trustees. I agree with the majority, therefore, that it is proper for this Court to reserve at least the issue of whether the trustees "have an interest in the deposit, independent of that asserted by the North Carolina Association, which was not considered by the Rehabilitation Court." *Ante*, at 716, n. 25. As for the policyholders, as I understand the opinion of the North Carolina court, under North Carolina law the Association was subrogated to the rights of the policyholders when it entered the service contract and undertook to make the policyholders whole. The policyholders thus no longer have an independent interest in the deposit.* See 48 N. C. App. 508, 518, 269 S. E. 2d 688, 694 (1980).

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*Since the policyholders and the Association appear to be the only possible beneficiaries of the trust, the trustees may have no beneficial interest to protect. This, however remains a matter of state law.

The authority of the Indiana court so to resolve the claims of the Association existed regardless of that court's jurisdiction over any particular asset of UNAC, including the North Carolina deposit. In *Riehle* v. *Margolies*, 279 U. S. 218 (1929), a creditor received a judgment against a corporation in state court. While the creditor's claim was being litigated in state court, a federal court appointed a receiver of the corporation's property. This Court held that the judgment from the state court regarding the creditor's claim had to be recognized as res judicata in the federal court, despite the fact that neither the corporation nor the receiver had undertaken to defend in the state court. The Court adopted a twofold distinction between control over claims and over assets:

> "In so far as [a court order] determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. [This] function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. . . . There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*." *Id.*, at 224.

The reasoning of *Riehle* was specifically applied to judgments between States under the Full Faith and Credit Clause in *Morris* v. *Jones*, 329 U. S. 545, 549 (1947): "[T]he distribution of assets of a debtor among creditors ordinarily has a 'twofold aspect.' It deals 'directly with the property' when it fixes the time and manner of distribution. . . . But proof and allowance of claims are matters distinct from distribution." *Id.*, at 548–549. Thus, in my view, jurisdiction over the deposit is simply not relevant to the question of the res judicata effect of the Indiana court's judgment as to the Association.

The Rehabilitation Plan fully determined the nature of the claim that the Association would have against Underwriters and established the manner in which it could collect on those claims. *Ante*, at 698–700. That decision must be given res judicata effect by the North Carolina court vis-à-vis the Association, unless the Indiana court failed to follow the procedural requirements of the Due Process Clause. I believe those requirements were met in this case, and, therefore, I concur in the judgment of the Court reversing the decision below.

UNITED STATES *v.* NEW MEXICO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 80-702. Argued December 8, 1981—Decided March 24, 1982

Sandia Corporation and Zia Company have contracts with the Federal Government to manage certain Government-owned atomic laboratories located in New Mexico. Los Alamos Constructors, Inc. (LACI), has a Government contract for construction and repair work at one of the laboratories. The contracts use an "advanced funding" procedure to meet contractor costs whereby the contractor is allowed to pay creditors and employees with drafts drawn on a special bank account in which United States Treasury funds are deposited, so that only federal funds are expended when the contractor meets its obligations. New Mexico imposes a gross receipts tax and a compensating use tax on those doing business within the State. The gross receipts tax in effect operates as a tax on the sale of goods and services. The use tax is imposed on property acquired out-of-state in a transaction that would have been subject to the gross receipts tax if it had occurred within the State. The Government brought suit in Federal District Court, seeking a declaratory judgment that advanced funds are not taxable gross receipts to the contractors; that the receipts of vendors selling property to the Government through the contractors cannot be taxed by the State; and that the use of Government-owned property by the contractors is not subject to the use tax. The District Court granted summary judgment for the Government. The Court of Appeals reversed, taking the view that the Government-contractor relationships in question did not so incorporate the contractors into the Government structure as to make them "instrumentalities of the United States" immune from the New Mexico taxes.

Held: The contractors, as independent taxable entities, are not protected by the Constitution's guarantee of federal supremacy, and hence are subject to the state taxes in question. Pp. 730–744.

(a) Federal immunity from state taxation cannot be conferred simply because the tax has an effect on the United States, or because the Federal Government shoulders the entire economic burden of the levy, or because the tax falls on the earnings of a contractor providing services to the Government. And where a use tax is involved, immunity cannot be conferred simply because the State levies the tax on the use of federal property in private hands, or, indeed, simply because the tax is paid with

Government funds. Tax immunity is appropriate only when the state levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. A finding of constitutional tax immunity therefore requires something more than the invocation of traditional agency notions. Pp. 730–738.

(b) With respect to the New Mexico use tax, the contractors cannot be termed "constituent parts" of the Federal Government. The congruence of professional interests between the contractors and the Government is not complete, the contractors' relationship with the Government having been created for limited and carefully defined purposes. Allowing a State to apply use taxes to such entities does not offend the notion of federal supremacy. *United States* v. *Boyd*, 378 U. S. 39. For similar reasons the New Mexico gross receipts tax must be upheld as applied to funds received by the contractors to meet salaries and internal costs. As to the tax on sales to the contractors, the facts that Sandia and Zia make purchases in their own names and presumably are themselves liable to the vendors, that the vendors are not informed that the Government is the only party with an independent interest in the purchase, and that the contractors need not obtain Government approval for each purchase, all demonstrate that the contractors have a substantial independent role in making purchases, and that the identity of interests between the Government and the contractors is far from complete. As a result, sales to Sandia and Zia are in neither a real nor a symbolic sense sales to the "United States itself." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, distinguished. The fact that title passes directly from the vendor to the Government cannot alone make the transaction a purchase by the United States, so long as the purchasing entity, in its role as purchaser, is sufficiently distinct from the Government. Pp. 738–743.

624 F. 2d 111, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

George W. Jones argued the cause, *pro hac vice*, for the United States. On the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Murray*, *Stuart A. Smith*, *Johnathan S. Cohen*, and *R. Bruce Johnson*.

Daniel H. Friedman, Special Assistant Attorney General of New Mexico, argued the cause for respondents. With him on the brief were *Jeff Bingaman*, Attorney General, *Richard*

M. Kopel, Sarah E. Bennett, James A. Burke, Edward R. Barnicle, Jr., Denise D. Fort, and *Gerald B. Richardson,* Assistant Attorneys General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?

I

A

This case concerns the contractual relationships between three private entities and the United States. The three agreements involved are typical in most respects of management contracts devised by the Atomic Energy Commission

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*Briefs of *amici curiae* urging affirmance were filed for Thirty-six States by *Gerald B. Richardson,* Assistant Attorney General of New Mexico, and by the Attorneys General of their respective States as follows: *Charles A. Graddick* of Alabama, *Wilson L. Condon* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *George Deukmejian* of California, *J. D. MacFarlane* of Colorado, *Jim Smith* of Florida, *Arthur K. Bolton* of Georgia, *David H. Leroy* of Idaho, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William Guste* of Louisiana, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Francis X. Bellotti* of Massachusetts, *Frank J. Kelley* of Michigan, *Warren Spannaus* of Minnesota, *John Ashcroft* of Missouri, *Mike Greely* of Montana, *Richard H. Bryan* of Nevada, *Robert Abrams* of New York, *Robert O. Wefald* of North Dakota, *William J. Brown* of Ohio, *Jan Eric Cartwright* of Oklahoma, *David Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *Mark V. Meierhenry* of South Dakota, *Mark White* of Texas, *David L. Wilkinson* of Utah, *John J. Easton, Jr.,* of Vermont, *Marshall Coleman* of Virginia, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning* of West Virginia, and *Steven F. Freudenthal* of Wyoming; and for the Multistate Tax Commission by *William D. Dexter.*

George Deukmejian, Attorney General, and *Anthony M. Summers* and *Neal J. Gobar,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae.*

(AEC), now the Department of Energy (DOE).[1] Like many of the Government's contractual undertakings, DOE management contracts generally provide the private contractor with its costs plus a fixed fee. But in several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities. As the parties to this case acknowledge, the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms. See App. 196–197; Hiestand & Florsheim, The AEC Management Contract Concept, 29 Federal B. J. 67 (1969) (Hiestand & Florsheim). While subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices.[2]

The first of the contractors, Sandia Corporation, was organized in 1949 as a subsidiary of Western Electric Company, Inc. Sandia manages the Government-owned Sandia Laboratories in Albuquerque, N. M., and engages exclusively in federally sponsored research. It receives no fee under its contract, and owns no property except for $1,000 in United States bonds that constitute its paid-in capital. But Sandia and Western Electric are guaranteed royalty-free, irrevocable licenses for any communications-related discoveries or inventions developed by most Sandia employees during the

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[1] Responsibility for the Nation's nuclear program was transferred from the AEC to the Energy Research and Development Administration in 1975, and to the Department of Energy in 1977. See Energy Reorganization Act of 1974, Pub. L. 93–438, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq.*; Exec. Order No. 11834, 3 CFR 943 (1971–1975 Comp.); Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565, 42 U. S. C. § 7101 *et seq.* (1976 ed., Supp. IV).

[2] AEC management contracts were developed in an attempt to secure Government control over the production of fissionable materials, while making use of private industry's expertise and resources. See *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 234–236 (1952); Tr. of Oral Arg. 4–6.

course of the contract, App. 34–35, and the company receives complete reimbursements for salary outlays and other expenditures. *Id.*, at 40–42.[3]

The Zia Company, another of the contractors, is a subsidiary of Santa Fe Industries, Inc. Since 1946, Zia has performed a variety of management, maintenance, and related functions at the Government's Los Alamos Scientific Laboratory, for which it receives its costs as well as a fixed annual fee. While Zia owns property and performs private work, virtually none of its property is used in the performance of its contract with the Government, and all of its private activities are conducted away from Los Alamos by a separate work force.

The third contractor is Los Alamos Constructors, Inc. (LACI), since 1953 a subsidiary of Zia. LACI's operations are limited to construction and repair work at the Los Alamos facility. The company owns no tangible personal property and makes no purchases; it procures needed property and equipment through its parent, Zia. And like Zia, LACI receives its costs plus a fixed annual fee from the Government.

The management contracts between the Government and the three contractors have a number of significant features in common. As in most DOE atomic facility management agreements, the contracts provide that title to all tangible personal property purchased by the contractors passes directly from the vendor to the Government. App. 231a (Zia); *id.*, at 34 (Sandia).[4] Similarly, the Government bears the

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[3] Sandia and its parent receive a variety of additional benefits from the contract. Most obviously, they develop expertise and acquire valuable technical information. See generally Newman, The Atomic Energy Industry: An Experiment in Hybridization, 60 Yale L. J. 1263, 1320–1321 (1951). They receive more tangible benefits as well: through Sandia's contract Western Electric is paid for furnishing a variety of products and services. See 624 F. 2d 111, 120, n. 12 (CA10 1980).

[4] LACI does not purchase goods, and the Government retains title to property it furnishes to the company. App. 29.

risk of loss for property procured by the contractors. Zia and LACI must submit an annual voucher of expenditures for Government approval. *Id.*, at 20 (Zia); *id.*, at 27 (LACI).[5] And the agreements give the Government control over the disposition of all property purchased under the contracts, as well as over each contractor's property management procedures. Disputes under the contracts are to be resolved by a DOE contracting official. *Id.*, at 128–129 (Zia standard terms) and 157–158 (Sandia standard terms).

On the other hand, the contractors place orders with third-party suppliers in their own names, and identify themselves as the buyers. See *id.*, at 36–37 (Sandia contract) and 120 (Zia standard terms). Indeed, the Government acknowledged during discovery that Sandia, Zia, and LACI "may be . . . 'independent contractor[s],' rather than . . . 'servant[s]' for . . . given 'function[s] under' the contract[s] (e. g., directing the details of day-to-day . . . operations and the hiring and direct supervision of employees)," *id.*, at 197, and the Government does not claim that the contractors are federal instrumentalities. *Id.*, at 201; see *Department of Employment* v. *United States*, 385 U. S. 355 (1966). Similarly, the United States disclaims responsibility for torts committed by the contractors' employees, and maintains that such employees have no claim against the United States for labor-related grievances. See 624 F. 2d 111, 116–117, n. 6 (CA10 1980).

Finally, and most importantly, the contracts use a so-called "advanced funding" procedure to meet contractor costs. Advanced funding, an accounting device developed shortly after the conclusion of the Manhattan Project, is designed to provide "up-to-date meaningful records of costs and controls of property," as well as to "speed up reimbursement of contrac-

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[5] Sandia must obtain written approval before advancing suppliers or subcontractors more than $15,000, *id.*, at 31, and must obtain written approval before entering into any "procurement transaction" involving more than $100,000. *Id.*, at 36.

tors." App. 204 (Fifth Semiannual Report of the Atomic Energy Commission (1949)). The procedure allows contractors to pay creditors and employees with drafts drawn on a special bank account in which United States Treasury funds are deposited.[6]

To put the advanced funding mechanism in place, the United States, the contractor, and a bank establish a designated bank account, pursuant to a three-party contract. The Government dispatches a letter of credit to a Federal Reserve Bank in favor of the contractor, making Treasury funds available in the designated account. The contractor pays its expenses by drawing on the account, at which time the bank or the contractor executes a payment voucher in an amount sufficient to cover the draft. The voucher is forwarded to the Federal Reserve Bank. The United States owns the account balance. See *id.*, at 19–20, 84–90a, 109–113. As a result of all this, only federal funds are expended when the contractor makes purchases. If the Government fails to provide funding, the contractor is excused from performance of the contract, and the Government is liable for all properly incurred claims.

Prior to July 1, 1977, the Government's contracts with Sandia, Zia, and LACI did not refer to the contractors as federal "agents." On that date—some two years *after* the commencement of this litigation—the agreements were modified to state that each contractor "acts as an agent [of the Government] . . . for certain purposes," including the disbursement of Government funds and the "purchase, lease, or other acquisition" of property. *Id.*, at 50–51, 55–56, 59–60. This was designed to recognize what was described as the "longstanding agency status and authority" of the contractors. *Id.*, at 50, 55, 59. Thus it was made clear that Sandia and

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[6] Advanced funding may be used whenever the program involved requires "advances to finance the recipient organization's activities," 31 CFR § 205.2(a) (1981). Recipients may include "any State and local government." § 205.3(a).

Zia were authorized to "pledge the credit of the United States," *id.*, at 52 and 56, and the Government declared that it "considers all obligations properly incurred" in accordance with the contractual provisions to be Government obligations "from their inception." *Id.*, at 52 (Sandia), 56 (Zia), and 60 (LACI). At the same time, however, the United States denied any intent "formally and directly [to] designat[e] the contractors as agents," *id.*, at 64, and each modification stated that it did not "create rights or obligations not otherwise provided for in the contract." *Id.*, at 52, 57, 61.

B

New Mexico imposes a gross receipts tax and a compensating use tax on those doing business within the State. With limited exceptions, "[f]or the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico." N. M. Stat. Ann. § 72–16A–4 (Supp. 1975).[7] In effect, the gross receipts tax operates as a tax on the sale of goods and services. The State also levies a compensating use tax, equivalent in amount to the gross receipts tax, "[f]or the privilege of using property in New Mexico." § 72–16A–7. This is imposed on property acquired out-of-state in a "transaction that would have been subject to the gross receipts tax had it occurred within [New Mexico]." § 72–16A–7(A)(2).[8] Thus the compensating use tax functions

[7] Since the initiation of this litigation the New Mexico tax statutes have been amended, and are now found at N. M. Stat. Ann. §§ 7–9–1 through 7–9–81 (1978). While the tax rate has been lowered to 3.5%, no other substantive change, pertinent here, has been made. For consistency, and to conform to the pleadings and primary references in the briefs, citations herein are to the old codification.

[8] The statute also has a catchall provision, imposing the compensating use tax on property acquired in any transaction that was not initially subject to tax "but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax." N. M. Stat. Ann. § 72–16A–7(A)(3) (Supp. 1975).

as an enforcement mechanism for the gross receipts tax by imposing a levy on the use of all property that has not already been taxed; the State collects the same percentage regardless of where the property is purchased. Neither tax, however, is imposed on the "receipts of the United States or any agency or instrumentality thereof," or on the "use of property by the United States or any agency or instrumentality thereof." §§ 72-16A-12.1, 72-16A-12.2.

Without objection, Zia and LACI each year paid the New Mexico gross receipts tax on the fixed fees they received from the Federal Government. But the Government argued that the contractors' other expenditures and operations are constitutionally immune from state taxation. In July 1975 the United States therefore initiated this suit in the United States District Court for the District of New Mexico, seeking a declaratory judgment that advanced funds are not taxable gross receipts to the contractors; that the receipts of vendors selling tangible property to the United States through the contractors cannot be taxed by the State; and that the use of Government-owned property by the contractors is not subject to the State's compensating use tax. App. 11-12.[9]

The District Court granted the United States summary judgment. Relying on *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 (1954), the court determined that the crucial inquiry is whether the contractors are "procurement agents"

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[9] Prior to 1967, the New Mexico Bureau of Revenue did not attempt to tax the contractors. In that year, the State sought to impose gross receipts and compensating use taxes on Zia and LACI for the period January 1, 1966, through June 30, 1967. The United States challenged the assessment, and the New Mexico Court of Appeals held that the State Commissioner of Revenue was estopped from assessing the taxes for the period in question. *United States* v. *Bureau of Revenue*, 87 N. M. 164, 531 P. 2d 212 (App. 1975). One judge, specially concurring, concluded that even if estoppel was unavailable, the taxes could not be imposed. *Id.*, at 166, 531 P. 2d, at 214. The New Mexico court did not address the constitutional validity of the tax.

for the Government. The court answered that question in the affirmative, noting that the Government "maintains control over the contractors' procurement systems, property management and disposal practices, method of payment of operational costs, and other operations under the contracts." 455 F. Supp. 993, 997 (1978). That analysis led the court to identify an agency relationship existing even in the years prior to the 1977 contract modifications. *Ibid.* The court therefore held that the gross receipts tax cannot constitutionally be applied to purchases by the contractors; because the court viewed the compensating use tax as a correlative of the receipts tax, it determined that the use tax also was invalid as applied to Sandia, Zia, and LACI. *Id.*, at 998. Finally, the court ruled that advanced funds do not serve as compensation to the contractors, and therefore cannot be taxed as gross receipts. *Id.*, at 998–999.

The United States Court of Appeals for the Tenth Circuit reversed. 624 F. 2d 111 (1980). In its view, this Court's decisions in the tax immunity area have been "more concerned with preserving the delicate financial balance between our co-existing sovereignties than with rigid adherence to agency law terminology." *Id.*, at 116. Advanced funding, the court declared, "is simply another means of reimbursement devised by accountants to eliminate major weaknesses in the government's bookkeeping practices." *Id.*, at 119. In meeting overhead and salaries with Government funds, the contractors were satisfying their own obligations, and they exercised dominion over the funds by issuing drafts to obligees. And insofar as the claims of third-party vendors are concerned, the court found federal "responsibility for properly incurred claims to be inherent in all cost-type contracts," *id.*, at 119, n. 9; any number of businesses act under letters of credit from banks and other sureties, and the Federal Government itself finances a variety of organizations—incleding States and local governments—in such a manner.

The other contractual provisions relied on by the District Court—federal control over procurement systems, management practices, and the like—failed to impress the Court of Appeals. It concluded that the Government-contractor relationship, viewed as a whole, did not "'so incorporat[e] [the contractors] into the government structure as to [make them] instrumentalities of the United States . . . .'" *Id.*, at 118, quoting *United States* v. *Boyd*, 378 U. S. 39, 48 (1964). And that Sandia received no fee for its services was of little consequence, in the court's view, because "decisions on the amount of fee, if any, to be paid a government contractor are not made primarily with agency consequences in mind." 624 F. 2d, at 120. Since the 1977 contractual amendments by their terms added nothing of substance to the agreements, they did not affect the court's analysis. The District Court was directed to enter summary judgment for New Mexico. *Id.*, at 121.

The United States sought certiorari, and we granted the writ to consider the seemingly intractable problems posed by state taxation of federal contractors. 450 U. S. 909 (1981).

II

A

With the famous declaration that "the power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 4 Wheat. 316, 431 (1819), Chief Justice Marshall announced for the Court the doctrine of federal immunity from state taxation. In so doing he introduced the Court to what has become a "much litigated and often confused field," *United States* v. *City of Detroit*, 355 U. S. 466, 473 (1958), one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.

McCulloch itself relied on generalized notions of federal supremacy to invalidate a state tax on the Second Bank of the

United States. The Court gave broad scope to state power: the opinion declined to "deprive the States of any resources which they originally possessed. It does not extend to . . . a tax imposed on the interest which the citizens of Maryland may hold in [the Bank], in common with other property of the same description throughout the State." 4 Wheat., at 436. Not long afterwards, however, Chief Justice Marshall, speaking for the Court, seemingly disregarded the *McCulloch* dictum in striking down a state tax on interest income from federal bonds, explaining that such levies cannot constitutionally fall on an "operation essential to the important objects for which the government was created." *Weston* v. *City Council of Charleston*, 2 Pet. 449, 467 (1829). During the following century the Court took to heart *Weston*'s expansive analysis of federal tax immunity, invalidating, among many others, state taxes on the income of federal employees, *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842); on income derived from property leased from the Federal Government, *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922); and on sales to the United States, *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218 (1928).[10]

These decisions, it has been said, were increasingly divorced both from the constitutional foundations of the immunity doctrine and from "the actual workings of our federalism," *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 490 (1939) (Frankfurter, J., concurring), and in *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), by a 5–4 vote, the Court marked a major change in course. Over the dissent's

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[10] It is in the case last cited that Justice Holmes in dissent, joined by Justice Brandeis and Justice Stone, countered the great Chief Justice's observation with other well-known words: "The power to tax is not the power to destroy while this Court sits." 277 U. S., at 223. Justice Frankfurter, concurring, in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 490 (1939), observed: "The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen."

justifiable objections that it was "overrul[ing], *sub silentio*, a century of precedents," *id.*, at 161, the Court upheld a state tax on the gross receipts of a contractor providing services to the Federal Government:

> "'[I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.'" *Id.*, at 150, quoting *Willcuts* v. *Bunn*, 282 U. S. 216, 225 (1931).

The Court's more recent cases involving federal contractors generally have hewed to the *James* analysis. *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), upheld a state tax on sales to a federal contractor, overruling *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, *supra*. Decisions such as *United States* v. *City of Detroit*, *supra*, have validated state use taxes on private entities holding federal property.

Even the Court's post-*James* decisions, however, cannot be set in an entirely unwavering line. *United States* v. *Allegheny County*, 322 U. S. 174 (1944), invalidated a state property tax that included in the assessment the value of federal machinery held by a private party; 14 years later that decision in large part was overruled by *United States* v. *City of Detroit*, *supra*. See *United States* v. *County of Fresno*, 429 U. S. 452, 462–463, n. 10 (1977). In *Livingston* v. *United States*, 364 U. S. 281 (1960), summarily aff'g 179 F. Supp. 9 (EDSC 1959), the Court, without opinion or citation, approved the invalidation of a state use tax as applied to a federal contractor. Yet *United States* v. *Boyd*, *supra*, upheld a virtually identical state tax, seemingly confining *Livingston* to its "extraordinary" facts. 378 U. S., at 45, n. 6.

Similarly, the decisions fail to speak with one voice on the relevance of traditional agency rules in determining the tax-

immunity status of federal contractors. Thus, *Alabama* v. *King & Boozer, supra,* declined to find immunity in part because the contractors involved lacked the "status of agents," 314 U. S., at 13, and *United States* v. *Township of Muskegon,* 355 U. S. 484, 486 (1958), upheld a use tax on a federal contractor with the caveat that the "case might well be different if [the contractor] . . . could properly be called a 'servant' of the United States in agency terms." See *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110 (1954). Yet *James* v. *Dravo Contracting Co., supra,* stated flatly that tax immunity is not dependent "'upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents.'" 302 U. S., at 154, quoting *Railroad Co.* v. *Peniston,* 18 Wall. 5, 36 (1873) (plurality opinion). And *United States* v. *Boyd, supra,* rejected the Government's argument that its contractors were federal agents and therefore tax immune, stating simply that the private entities were not "instrumentalities of the United States." 378 U. S., at 48.

B

We have concluded that the confusing nature of our precedents counsels a return to the underlying constitutional principle. The one constant here, of course, is simple enough to express: a State may not, consistent with the Supremacy Clause, U. S. Const., Art. VI, cl. 2, lay a tax "directly upon the United States." *Mayo* v. *United States,* 319 U. S. 441, 447 (1943). While "[o]ne could, and perhaps should, read *M'Culloch* . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality," *First Agricultural Bank* v. *State Tax Comm'n,* 392 U. S. 339, 350 (1968) (dissenting opinion), the Court has never questioned the propriety of absolute federal immunity from state taxation. And after 160 years, the doctrine has gathered "a momentum of authority that reflects, if not a detailed exposition of considerations of policy demanded by our federal system, certainly a deep instinct

that there are such considerations . . . ." *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 503–504 (1958) (opinion of Frankfurter, J.).

But the limits on the immunity doctrine are, for present purposes, as significant as the rule itself. Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. That is the import of *Alabama* v. *King & Boozer*, where a sales tax was imposed on the gross receipts of a vendor selling to a cost-plus Government contractor. The Court found it constitutionally irrelevant that the United States reimbursed all the contractor's expenditures, including those going to meet the tax: the Government's right to be free from state taxation "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." 314 U. S., at 9. That the contractor is purchasing property for the Government is similarly irrelevant; in *King & Boozer*, title to goods purchased by the contractor vested in the United States immediately upon shipment by the seller. *Id.*, at 13.

Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. *James* v. *Dravo Contracting Co.*, *supra*. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, *United States* v. *City of Detroit*, *supra*, even if the private entity is using the Government property to provide the United States with goods, *United States* v. *Township of Muskegon*, *supra*; *City of Detroit* v. *Murray Corp.*, *supra*, or services, *Curry* v. *United States*, 314 U. S. 14 (1941); *United States* v. *Boyd*, *supra*. In such a situation the contractor's use of the property "in connection with commercial activities carried on for

profit," is "a separate and distinct taxable activity." *United States* v. *Boyd*, 378 U. S., at 44. Indeed, immunity cannot be conferred simply because the tax is paid with Government funds; that was apparently the case in *Boyd*, where the contractor made expenditures under an advanced funding arrangement similar to the one involved here. *Id.*, at 41.

What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling "clashing sovereignty," *McCulloch* v. *Maryland*, 4 Wheat., at 430, by preventing the States from laying demands directly on the Federal Government. See *City of Detroit* v. *Murray Corp.*, 355 U. S., at 504–505 (opinion of Frankfurter, J.). As the federal structure—along with the workings of the tax immunity doctrine[11]—has evolved, this command has taken on essentially symbolic importance, as the visible "consequence of that [federal] supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat., at 436. At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives,

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[11] With the abandonment of the notion that the economic—as opposed to the legal—incidence of the tax is relevant, it becomes difficult to maintain that federal tax immunity is designed to insulate federal operations from the effects of state taxation. It remains true, of course, that state taxes on contractors are constitutionally invalid if they discriminate against the Federal Government, or substantially interfere with its activities. See *United States* v. *County of Fresno*, 429 U. S. 452, 463, n. 11, 464 (1977); *Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S. 744 (1961); *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 495 (1958). New Mexico, however, is not discriminating here.

by giving full range to each sovereign's taxing authority. See *Graves* v. *New York ex rel. O'Keefe*, 306 U. S., at 483.

Thus, a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." *City of Detroit* v. *Murray Corp.*, 355 U. S., at 503 (opinion of Frankfurter, J.). That conclusion is compelled by the Court's principal decisions exploring the nature of the Constitution's immunity guarantee. Chief Justice Hughes' opinion for the Court in *James*, which set the doctrine on its modern course, suggested that a state tax is impermissible when the taxed entity is "so intimately connected with the exercise of a power or the performance of a duty" by the Government that taxation of it would be "'a direct interference with the functions of government itself.'" 302 U. S., at 157, quoting *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524 (1926). And the point is settled by *Boyd*, the Court's most recent decision in the field. There, the Government argued that its contractors were tax-exempt because they were federal agents. Without any discussion of traditional agency rules the Court rejected that suggestion out-of-hand, declaring that "we cannot believe that [the contractors are] 'so assimilated by the Government as to become one of its constituent parts.'" 378 U. S., at 47, quoting *United States* v. *Township of Muskegon*, 355 U. S., at 486. And the Court continued:

> "Should the [Atomic Energy] Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that [the contractors], both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity." 378 U. S., at 48.

The Court's other cases describing the nature of a federal instrumentality have used similar language: "virtually . . . an

arm of the Government," *Department of Employment* v. *United States*, 385 U. S., at 359–360; "integral parts of [a governmental department]," and "arms of the Government deemed by it essential for the performance of governmental functions," *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 485 (1942).

Granting tax immunity only to entities that have been "incorporated into the government structure" can forestall, at least to a degree, some of the manipulation and wooden formalism that occasionally have marked tax litigation—and that have no proper place in determining the allocation of power between co-existing sovereignties. In this case, for example, the Government and its contractors modified their agreements two years into the litigation in an obvious attempt to strengthen the case for nonliability. Yet the Government resists using its own employees for the tasks at hand—or, indeed, even formally designating Sandia, Zia, and LACI as agents—because it seeks to tap the expertise of industry, without subjecting its contractors to burdensome federal procurement regulations. See Hiestand & Florsheim, at 81; App. 182–184. Instead, the Government earnestly argues that its contractors are entitled to tax immunity because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement. Brief for United States 32–35. We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows "any government functionary to draw the constitutional line by changing a few words in a contract." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S., at 126 (dissenting opinion).

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. *James* v. *Dravo Contracting Co.*, 302 U. S., at 161; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 234 (1952). And this allocation of responsibility is wholly

appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts* v. *United States*, 435 U. S. 444, 456 (1978) (plurality opinion). See *United States* v. *City of Detroit*, 355 U. S., at 474. But absent congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate." *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 293 (1976).

III

It remains to apply these principles to the Sandia, Zia, and LACI contracts. The Government concedes that the legal incidence of the gross receipts and use taxes falls on the contractors, Brief for United States 25, and we do not disagree. See *United States* v. *New Mexico*, 581 F. 2d 803, 806 (CA10 1978). The issue, then, is whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself.

So far as the use tax is concerned, *United States* v. *Boyd*, *supra*, controls this case. The contracts at issue in *Boyd* were standard AEC management contracts, in all relevant respects identical to the ones here. The contractors performed maintenance and construction work at Government facilities, under the general direction of the Government. They procured materials, and paid for the goods with Government funds under an advanced funding arrangement; title passed directly from the vendor to the United States. The contractors owned none of the property involved, and received a fixed annual fee. Indeed, one of the contractor's purchase orders stated that it made purchases "for and on behalf of the Government." 378 U. S., at 42, n. 4. And the Tennessee use tax did not differ in any significant way from the use tax now before us.[12]

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[12] The Government advances only one ground for distinguishing *Boyd*; it contends that the Tennessee use tax was a "privilege-type use tax," while

As noted above, the Government argued that this close contractual relationship made the contractors federal agents, and therefore tax immune. Yet the Court had no difficulty upholding the application of the Tennessee tax, concluding that "'[t]he vital thing' is that [the contractors are] 'using the property in connection with [their] own commercial activities.'" *Id.*, at 45, quoting *United States* v. *Township of Muskegon*, 355 U. S., at 486. That the federal property involved was being used for the Government's benefit—something that by definition will be true in virtually every management contract—was irrelevant, for the contractors remained distinct entities pursuing "private ends," and their actions remained "commercial activities carried on for profit." 378 U. S., at 44. For that reason, the contractors

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New Mexico's is a "compensating use tax." Brief for United States 25, 39, n. 15; Reply Brief for United States 4. As we understand its argument, the Government means to suggest that Tennessee was attempting to tax the privilege of using property, while New Mexico's levy is designed only to enforce its gross receipts tax, and therefore should be analyzed as a sales tax. In our view, this distinction is without substance. The Tennessee tax at issue in *Boyd* imposed a general levy on those "exercising a taxable privilege" by "selling tangible personal property" or "us[ing] or consum[ing] . . . any item or article of tangible personal property," 12 Tenn. Code Ann. § 67–3003 (1963 Cum. Supp.), but the tax was not imposed if the sales or use tax had already been paid. § 67–3003(b). Section 67–3004 specifically applied this tax to the use of property by a contractor "unless such property has been previously subjected to a sales or use tax."

The New Mexico use tax under consideration here operates in precisely the same way. Both taxes in terms reach the *use* of property; both have the effect of serving as enforcement mechanisms for the state sales tax. Both serve to ensure that either the sale or the use of all property in the hands of nonimmune entities will be taxed, no matter where the property is purchased. And both, in terms, tax the privilege of doing business in the State. See N. M. Stat. Ann. § 72–16A–4 (Supp. 1975) (gross receipts tax imposed "[f]or the privilege of engaging in business"; § 72–16A–7 (use tax imposed "[f]or the privilege of using property"). In short, the two taxes have the same "practical operation and effect." *City of Detroit* v. *Murray Corp.*, 355 U. S., at 493.

had not become "instrumentalities" of the United States. *Id.*, at 48.[13]

The same factors are at work here. The tax, the taxed activity, and the contractual relationships do not differ from those involved in *Boyd*. The contractors here are privately owned corporations; "Government officials do not run [their] day-to-day operations nor does the Government have any ownership interest." *First Agricultural Bank* v. *State Tax Comm'n*, 392 U. S., at 354 (dissenting opinion). In contrast to federal employees, then, Sandia and its fellow contractors cannot be termed "constituent parts" of the Federal Government. It is true, of course, that employees are a special type of agent, and like the contractors here employees are paid for their services. But the differences between an employee and one of these contractors are crucial. The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully de-

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[13] The Government argues that the tax here is supported by *Livingston* v. *United States*, 364 U. S. 281 (1960), aff'g 179 F. Supp. 9 (EDSC 1959). There, the Court summarily affirmed the District Court's invalidation of a state sales and use tax, as applied to the purchase and use of property by an AEC contractor. The District Court noted the "extraordinary" nature of the contract involved, *id.*, at 16, finding that the contractor had entered into the agreement entirely as a "contribution to the defense effort." *Id.*, at 17. The contractor received a one dollar fee, and otherwise operated "without hope of gain," *id.*, at 17–18. The District Court found that the research conducted and experience gained by the contractor's employees were unlikely to benefit the corporation. *Id.*, at 23. And the court found that the contractor acted "as the *alter ego* of the [Atomic Energy] Commission." *Id.*, at 18. *Boyd* distinguished *Livingston* by confining it to its "extraordinary" facts, finding crucial "the factual determination that [the *Livingston* contractor] received no benefits from the contract." 378 U. S., at 45, n. 6. *Livingston* is inapplicable here for the same reasons. Zia and LACI, of course, receive fixed fees for their services. Sandia does not receive a cash fee, but it obtains obvious benefits from its contractual relationship with the United States. See *supra*, at 723–724, and n. 3. There has been no suggestion—let alone a finding below—that Sandia and Western Electric entered into the contract for only altruistic reasons.

fined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy.[14]

For similar reasons, the New Mexico gross receipts tax must be upheld as applied to funds received by the contractors to meet salaries and internal costs. Once it is conceded that the contractors are independent taxable entities, it cannot be disputed that their gross income is taxable. This conclusion follows directly from *James* v. *Dravo Contracting Co.*, *supra*, where the Court upheld a state tax reaching "gross amounts received from the United States." 302 U. S., at 137. In any event, incurring obligations to achieve contractual ends is not significantly different from using property for the same purposes. And despite the Government's arguments, the use of advanced funding does not change the analysis. That device is, at heart, an efficient method of reimbursing contractors—something the Government has apparently recognized in contexts other than tax litigation. See App. 31 (Sandia contract), 189 (Ninth Semiannual Report of the Atomic Energy Commission (1951)), 191 (same). If receipt of advanced funding is coextensive with status as a federal instrumentality, virtually every federal contractor is, or could easily become, immune from state taxation.

New Mexico's tax on sales to the contractors presents a more complex problem. So far as the use tax discussed above is concerned, the subject of the levy is the taxed entity's beneficial use of the property involved. See *United States* v. *Boyd*, 378 U. S., at 44. Unless the entity as a whole is one of the Government's "constituent parts," then, a

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[14] While a use tax may be valid only to the extent that it reaches the contractor's interest in Government-owned property, cf. *City of Detroit* v. *Murray Corp.*, 355 U. S., at 494; *United States* v. *Colorado*, 627 F. 2d 217 (CA10 1980), summarily aff'd *sub nom. Jefferson County* v. *United States*, 450 U. S. 901 (1981), there has been no suggestion here that the contractors are being taxed beyond the value of their use.

tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale—in both a real and a symbolic sense—a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure.

Such was the Court's conclusion in *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, a decision on which the Government heavily relies. The contractor in that case identified itself as a federal procurement agent, and when it made purchases title passed directly to the Government; the purchase orders themselves declared that the purchase was made by the Government and that the United States was liable on the sale. Equally as important, the contractor itself was *not* liable for the purchase price, and it required specific Government approval for each transaction. See 347 U. S., at 120–121. And, as the Court emphasized, the statutory procurement scheme envisioned the use of federal purchasing agents. *Id.*, at 114. The Court concluded that a sale to the contractor was in effect a sale to the United States, and therefore not a proper subject for the Arkansas sales tax.[15] As we have noted elsewhere, *Kern-Limerick* "stands only for the proposition that the State may not impose a tax the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno*, 429 U. S., at 459–460, n. 7.

We think it evident that the *Kern-Limerick* principle does not invalidate New Mexico's sales tax as applied to purchases made by the contractors here. Even accepting the Government's representation that it is directly liable to vendors for

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[15] Arkansas did not impose a corresponding use tax, and the Court therefore considered only whether the sale itself was a taxable transaction.

the purchase price, see Tr. of Oral Arg. 42–45,[16] Sandia and Zia nevertheless make purchases in their own names—Sandia, in fact, is contractually obligated to do so, App. 37—and presumably they are themselves liable to the vendors. Vendors are not informed that the Government is the only party with an independent interest in the purchase, as was true in *Kern-Limerick*, and the Government disclaims any formal intention to denominate the contractors as purchasing agents. Similarly, Sandia and Zia need not obtain advance Government approval for each purchase.[17] These factors demonstrate that the contractors have a substantial independent role in making purchases, and that the identity of interests between the Government and the contractors is far from complete. As a result, sales to Zia and Sandia are in neither a real nor a symbolic sense sales to the "United States itself." It is true that title passes directly from the vendor to the Federal Government, but that factor alone cannot make the transaction a purchase by the United States, so long as the purchasing entity, in its role as a purchaser, is sufficiently distinct from the Government. *Alabama* v. *King & Boozer*, 314 U. S., at 13.

There is a final irony in this case. In *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232 (1952), the Court considered a state sales and use tax imposed on AEC management contractors. The terms of the contracts were in most relevant respects identical to the ones here, and insofar as they differed they established an even closer relationship between

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[16] It is not entirely clear that the Government's representation is accurate. See, *e. g.*, *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *United States*, 112 Ct. Cl. 563, 81 F. Supp. 596 (1949) (no contract action against the United States in the Court of Claims absent privity of contract). In light of our conclusion about the significance of other aspects of the contracts, there is no need for us to address this issue.

[17] For Zia and LACI the Government contents itself with an annual review of expenditures, App. 20, 27; for Sandia, it requires advance approval of transactions involving $100,000 or more. *Id.*, at 36.

the Government and the contractors. See Brief for United States, O. T. 1951, Nos. 186 and 187, pp. 8–12. The Court held that in the last sentence of § 9(b) of the Atomic Energy Act of 1946, 60 Stat. 765—which barred state or local taxation of AEC "activities"—Congress had statutorily exempted the contractors from state taxation, because the operations of management contractors were Commission activities. 342 U. S., at 234. Congress responded by repealing the last sentence of § 9(b), Pub. L. 262, 67 Stat. 575, in an attempt to "place the Commission and its activities on the same basis, with respect to immunity from State and local taxation, as other Federal agencies." S. Rep. No. 694, 83d Cong., 1st Sess., 3 (1953). In doing so, Congress endorsed the principle that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States." *Id.*, at 2.

We do not suggest that the repeal of § 9(b) waives the Government's constitutional tax immunity; Congress intended AEC contractors to be shielded by constitutional immunity principles "as interpreted by the courts." S. Rep. No. 694, at 3. But it is worth remarking that DOE is asking us to establish as a constitutional rule something that it was unable to obtain statutorily from Congress. For the reasons set out above, we conclude that the contractors here are not protected by the Constitution's guarantee of federal supremacy. If political or economic considerations suggest that a broader immunity rule is appropriate, "[s]uch complex problems are ones which Congress is best qualified to resolve." *United States* v. *City of Detroit*, 355 U. S., at 474.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

SANTOSKY ET AL. v. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

No. 80-5889. Argued November 10, 1981—Decided March 24, 1982

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." The New York Family Court Act (§ 622) requires that only a "fair preponderance of the evidence" support that finding. Neglect proceedings were brought in Family Court to terminate petitioners' rights as natural parents in their three children. Rejecting petitioners' challenge to the constitutionality of § 622's "fair preponderance of the evidence" standard, the Family Court weighed the evidence under that standard and found permanent neglect. After a subsequent dispositional hearing, the Family Court ruled that the best interests of the children required permanent termination of petitioners' custody. The Appellate Division of the New York Supreme Court affirmed, and the New York Court of Appeals dismissed petitioners' appeal to that court.

Held:

1. Process is constitutionally due a natural parent at a state-initiated parental rights termination proceeding. Pp. 752–757.

(a) The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. Pp. 752–754.

(b) The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the public and

private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The minimum standard is a question of federal law which this Court may resolve. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard. Pp. 754–757.

2. The "fair preponderance of the evidence" standard prescribed by § 622 violates the Due Process Clause of the Fourteenth Amendment. Pp. 758–768.

(a) The balance of private interests affected weighs heavily against use of such a standard in parental rights termination proceedings, since the private interest affected is commanding and the threatened loss is permanent. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. Pp. 758–761.

(b) A preponderance standard does not fairly allocate the risk of an erroneous factfinding between the State and the natural parents. In parental rights termination proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding. Coupled with the preponderance standard, these factors create a significant prospect of erroneous termination of parental rights. A standard of proof that allocates the risk of error nearly equally between an erroneous failure to terminate, which leaves the child in an uneasy status quo, and an erroneous termination, which unnecessarily destroys the natural family, does not reflect properly the relative severity of these two outcomes. Pp. 761–766.

(c) A standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings. Pp. 766–768.

3. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. Pp. 768–770.

75 App. Div. 2d 910, 427 N. Y. S. 2d 319, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a

dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 770.

Martin Guggenheim argued the cause for petitioners. With him on the briefs was *Alan N. Sussman*.

Steven Domenic Scavuzzo argued the cause *pro hac vice* for respondents. With him on the brief was *H. Randall Bixler*. *Wilfrid E. Marrin* and *Frederick J. Magovern* filed a brief for respondents Balogh et al.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." N.Y. Soc. Serv. Law §§ 384–b.4.(d), 384–b.7.(a) (McKinney Supp. 1981–1982) (Soc. Serv. Law). The New York Family Court Act § 622 (McKinney 1975 and Supp. 1981–1982) (Fam. Ct. Act) requires that only a "fair preponderance of the evidence" support that finding. Thus, in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action.

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in

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*Briefs of *amici curiae* urging reversal were filed by *Marcia Robinson Lowry*, *Steven R. Shapiro*, and *Margaret Hayman* for the American Civil Liberties Union Children's Rights Project et al.; and by *Louise Gruner Gans*, *Catherine P. Mitchell*, *Norman Siegel*, *Gary Connor*, and *Daniel Greenberg* for Community Action for Legal Services, Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, and *Lawrence J. Logan* and *Robert J. Schack*, Assistant Attorneys General, for the State of New York; and by *Dave Frohnmayer*, Attorney General, *William F. Gary*, Solicitor General, and *Jan Peter Londahl*, Assistant Attorney General, for the State of Oregon.

their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

I

A

New York authorizes its officials to remove a child temporarily from his or her home if the child appears "neglected," within the meaning of Art. 10 of the Family Court Act. See §§ 1012(f), 1021–1029. Once removed, a child under the age of 18 customarily is placed "in the care of an authorized agency," Soc. Serv. Law § 384–b.7.(a), usually a state institution or a foster home. At that point, "the state's first obligation is to help the family with services to . . . reunite it . . . ." § 384–b.1.(a)(iii). But if convinced that "positive, nurturing parent-child relationships no longer exist," § 384–b.1.(b), the State may initiate "permanent neglect" proceedings to free the child for adoption.

The State bifurcates its permanent neglect proceeding into "fact-finding" and "dispositional" hearings. Fam. Ct. Act §§ 622, 623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam. Ct. Act §§ 614.1.(a)–(d) and Soc. Serv. Law § 384–b.7.(a). See Fam. Ct. Act § 622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. §§ 623, 631.

At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency "made diligent efforts to encourage and strengthen the parental relationship." Fam. Ct. Act §§ 614.1.(c), 611. The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." § 614.1.(d). Should the State support its allegations by "a fair preponderance of the evidence," § 622, the child may be declared permanently ne-

glected. § 611. That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child. §§ 631(c), 634. Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.[1]

New York's permanent neglect statute provides natural parents with certain procedural protections.[2] But New York permits its officials to establish "permanent neglect" with less proof than most States require. Thirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a "fair preponderance of the evidence."[3] The only analogous federal statute of which we are aware

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[1] At oral argument, counsel for petitioners asserted that, in New York, natural parents have no means of restoring terminated parental rights. Tr. of Oral Arg. 9. Counsel for respondent, citing Fam. Ct. Act § 1061, answered that parents may petition the Family Court to vacate or set aside an earlier order on narrow grounds, such as newly discovered evidence or fraud. Tr. of Oral Arg. 26. Counsel for respondent conceded, however, that this statutory provision has never been invoked to set aside a permanent neglect finding. *Id.*, at 27.

[2] Most notably, natural parents have a statutory right to the assistance of counsel and of court-appointed counsel if they are indigent. Fam. Ct. Act § 262.(a)(iii).

[3] Fifteen States, by statute, have required "clear and convincing evidence" or its equivalent. See Alaska Stat. Ann. § 47.10.080(c)(3) (1980); Cal. Civ. Code Ann. § 232(a)(7) (West Supp. 1982); Ga. Code §§ 24A-2201(c), 24A-3201 (1979); Iowa Code § 600A.8 (1981) ("clear and convincing proof"); Me. Rev. Stat. Ann., Tit. 22, § 4055.1.B.(2) (Supp. 1981-1982); Mich. Comp. Laws § 722.25 (Supp. 1981-1982); Mo. Rev. Stat. § 211.447.2(2) (Supp. 1981) ("clear, cogent and convincing evidence"); N. M. Stat. Ann. § 40-7-4.J. (Supp. 1981); N. C. Gen. Stat. § 7A-289.30(e) (1981) ("clear, cogent, and convincing evidence"); Ohio Rev. Code Ann. §§ 2151.35, 2151.414(B) (Page Supp. 1982); R. I. Gen. Laws § 15-7-7(d) (Supp. 1980); Tenn. Code Ann. § 37-246(d) (Supp. 1981); Va. Code § 16.1-283.B (Supp. 1981); W. Va. Code § 49-6-2(c) (1980) ("clear and convincing proof"); Wis. Stat. § 48.31(1) (Supp. 1981-1982).

Fifteen States, the District of Columbia, and the Virgin Islands, by court decision, have required "clear and convincing evidence" or its equivalent. See *Dale County Dept. of Pensions & Security* v. *Robles*, 368 So. 2d 39, 42

permits termination of parental rights solely upon "evidence beyond a reasonable doubt." Indian Child Welfare Act of 1978, Pub. L. 95–608, § 102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. IV). The question here is whether

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(Ala. Civ. App. 1979); *Harper* v. *Caskin*, 265 Ark. 558, 560–561, 580 S. W. 2d 176, 178 (1979); *In re J. S. R.*, 374 A. 2d 860, 864 (D. C. 1977); *Torres* v. *Van Eepoel*, 98 So. 2d 735, 737 (Fla. 1957); *In re Kerns*, 225 Kan. 746, 753, 594 P. 2d 187, 193 (1979); *In re Rosenbloom*, 266 N. W. 2d 888, 889 (Minn. 1978) ("clear and convincing proof"); *In re J. L. B.*, —— Mont. ——, ——, 594 P. 2d 1127, 1136 (1979); *In re Souza*, 204 Neb. 503, 510, 283 N. W. 2d 48, 52 (1979); *J.* v. *M.*, 157 N. J. Super. 478, 489, 385 A. 2d 240, 246 (App. Div. 1978); *In re J. A.*, 283 N. W. 2d 83, 92 (N. D. 1979); *In re Darren Todd H.*, 615 P. 2d 287, 289 (Okla. 1980); *In re William L.*, 477 Pa. 322, 332, 383 A. 2d 1228, 1233, cert. denied *sub nom. Lehman* v. *Lycoming County Children's Services*, 439 U. S. 880 (1978); *In re G. M.*, 596 S. W. 2d 846, 847 (Tex. 1980); *In re Pitts*, 535 P. 2d 1244, 1248 (Utah 1975); *In re Maria*, 15 V. I. 368, 384 (1978); *In re Sego*, 82 Wash. 2d 736, 739, 513 P. 2d 831, 833 (1973) ("clear, cogent, and convincing evidence"); *In re X.*, 607 P. 2d 911, 919 (Wyo. 1980) ("clear and unequivocal").

South Dakota's Supreme Court has required a "clear preponderance" of the evidence in a dependency proceeding. See *In re B. E.*, 287 N. W. 2d 91, 96 (1979). Two States, New Hampshire and Louisiana, have barred parental rights terminations unless the key allegations have been proved beyond a reasonable doubt. See *State* v. *Robert H.*, 118 N. H. 713, 716, 393 A. 2d 1387, 1389 (1978); La. Rev. Stat. Ann. § 13:1603.A (West Supp. 1982). Two States, Illinois and New York, have required clear and convincing evidence, but only in certain types of parental rights termination proceedings. See Ill. Rev. Stat., ch. 37, ¶¶ 705–9(2), (3) (1979), amended by Act of Sept. 11, 1981, 1982 Ill. Laws, P. A. 82–437 (generally requiring a preponderance of the evidence, but requiring clear and convincing evidence to terminate the rights of minor parents and mentally ill or mentally deficient parents); N. Y. Soc. Serv. Law §§ 383–b.3.(g), 384–b–4(c), and 384–b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse).

So far as we are aware, only two federal courts have addressed the issue. Each has held that allegations supporting parental rights termination must be proved by clear and convincing evidence. *Sims* v. *State Dept. of Public Welfare*, 438 F. Supp. 1179, 1194 (SD Tex. 1977), rev'd on other grounds *sub nom. Moore* v. *Sims*, 442 U. S. 415 (1979); *Alsager* v. *District Court of*

New York's "fair preponderance of the evidence" standard is constitutionally sufficient.

B

Petitioners John Santosky II and Annie Santosky are the natural parents of Tina and John III. In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding under Fam. Ct. Act § 1022 and removed Tina from her natural home. About 10 months later, he removed John III and placed him with foster parents. On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate removal was necessary to avoid imminent danger to his life or health.

In October 1978, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children.[4] Petitioners challenged the constitutionality of the "fair preponderance of the evidence" standard specified in Fam. Ct. Act § 622. The Family Court Judge rejected this constitutional challenge, App. 29–30, and weighed the evidence under the statutory standard. While acknowledging that the Santoskys had maintained contact with their children, the judge found those visits "at best superficial and devoid of any real emotional content." *Id.*, at 21. After

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Polk County, 406 F. Supp. 10, 25 (SD Iowa 1975), aff'd on other grounds, 545 F. 2d 1137 (CA8 1976).

[4] Respondent had made an earlier and unsuccessful termination effort in September 1976. After a factfinding hearing, the Family Court Judge dismissed respondent's petition for failure to prove an essential element of Fam. Ct. Act § 614.1.(d). See *In re Santosky*, 89 Misc. 2d 730, 393 N. Y. S. 2d 486 (1977). The New York Supreme Court, Appellate Division, affirmed, finding that "the record as a whole" revealed that petitioners had "substantially planned for the future of the children." *In re John W.*, 63 App. Div. 2d 750, 751, 404 N. Y. S. 2d 717, 719 (1978).

deciding that the agency had made "'diligent efforts' to encourage and strengthen the parental relationship," *id.*, at 30, he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. *Id.*, at 33–37. The judge later held a dispositional hearing and ruled that the best interests of the three children required permanent termination of the Santoskys' custody.[5] *Id.*, at 39.

Petitioners appealed, again contesting the constitutionality of § 622's standard of proof.[6] The New York Supreme Court, Appellate Division, affirmed, holding application of the preponderance-of-the-evidence standard "proper and constitutional." *In re John AA*, 75 App. Div. 2d 910, 427 N. Y. S. 2d 319, 320 (1980). That standard, the court reasoned, "recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . . ." *Ibid.*

The New York Court of Appeals then dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved." App. 55. We granted certiorari to consider petitioners' constitutional claim. 450 U. S. 993 (1981).

II

Last Term, in *Lassiter* v. *Department of Social Services*, 452 U. S. 18 (1981), this Court, by a 5–4 vote, held that the

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[5] Since respondent took custody of Tina, John III, and Jed, the Santoskys have had two other children, James and Jeremy. The State has taken no action to remove these younger children. At oral argument, counsel for respondent replied affirmatively when asked whether he was asserting that petitioners were "unfit to handle the three older ones but not unfit to handle the two younger ones." Tr. of Oral Arg. 24.

[6] Petitioners initially had sought review in the New York Court of Appeals. That court *sua sponte* transferred the appeal to the Appellate Division, Third Department, stating that a direct appeal did not lie because "questions other than the constitutional validity of a statutory provision are involved." App. 50.

Fourteenth Amendment's Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The case casts light, however, on the two central questions here—whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due.

In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." *Id.*, at 37 (first dissenting opinion); see *id.*, at 24–32 (opinion of the Court); *id.*, at 59–60 (STEVENS, J., dissenting). See also *Little* v. *Streater*, 452 U. S. 1, 13 (1981). The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 845 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to

destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[7]

In *Lassiter*, the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. See 452 U. S., at 27–31; *id.*, at 37–48 (first dissenting opinion). But see *id.*, at 59–60 (STEVENS, J., dissenting). While the respective *Lassiter* opinions disputed whether those factors should be weighed against a presumption disfavoring appointed counsel for one not threatened with loss of physical liberty, compare 452 U. S., at 31–32, with *id.*, at 41, and n. 8 (first dissenting opinion), that concern is irrelevant here. Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straightforward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.

In *Addington* v. *Texas*, 441 U. S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to

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[7] We therefore reject respondent's claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest. See Brief for Respondent Kramer 11–18; Tr. of Oral Arg. 38. The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.

'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.*, at 423, quoting *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U. S., at 423. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.*, at 424. See also *In re Winship*, 397 U. S., at 372 (Harlan, J., concurring).

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980). See also *Logan* v. *Zimmerman Brush Co.*, *ante*, at 432. Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has

traditionally been left to the judiciary to resolve." *Woodby* v. *INS*, 385 U. S. 276, 284 (1966).[8] "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington* v. *Texas*, 441 U. S., at 425, quoting *Tippett* v. *Maryland*, 436 F. 2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. dism'd *sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U. S. 355 (1972).

This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington* v. *Texas*, 441 U. S., at 424. Notwithstanding "the state's 'civil labels and good intentions,'" *id.*, at 427, quoting *In re Winship*, 397 U. S., at 365–366, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U. S., at 425, 426. See, *e. g.*, *Addington* v. *Texas*, *supra* (civil commitment); *Woodby* v. *INS*, 385 U. S., at 285 (deportation); *Chaunt* v. *United States*, 364 U. S. 350, 353 (1960) (denaturalization);

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[8] The dissent charges, *post*, at 772, n. 2, that "this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens." As the dissent properly concedes, however, the Court must examine a State's chosen standard to determine whether it satisfies "the constitutional minimum of 'fundamental fairness.'" *Ibid.* See, *e. g.*, *Addington* v. *Texas*, 441 U. S. 418, 427, 433 (1979) (unanimous decision of participating Justices) (Fourteenth Amendment requires at least clear and convincing evidence in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital); *In re Winship*, 397 U. S. 358, 364 (1970) (Due Process Clause of the Fourteenth Amendment protects the accused in state proceeding against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

Schneiderman v. *United States*, 320 U. S. 118, 125, 159 (1943) (denaturalization).

In *Lassiter*, to be sure, the Court held that fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U. S., at 31–32 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper *standard of proof* for a given proceeding. Standards of proof, like other "procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U. S., at 344 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.[9]

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[9] For this reason, we reject the suggestions of respondent and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a "package." See Tr. of Oral Arg. 25, 36, 38. Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the "cumulative effect" of state procedures. In the criminal context, for example, the Court has never assumed that "strict substantive standards or special procedures compensate for a lower burden of proof . . . ." *Post*, at 773. See *In re Winship*, 397 U. S., at 368. Nor has the Court treated appellate review as a curative for an inadequate burden of proof. See *Woodby* v. *INS*, 385 U. S. 276, 282 (1966) ("judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment").

As the dissent points out, "the standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erro-

III

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

A

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg* v. *Kelly*, 397 U. S. 254, 262–263 (1970), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

Lassiter declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property

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neous decisions.'" *Post*, at 785, quoting *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 13 (1979). Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the factfinder. But only the standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" he draws from that information. *In re Winship*, 397 U. S., at 370 (Harlan, J., *concurring*). The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.

right. 452 U. S., at 27, quoting *Stanley* v. *Illinois*, 405 U. S., at 651. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." 452 U. S., at 27.

In government-initiated proceedings to determine juvenile delinquency, *In re Winship*, *supra;* civil commitment, *Addington* v. *Texas*, *supra;* deportation, *Woodby* v. *INS*, *supra;* and denaturalization, *Chaunt* v. *United States*, *supra*, and *Schneiderman* v. *United States*, *supra*, this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof. Yet juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, at least to a degree, are all *reversible* official actions. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. See n. 1, *supra*. Few forms of state action are both so severe and so irreversible.

Thus, the first *Eldridge* factor—the private interest affected—weighs heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them.

The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam. Ct. Act § 614.1.(d). The questions disputed and decided are

what the State did—"made diligent efforts," § 614.1.(c)—and what the natural parents did not do—"maintain contact with or plan for the future of the child." § 614.1.(d). The State marshals an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.[10]

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act § 631 (judge shall make his order "solely on the basis of the best interests of the child," and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.[11] Thus,

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[10] The Family Court Judge in the present case expressly refused to terminate petitioners' parental rights on a "non-statutory, no-fault basis." App. 22–29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,'" quoting *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (1977) (Stewart, J., concurring in judgment)).

[11] For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever." *In re K. S.*, 33 Colo. App. 72, 76, 515 P. 2d 130, 133 (1973).

Some losses cannot be measured. In this case, for example, Jed Santosky was removed from his natural parents' custody when he was only

at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

However substantial the foster parents' interests may be, cf. *Smith* v. *Organization of Foster Families*, 431 U. S., at 845–847, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding. Fam. Ct. Act § 1055(d); Soc. Serv. Law § 384–6.3(b), 392.7.(c). Alternatively, the foster parents can make their case for custody at the dispositional stage of a state-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child's best interests. Fam. Ct. Act §§ 623, 631. For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections.

B

Under *Mathews* v. *Eldridge*, we next must consider both the risk of erroneous deprivation of private interests resulting from use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce that risk. See 424 U. S., at 335. Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties.

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three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that Jed would ever know his natural parents.

In New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. Cf. *Lassiter* v. *Department of Social Services*, 452 U. S., at 42–44 (first dissenting opinion); *Meltzer* v. *C. Buck LeCraw & Co.*, 402 U. S. 954, 959 (1971) (Black, J., dissenting from denial of certiorari). See also dissenting opinion, *post*, at 777–779 (describing procedures employed at factfinding proceeding). The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. Fam. Ct. Act §§ 614, 616, 617. The factfinding hearing is conducted pursuant to formal rules of evidence. § 624. The State, the parents, and the child are all represented by counsel. §§ 249, 262. The State seeks to establish a series of historical facts about the intensity of its agency's efforts to reunite the family, the infrequency and insubstantiality of the parents' contacts with their child, and the parents' inability or unwillingness to formulate a plan for the child's future. The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the State has proved the statutory elements of permanent neglect by a fair preponderance of the evidence. § 622.

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith* v. *Organization of Foster Families*, 431 U. S., at 835, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent.[11]

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[11] For example, a New York court appraising an agency's "diligent efforts" to provide the parents with social services can excuse efforts *not* made on the grounds that they would have been "detrimental to the best interests of the child." Fam. Ct. Act § 614.1.(c). In determining whether

Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.*, at 833–835, such proceedings are often vulnerable to judgments based on cultural or class bias.

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.[13]

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the parent "substantially and continuously or repeatedly" failed to "maintain contact with . . . the child," § 614.1.(d), the judge can discount actual visits or communications on the grounds that they were insubstantial or "overtly demonstrat[ed] a lack of affectionate and concerned parenthood." Soc. Serv. Law § 384–b.7.(b). When determining whether the parent planned for the child's future, the judge can reject as unrealistic plans based on overly optimistic estimates of physical or financial ability. § 384–b.7.(c). See also dissenting opinion, *post*, at 779–780, nn. 8 and 9.

[13] In this case, for example, the parents claim that the State sought court orders denying them the right to visit their children, which would have prevented them from maintaining the contact required by Fam. Ct. Act. § 614.1.(d). See Brief for Petitioners 9. The parents further claim that the State cited their rejection of social services they found offensive or superfluous as proof of the agency's "diligent efforts" and their own "failure to plan" for the children's future. *Id.*, at 10–11.

We need not accept these statements as true to recognize that the State's unusual ability to structure the evidence increases the risk of an erroneous factfinding. Of course, the disparity between the litigants' re-

The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here, see n. 4, *supra*, it always can try once again to cut off the parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Coupled with a "fair preponderance of the evidence" standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. See *In re Winship*, 397 U. S., at 371, n. 3 (Harlan, J., concurring). Given the weight of the private interests at stake, the social cost of even occasional error is sizable.

Raising the standard of proof would have both practical and symbolic consequences. Cf. *Addington* v. *Texas*, 441 U. S., at 426. The Court has long considered the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U. S., at 363. An elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Addington* v. *Texas*, 441 U. S., at 427. "Increasing the burden of proof is one way to impress the factfinder with the im-

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sources will be vastly greater in States where there is no statutory right to court-appointed counsel. See *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 34 (1981) (only 33 States and the District of Columbia provide that right by statute).

portance of the decision and thereby perhaps to reduce the chances that inappropriate" terminations will be ordered. *Ibid.*

The Appellate Division approved New York's preponderance standard on the ground that it properly "balanced rights possessed by the child . . . with those of the natural parents. . . ." 75 App. Div. 2d, at 910, 427 N. Y. S. 2d, at 320. By so saying, the court suggested that a preponderance standard properly allocates the risk of error *between* the parents and the child.[14] That view is fundamentally mistaken.

The court's theory assumes that termination of the natural parents' rights invariably will benefit the child.[15] Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. Cf. *In re Winship*, 397 U. S., at 371 (Harlan, J., concurring). For the child, the likely consequence of an erroneous failure to terminate is preservation of

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[14] The dissent makes a similar claim. See *post*, at 786–791.

[15] This is a hazardous assumption at best. Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. See, *e. g.*, Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 993 (1975) ("In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention").

Nor does termination of parental rights necessarily ensure adoption. See Brief for Community Action for Legal Services, Inc., et al. as *Amici Curiae* 22–23. Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and "temporary" foster placements after his ties to his natural parents have been severed. See *Smith* v. *Organization of Foster Families*, 431 U. S., at 833–838 (describing the "limbo" of the New York foster care system).

an uneasy status quo.[16] For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

C

Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" at the *factfinding* proceeding. *Lassiter* v. *Department of Social Services*, 452 U. S., at 27. As *parens patriae*, the State's goal is to provide the child with a permanent home. See Soc. Serv. Law § 384–b.1.(a)(i) (statement of legislative findings and intent). Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not

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[16] When the termination proceeding occurs, the child is not living at his natural home. A child cannot be adjudicated "permanently neglected" until, "for a period of more than one year," he has been in "the care of an authorized agency." Soc. Serv. Law § 384–b.7.(a); Fam. Ct. Act § 614.1.(d). See also dissenting opinion, *post*, at 789–790.

Under New York law, a judge has ample discretion to ensure that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment. In this case, when the State's initial termination effort failed for lack of proof, see n. 4, *supra*, the court simply issued orders under Fam. Ct. Act § 1055(b) extending the period of the child's foster home placement. See App. 19–20. See also Fam. Ct. Act § 632(b) (when State's permanent neglect petition is dismissed for insufficient evidence, judge retains jurisdiction to reconsider underlying orders of placement); § 633 (judge may suspend judgment at dispositional hearing for an additional year).

severance, of natural familial bonds.[17] § 384–b.1.(a)(ii). "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley* v. *Illinois*, 405 U. S., at 652.

The State's interest in finding the child an alternative permanent home arises only "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child." Soc. Serv. Law § 384–b.1.(a)(iv) (emphasis added). At the factfinding, that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

Unlike a constitutional requirement of hearings, see, *e. g.*, *Mathews* v. *Eldridge*, 424 U. S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings. See n. 3, *supra*.

Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders. New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See Soc. Serv. Law §§ 384–b.3.(g), 384–b.4.(c), and 384–b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse). New York also demands at least clear and convincing evidence in proceedings of far less moment than parental rights termination proceedings. See, *e. g.*, N. Y. Veh. & Traf. Law § 227.1 (McKinney Supp. 1981) (requiring the State to prove traffic

[17] Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, *after* the parents have been found unfit.

infractions by "clear and convincing evidence") and *In re Rosenthal* v. *Hartnett*, 36 N. Y. 2d 269, 326 N. E. 2d 811 (1975); see also *Ross* v. *Food Specialties, Inc.*, 6 N. Y. 2d 336, 341, 160 N. E. 2d 618, 620 (1959) (requiring "clear, positive and convincing evidence" for contract reformation). We cannot believe that it would burden the State unduly to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license.

IV

The logical conclusion of this balancing process is that the "fair preponderance of the evidence" standard prescribed by Fam. Ct. Act § 622 violates the Due Process Clause of the Fourteenth Amendment.[18] The Court noted in *Addington:* "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U. S., at 427. Thus, at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable. The next question, then, is whether a "beyond a reasonable doubt" or a "clear and convincing" standard is constitutionally mandated.

In *Addington*, the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons—because of our hesitation to apply that unique standard "too broadly or casually in noncriminal cases," *id.*, at 428, and because the psychiatric evidence ordinarily adduced at commitment proceedings is

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[18] The dissent's claim that today's decision "will inevitably lead to the federalization of family law," *post*, at 773, is, of course, vastly overstated. As the dissent properly notes, the Court's duty to "refrai[n] from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state statutes." *Post*, at 771.

rarely susceptible to proof beyond a reasonable doubt. *Id.*, at 429–430, 432–433. To be sure, as has been noted above, in the Indian Child Welfare Act of 1978, Pub. L. 95–608, §102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. IV), Congress requires "evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty . . . ." H. R. Rep. No. 95–1386, p. 22 (1978). Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings.

Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress. Cf. *Lassiter* v. *Department of Social Services*, 452 U. S., at 30; *id.*, at 44–46 (first dissenting opinion) (describing issues raised in state termination proceedings). The substantive standards applied vary from State to State. Although Congress found a "beyond a reasonable doubt" standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.

A majority of the States have concluded that a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. See n. 3, *supra*. We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard

is a matter of state law properly left to state legislatures and state courts. Cf. *Addington* v. *Texas*, 441 U. S., at 433.

We, of course, express no view on the merits of petitioners' claims.[19] At a hearing conducted under a constitutionally proper standard, they may or may not prevail. Without deciding the outcome under any of the standards we have approved, we vacate the judgment of the Appellate Division and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body politic. But today's decision certainly moves us in that direction. By parsing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal-court intrusion into every facet of state family law. If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic,"[1] it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with "fundamental fairness" whenever its actions infringe their protected liberty or property interests. By adoption of the procedures relevant to this case, New

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[19] Unlike the dissent, we carefully refrain from accepting as the "facts of this case" findings that are not part of the record and that have been found only to be more likely true than not.

[1] *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921).

York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme "fundamentally fair."

I

State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.

Throughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States* v. *Yazell*, 382 U. S. 341, 352 (1966). This is not to say that the Court should blink at clear constitutional violations in state statutes, but rather that in this area, of all areas, "substantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals." *Mathews* v. *Eldridge*, 424 U. S. 319, 349 (1976).

This case presents a classic occasion for such solicitude. As will be seen more fully in the next part, New York has enacted a comprehensive plan to *aid* marginal parents in regaining the custody of their child. The central purpose of the New York plan is to reunite divided families. Adoption of the preponderance-of-the-evidence standard represents New York's good-faith effort to balance the interest of par-

ents against the legitimate interests of the child and the State. These earnest efforts by state officials should be given weight in the Court's application of due process principles. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kan. & Tex. R. Co.* v. *May*, 194 U. S. 267, 270 (1904).[2]

The majority may believe that it is adopting a relatively unobtrusive means of ensuring that termination proceedings provide "due process of law." In fact, however, fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes. By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof. A state law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be ac-

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[2] The majority asserts that "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.' *Woodby* v. *INS*, 385 U. S. 276, 284 (1966)." *Ante*, at 755–756. To the extent that the majority seeks, by this statement, to place upon the federal judiciary the primary responsibility for deciding the appropriate standard of proof in state matters, it arrogates to itself a responsibility wholly at odds with the allocation of authority in our federalist system and wholly unsupported by the prior decisions of this Court. In *Woodby* v. *INS*, 385 U. S. 276 (1966), the Court determined the proper standard of proof to be applied under a *federal* statute, and did so only after concluding that "Congress ha[d] not addressed itself to the question of what degree of proof [was] required in deportation proceedings." *Id.*, at 284. Beyond an examination for the constitutional minimum of "fundamental fairness"—which clearly is satisfied by the New York procedures at issue in this case—this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens.

ceptable to the majority if it provided no procedures other than one 30-minute hearing. Similarly, the majority probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (1977) (Stewart, J., concurring in judgment).

After fixing the standard of proof, therefore, the majority will be forced to evaluate other aspects of termination proceedings with reference to that point. Having in this case abandoned evaluation of the overall effect of a scheme, and with it the possibility of finding that strict substantive standards or special procedures compensate for a lower burden of proof, the majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation. As will be seen in the next part, no clear constitutional violation has occurred in this case.

II

As the majority opinion notes, petitioners are the parents of five children, three of whom were removed from petitioners' care on or before August 22, 1974. During the next four and one-half years, those three children were in the custody of the State and in the care of foster homes or institutions, and the State was diligently engaged in efforts to prepare petitioners for the children's return. Those efforts were un-

successful, however, and on April 10, 1979, the New York Family Court for Ulster County terminated petitioners' parental rights as to the three children removed in 1974 or earlier. This termination was preceded by a judicial finding that petitioners had failed to plan for the return and future of their children, a statutory category of permanent neglect. Petitioners now contend, and the Court today holds, that they were denied due process of law, not because of a general inadequacy of procedural protections, but simply because the finding of permanent neglect was made on the basis of a preponderance of the evidence adduced at the termination hearing.

It is well settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U. S. 564, 569 (1972). In determining whether such liberty or property interests are implicated by a particular government action, "we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.*, at 571 (emphasis in original). I do not disagree with the majority's conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. See *Smith* v. *Organization of Foster Families*, *supra*, at 862–863 (Stewart, J., concurring in judgment). "Once it is determined that due process applies, [however,] the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). It is the majority's answer to this question with which I disagree.

A

Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, "not all situations calling for

procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer*, *supra*, at 481. See also *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979); *Mathews* v. *Eldridge*, 424 U. S., at 334; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.

Given this flexibility, it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. As we have stated before, courts must consider "the fairness and reliability of the existing . . . procedures" before holding that the Constitution requires more. *Mathews* v. *Eldridge*, *supra*, at 343. Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."[3] In some instances, the Court has even looked to nonprocedural restraints on official action in determining whether the deprivation of a protected interest was effected without due process of law. *E. g.*, *Ingraham* v.

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[3] Although, as the majority states, we have held that the minimum requirements of procedural due process are a question of federal law, such a holding does not mean that the procedural protections afforded by a State will be inadequate under the Fourteenth Amendment. It means simply that the adequacy of the state-provided process is to be judged by constitutional standards—standards which the majority itself equates to "fundamental fairness." *Ante*, at 754. I differ, therefore, not with the majority's statement that the requirements of due process present a federal question, but with its apparent assumption that the presence of "fundamental fairness" can be ascertained by an examination which completely disregards the plethora of protective procedures accorded parents by New York law.

Wright, 430 U. S. 651 (1977). In this case, it is just such a broad look at the New York scheme which reveals its fundamental fairness.[4]

The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court. N. Y. Soc. Serv. Law (SSL) § 384–b.3.(d) (McKinney Supp. 1981–1982). Before a petition for permanent termination can be filed in that court, however, several other events must first occur.

The Family Court has jurisdiction only over those children who are in the care of an authorized agency. N. Y. Family Court Act (FCA) § 614.1.(b) (McKinney 1975 and Supp. 1981–1982). Therefore, the children who are the subject of a termination petition must previously have been removed from their parents' home on a temporary basis. Temporary removal of a child can occur in one of two ways. The parents may consent to the removal, FCA § 1021, or, as occurred in this case, the Family Court can order the removal pursuant to a finding that the child is abused or neglected.[5] FCA §§ 1051, 1052.

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[4] The majority refuses to consider New York's procedure as a whole, stating that "[t]he statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." *Ante*, at 758, n. 9. Implicit in this statement is the conclusion that the risk of error may be reduced to constitutionally tolerable levels only by raising the standard of proof—that other procedures can never eliminate "undue uncertainty" so long as the standard of proof remains too low. Aside from begging the question of whether the risks of error tolerated by the State in this case are "undue," see *infra*, at 785–791, this conclusion denies the flexibility that we have long recognized in the principle of due process; understates the error-reducing power of procedural protections such as the right to counsel, evidentiary hearings, rules of evidence, and appellate review; and establishes the standard of proof as the *sine qua non* of procedural due process.

[5] An abused child is one who has been subjected to intentional physical injury "which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emo-

Court proceedings to order the temporary removal of a child are initiated by a petition alleging abuse or neglect, filed by a state-authorized child protection agency or by a person designated by the court. FCA §§ 1031, 1032. Unless the court finds that exigent circumstances require removal of the child before a petition may be filed and a hearing held, see FCA § 1022, the order of temporary removal results from a "dispositional hearing" conducted to determine the appropriate form of alternative care. FCA § 1045. See also FCA § 1055. This "dispositional hearing" can be held only after the court, at a separate "fact-finding hearing," has found the child to be abused or neglected within the specific statutory definition of those terms. FCA §§ 1012, 1044, 1051.

Parents subjected to temporary removal proceedings are provided extensive procedural protections. A summons and copy of the temporary removal petition must be served upon the parents within two days of issuance by the court, FCA §§ 1035, 1036, and the parents may, at their own request, delay the commencement of the factfinding hearing for three days after service of the summons. FCA § 1048.[6] The fact-finding hearing may not commence without a determination by the court that the parents are present at the hearing and have been served with the petition. FCA § 1041. At the hearing itself, "only competent, material and relevant evidence may be admitted," with some enumerated exceptions

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tional health or protracted loss or impairment of the function of any bodily organ." FCA § 1012(e)(i). Sexual offenses against a child are also covered by this category. A neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education." FCA § 1012(f)(i)(A).

[6] The relatively short time between notice and commencement of hearing provided by § 1048 undoubtedly reflects the State's desire to protect the child. These proceedings are designed to permit prompt action by the court when the child is threatened with imminent and serious physical, mental, or emotional harm.

for particularly probative evidence. FCA § 1046(b)(ii). In addition, indigent parents are provided with an attorney to represent them at both the factfinding and dispositional hearings, as well as at all other proceedings related to temporary removal of their child. FCA § 262(a)(i).

An order of temporary removal must be reviewed every 18 months by the Family Court. SSL § 392.2. Such review is conducted by hearing before the same judge who ordered the temporary removal, and a notice of the hearing, including a statement of the dispositional alternatives, must be given to the parents at least 20 days before the hearing is held. SSL § 392.4. As in the initial removal action, the parents must be parties to the proceedings, *ibid.*, and are entitled to court-appointed counsel if indigent. FCA § 262(a).

One or more years after a child has been removed temporarily from the parents' home, permanent termination proceedings may be commenced by the filing of a petition in the court which ordered the temporary removal. The petition must be filed by a state agency or by a foster parent authorized by the court, SSL § 384–b.3.(b), and must allege that the child has been permanently neglected by the parents. SSL § 384–b.3.(d).[7] Notice of the petition and the dispositional proceedings must be served upon the parents at least 20 days before the commencement of the hearing, SSL § 384–b.3.(e), must inform them of the potential consequences of the hearing, *ibid.*, and must inform them "of their right to the assistance of counsel, including [their] right . . . to have counsel assigned by the court [if] they are financially unable to obtain counsel." *Ibid.* See also FCA § 262.

As in the initial removal proceedings, two hearings are held in consideration of the permanent termination petition.

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[7] Permanent custody also may be awarded by the Family Court if both parents are deceased, the parents abandoned the child at least six months prior to the termination proceedings, or the parents are unable to provide proper and adequate care by reason of mental illness or mental retardation. SSL § 384–b.4.(c).

SSL § 384–b.3.(f). At the factfinding hearing, the court must determine, by a fair preponderance of the evidence, whether the child has been permanently neglected. SSL § 384–b.3.(g). "Only competent, material and relevant evidence may be admitted in a fact-finding hearing." FCA § 624. The court may find permanent neglect if the child is in the care of an authorized agency or foster home and the parents have "failed for a period of more than one year . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so." SSL § 384–b.7.(a).[8] In addition, because the State considers its "first obligation" to be the reuniting of the child with its natural parents, SSL § 384–b.1.(iii), the court must also find that the supervising state agency has, without success, made "*diligent* efforts to encourage and strengthen the parental relationship." SSL § 384–b.7.(a) (emphasis added).[9]

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[8] As to maintaining contact with the child, New York law provides that "evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such a character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." SSL § 384–b.7.(b).

Failure to plan for the future of the child means failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent." SSL § 384–b.7.(c).

[9] "Diligent efforts" are defined under New York law to "mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

"(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

Following the factfinding hearing, a separate, dispositional hearing is held to determine what course of action would be in "the best interests of the child." FCA § 631. A finding of permanent neglect at the factfinding hearing, although necessary to a termination of parental rights, does not control the court's order at the dispositional hearing. The court may dismiss the petition, suspend judgment on the petition and retain jurisdiction for a period of one year in order to provide further opportunity for a reuniting of the family, or terminate the parents' right to the custody and care of the child. FCA §§ 631–634. The court must base its decision solely upon the record of "material and relevant evidence" introduced at the dispositional hearing, FCA § 624; *In re "Female" M.*, 70 App. Div. 2d 812, 417 N. Y. S. 2d 482 (1979), and may not entertain any presumption that the best interests of the child "will be promoted by any particular disposition." FCA § 631.

As petitioners did in this case, parents may appeal any unfavorable decision to the Appellate Division of the New York Supreme Court. Thereafter, review may be sought in the New York Court of Appeals and, ultimately, in this Court if a federal question is properly presented.

As this description of New York's termination procedures demonstrates, the State seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role. Fully understood, the New York system is a comprehensive program to *aid* parents such as petitioners. Only as a last resort, when "diligent efforts" to reunite the family have failed, does New

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"(2) making suitable arrangements for the parents to visit the child;

"(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

"(4) informing the parents at appropriate intervals of the child's progress, development and health." SSL § 384–b.7.(f).

York authorize the termination of parental rights. The procedures for termination of those relationships which cannot be aided and which threaten permanent injury to the child, administered by a judge who has supervised the case from the first temporary removal through the final termination, cannot be viewed as fundamentally unfair. The facts of this case demonstrate the fairness of the system.

The three children to which this case relates were removed from petitioners' custody in 1973 and 1974, before petitioners' other two children were born. The removals were made pursuant to the procedures detailed above and in response to what can only be described as shockingly abusive treatment.[10] At the temporary removal hearing held before the Family Court on September 30, 1974, petitioners were represented by counsel, and allowed the Ulster County Department of Social Services (Department) to take custody of the three children.

Temporary removal of the children was continued at an evidentiary hearing held before the Family Court in December 1975, after which the court issued a written opinion concluding that petitioners were unable to resume their parental responsibilities due to personality disorders. Unsatisfied with the progress petitioners were making, the court also di-

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[10] Tina Apel, the oldest of petitioners' five children, was removed from their custody by court order in November 1973 when she was two years old. Removal proceedings were commenced in response to complaints by neighbors and reports from a local hospital that Tina had suffered injuries in petitioners' home including a fractured left femur, treated with a homemade splint; bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg. The following summer John Santosky III, petitioners' second oldest child, was also removed from petitioners' custody. John, who was less than one year old at the time, was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back. Exhibit to Brief for Respondent Kramer 1–5. Jed Santosky, the third oldest of petitioners' children, was removed from his parents' custody when only three days old as a result of the abusive treatment of the two older children.

rected the Department to reduce to writing the plan which it had designed to solve the problems at petitioners' home and reunite the family.

A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved in February 1976. Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother. Brief for Respondent Kramer 1–7. Between early 1976 and the final termination decision in April 1979, the State spent more than $15,000 in these efforts to rehabilitate petitioners as parents. App. 34.

Petitioners' response to the State's effort was marginal at best. They wholly disregarded some of the available services and participated only sporadically in the others. As a result, and out of growing concern over the length of the children's stay in foster care, the Department petitioned in September 1976 for permanent termination of petitioners' parental rights so that the children could be adopted by other families. Although the Family Court recognized that petitioners' reaction to the State's efforts was generally "nonresponsive, even hostile," the fact that they were "at least superficially cooperative" led it to conclude that there was yet hope of further improvement and an eventual reuniting of the family. Exhibit to Brief for Respondent Kramer 618. Accordingly, the petition for permanent termination was dismissed.

Whatever progress petitioners were making prior to the 1976 termination hearing, they made little or no progress thereafter. In October 1978, the Department again filed a termination petition alleging that petitioners had completely failed to plan for the children's future despite the considerable efforts rendered in their behalf. This time, the Family Court agreed. The court found that petitioners had "failed in any meaningful way to take advantage of the many social

and rehabilitative services that have not only been made available to them but have been diligently urged upon them." App. 35. In addition, the court found that the "infrequent" visits "between the parents and their children were at best superficial and devoid of any real emotional content." *Id.*, at 21. The court thus found "nothing in the situation which holds out any hope that [petitioners] may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time, it must be said, 'enough is enough.'" *Id.*, at 36.

In accordance with the statutory requirements set forth above, the court found that petitioners' failure to plan for the future of their children, who were then seven, five, and four years old and had been out of petitioners' custody for at least four years, rose to the level of permanent neglect. At a subsequent dispositional hearing, the court terminated petitioners' parental rights, thereby freeing the three children for adoption.

As this account demonstrates, the State's extraordinary 4-year effort to reunite petitioners' family was not just unsuccessful, it was altogether rebuffed by parents unwilling to improve their circumstances sufficiently to permit a return of their children. At every step of this protracted process petitioners were accorded those procedures and protections which traditionally have been required by due process of law. Moreover, from the beginning to the end of this sad story all judicial determinations were made by one Family Court Judge. After four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the State's rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners' rehabilitation.

It is inconceivable to me that these procedures were "fundamentally unfair" to petitioners. Only by its obsessive

focus on the standard of proof and its almost complete disregard of the facts of this case does the majority find otherwise.[11] As the discussion above indicates, however, such a

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[11] The majority finds, without any reference to the facts of this case, that "numerous factors [in New York termination proceedings] combine to magnify the risk of erroneous factfinding." *Ante*, at 762. Among the factors identified by the majority are the "unusual discretion" of the Family Court judge "to underweigh probative facts that might favor the parent"; the often uneducated, minority status of the parents and their consequent "vulnerab[ility] to judgments based on cultural or class bias"; the "State's ability to assemble its case," which "dwarfs the parents' ability to mount a defense" by including an unlimited budget, expert attorneys, and "full access to all public records concerning the family"; and the fact that "natural parents have no 'double jeopardy' defense against repeated state" efforts, "with more or better evidence," to terminate parental rights "even when the parents have attained the level of fitness required by the State." *Ante*, at 762, 763, 764. In short, the majority characterizes the State as a wealthy and powerful bully bent on taking children away from defenseless parents. See *ante*, at 761–764. Such characterization finds no support in the record.

The intent of New York has been stated with eminent clarity: "the [S]tate's *first obligation* is to *help* the family with services to *prevent* its break-up or to *reunite* it if the child has already left home." SSL § 384–b.1.(a)(iii) (emphasis added). There is simply no basis in fact for believing, as the majority does, that the State does not mean what it says; indeed, the facts of this case demonstrate that New York has gone the extra mile in seeking to effectuate its declared purpose. See *supra*, at 781–785. More importantly, there should be no room in the jurisprudence of this Court for decisions based on unsupported, inaccurate assumptions.

A brief examination of the "factors" relied upon by the majority demonstrates its error. The "unusual" discretion of the Family Court judge to consider the " 'affectio[n] and concer[n]' " displayed by parents during visits with their children, *ante*, at 763, n. 12, is nothing more than discretion to consider reality; there is not one shred of evidence in this case suggesting that the determination of the Family Court was "based on cultural or class bias"; if parents lack the "ability to mount a defense," the State provides them with the full services of an attorney, FCA § 262, and they, like the State, have "full access to all *public* records concerning the family" (emphasis added); and the absence of "double jeopardy" protection simply recognizes the fact that family problems are often ongoing and may in the future

focus does not comport with the flexible standard of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

B

In addition to the basic fairness of the process afforded petitioners, the standard of proof chosen by New York clearly reflects a constitutionally permissible balance of the interests at stake in this case. The standard of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J. concurring); *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). In this respect, the standard of proof is a crucial component of legal process, the primary function of which is "to minimize the risk of erroneous decisions."[12] *Greenholtz* v. *Nebraska*

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warrant action that currently is unnecessary. In this case the Family Court dismissed the first termination petition because it desired to give petitioners "the benefit of the doubt," Exhibit to Brief for Respondent Kramer 620, and a second opportunity to raise themselves to "an acceptable minimal level of competency as parents." *Id.*, at 624. It was their complete failure to do so that prompted the second, successful termination petition. See *supra*, at 781–784 and this page.

[12] It is worth noting that the significance of the standard of proof in New York parental termination proceedings differs from the significance of the standard in other forms of litigation. In the usual adjudicatory setting, the factfinder has had little or no prior exposure to the facts of the case. His only knowledge of those facts comes from the evidence adduced at trial, and he renders his findings solely upon the basis of that evidence. Thus, normally, the standard of proof is a crucial factor in the final outcome of the case, for it is the scale upon which the factfinder weighs his knowledge and makes his decision.

Although the standard serves the same function in New York parental termination proceedings, additional assurances of accuracy are present in its application. As was adduced at oral argument, the practice in New York is to assign one judge to supervise a case from the initial temporary removal of the child to the final termination of parental rights. Therefore,

Penal Inmates, 442 U. S., at 13. See also *Addington* v. *Texas*, *supra*, at 425; *Mathews* v. *Eldridge*, 424 U. S., at 344.

In determining the propriety of a particular standard of proof in a given case, however, it is not enough simply to say that we are trying to minimize the risk of error. Because errors in factfinding affect more than one interest, we try to minimize error as to those interests which we consider to be most important. As Justice Harlan explained in his well-known concurrence to *In re Winship:*

> "In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when dhe true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
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> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof

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as discussed above, the factfinder is intimately familiar with the case before the termination proceedings ever begin. Indeed, as in this case, he often will have been closely involved in protracted efforts to rehabilitate the parents. Even if a change in judges occurs, the Family Court retains jurisdiction of the case and the newly assigned judge may take judicial notice of all prior proceedings. Given this familiarity with the case, and the necessarily lengthy efforts which must precede a termination action in New York, decisions in termination cases are made by judges steeped in the background of the case and peculiarly able to judge the accuracy of evidence placed before them. This does not mean that the standard of proof in these cases can escape due process scrutiny, only that additional assurances of accuracy attend the application of the standard in New York termination proceedings.

beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." 397 U. S., at 370–371.

When the standard of proof is understood as reflecting such an assessment, an examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof. Because proof by a preponderance of the evidence requires that "[t]he litigants . . . share the risk of error in a roughly equal fashion," *Addington* v. *Texas*, *supra*, at 423, it rationally should be applied only when the interests at stake are of roughly equal societal importance. The interests at stake in this case demonstrate that New York has selected a constitutionally permissible standard of proof.

On one side is the interest of parents in a continuation of the family unit and the raising of their own children. The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley* v. *Illinois*, 405 U. S. 645, 651." *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 27 (1981). In creating the scheme at issue in this case, the New York Legislature

was expressly aware of this right of parents "to bring up their own children." SSL § 384–b.1.(a)(ii).

On the other side of the termination proceeding are the often countervailing interests of the child.[13] A stable, loving

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[13] The majority dismisses the child's interest in the accuracy of determinations made at the factfinding hearing because "[t]he factfinding does not purport . . . to balance the child's interest in a normal family home against the parents' interest in raising the child," but instead "pits the State directly against the parents." *Ante*, at 759. Only "[a]fter the State has established parental unfitness," the majority reasons, may the court "assume . . . that the interests of the child and the natural parents do diverge." *Ante*, at 760.

This reasoning misses the mark. The child has an interest in the outcome of the factfinding hearing independent of that of the parent. To be sure, "the child and his parents share a vital interest in preventing *erroneous* termination of their natural relationship." *Ibid.* (emphasis added). But the child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error *in the factfinding hearing* that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child. See nn. 14, 15, *infra*.

The preponderance-of-the-evidence standard, which allocates the risk of error more or less evenly, is employed when the social disutility of error *in either direction* is roughly equal—that is, when an incorrect finding of fault would produce consequences as undesirable as the consequences that would be produced by an incorrect finding of *no* fault. Only when the disutility of error in one direction discernibly outweighs the disutility of error in the other direction do we choose, by means of the standard of proof, to reduce the likelihood of the more onerous outcome. See *In re Winship*, 397 U. S. 358, 370–372 (1970) (Harlan, J., concurring).

New York's adoption of the preponderance-of-the-evidence standard reflects its conclusion that the undesirable consequence of an erroneous finding of parental unfitness—the unwarranted termination of the family relationship—is roughly equal to the undesirable consequence of an erroneous finding of parental fitness—the risk of permanent injury to the child either by return of the child to an abusive home or by the child's continued lack of a permanent home. See nn. 14, 15, *infra*. Such a conclusion is well within the province of state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the Members of this Court disagree with the New York Legislature's weighing of the interests of the parents and the child in an error-free factfinding hearing.

homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline. If the Family Court makes an incorrect factual determination resulting in a failure to terminate a parent-child relationship which rightfully should be ended, the child involved must return either to an abusive home[14] or to the often unstable world of foster care.[15] The reality of these

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[14] The record in this case illustrates the problems that may arise when a child is returned to an abusive home. Eighteen months after Tina, petitioners' oldest child, was first removed from petitioners' home, she was returned to the home on a trial basis. Katherine Weiss, a supervisor in the Child Protective Unit of the Ulster County Child Welfare Department, later testified in Family Court that "[t]he attempt to return Tina to her home just totally blew up." Exhibit to Brief for Respondent Kramer 135. When asked to explain what happened, Mrs. Weiss testified that "there were instances on the record in this court of Mr. Santosky's abuse of his wife, alleged abuse of the children and proven neglect of the children." *Ibid.* Tina again was removed from the home, this time along with John and Jed.

[15] The New York Legislature recognized the potential harm to children of extended, nonpermanent foster care. It found "that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens." SSL § 384-b.1.(b). Subsequent studies have proved this finding correct. One commentator recently wrote of "the lamentable conditions of many foster care placements" under the New York system even today. He noted: "Over fifty percent of the children in foster care have been in this 'temporary' status for more than two years; over thirty percent for more than five years. During this time, many children are placed in a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need." Besharov, State Intervention To Protect

risks is magnified by the fact that the only families faced with termination actions are those which have voluntarily surrendered custody of their child to the State, or, as in this case, those from which the child has been removed by judicial action because of threatened irreparable injury through abuse or neglect. Permanent neglect findings also occur only in families where the child has been in foster care for at least one year.

In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child." *Lassiter* v. *Department of Social Services*, 452 U. S., at 27.[16] Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1944). Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." *Id.*, at 165. See also *Ginsberg* v. *New York*, 390 U. S. 629, 640–641 (1968).

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a sta-

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Children: New York's Definition of "Child Abuse" and "Child Neglect," 26 N. Y. L. S. L. Rev. 723, 770–771 (1981) (footnotes omitted). In this case, petitioners' three children have been in foster care for more than four years, one child since he was only three days old. Failure to terminate petitioners' parental rights will only mean a continuation of this unsatisfactory situation.

[16] The majority's conclusion that a state interest in the child's well-being arises only after a determination of parental unfitness suffers from the same error as its assertion that the child has no interest, separate from that of its parents, in the accuracy of the factfinding hearing. See n. 13, *supra*.

ble, nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance-of-the-evidence standard of proof. See *Addington* v. *Texas*, 441 U. S., at 423. This is precisely the balance which has been struck by the New York Legislature: "It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption." SSL § 384–b.1.(b).

III

For the reasons heretofore stated, I believe that the Court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violates due process of law. The decision disregards New York's earnest efforts to *aid* parents in regaining the custody of their children and a host of procedural protections placed around parental rights and interests. The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether loses sight of the unmistakable fairness of the New York procedure.

Even more worrisome, today's decision cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems. Accordingly, I dissent.

Reporter's Note

Orders commencing with March 3, 1982, begin with page 995. The preceding orders in 455 U. S., from January 15 through March 1, 1982, were reported in Parts 1 and 2 at 901–995. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

Rehearing Denied

No. 81-743. COWGILL ET AL. *v.* FLORIDA, 454 U. S. 1134;

No. 81-833. ROSS *v.* BIRD, CHIEF JUSTICE, CALIFORNIA SUPREME COURT, ET AL.; and ROSS *v.* SAN DIEGO COUNTY SUPERIOR COURT ET AL., 454 U. S. 1147;

No. 81-5612. IN RE BEACH, *ante*, p. 906;

No. 81-5641. FISCHETTI *v.* ASCIONE, 454 U. S. 1135;

No. 81-5648. WARD *v.* UNITED STATES, *ante*, p. 922;

No. 81-5675. CARABALLO *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, 454 U. S. 1153;

No. 81-5676. BAILEY *v.* REDMAN, WARDEN, DELAWARE CORRECTIONAL CENTER, ET AL., 454 U. S. 1153;

No. 81-5739. GALLO *v.* MASSACHUSETTS, 454 U. S. 1155; and

No. 81-5860. CRENSHAW *v.* UNITED STATES ET AL., *ante*, p. 912. Petitions for rehearing denied.

MARCH 3, 1982

Dismissal Under Rule 53

No. 81-1309. REINSTEIN *v.* SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 661 F. 2d 255.

MARCH 8, 1982

Affirmed on Appeal

No. 81-865. METROCENTRE IMPROVEMENT DISTRICT NO. 1, CITY OF LITTLE ROCK, ARKANSAS *v.* FEDERAL RESERVE BANK OF ST. LOUIS. Affirmed on appeal from C. A. 8th Cir. JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 657 F. 2d 183.

Appeals Dismissed

No. 81-1315. WESTPHALEN *v.* CITY OF CHICAGO ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 93 Ill. App. 3d 1110, 418 N. E. 2d 63.

No. 81-6055. HERNANDEZ *v.* DEPARTMENT OF LABOR AND HUMAN RESOURCES ET AL. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81-1324. ESPOSITO *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 54 N. Y. 2d 886, 429 N. E. 2d 425.

Vacated and Remanded on Appeal

No. 80-2003. HONDA MOTOR CO., LTD. *v.* COONS. Appeal from Super. Ct. N. J., App. Div. Judgment vacated and case remanded for further consideration in light of *G. D. Searle & Co.* v. *Cohn, ante,* p. 404. JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR would dismiss the appeal for want of jurisdiction. Reported below: 176 N. J. Super. 575, 424 A. 2d 446.

Certiorari Granted—Vacated and Remanded

No. 81-1038. DUCKWORTH, WARDEN, ET AL. *v.* COWELL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the Northern District of Indiana to dismiss the petition for writ of habeas corpus. *Rose v. Lundy, ante,* p. 509. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari. Reported below: 665 F. 2d 1050.

No. 81-1098. CENTRAL INTELLIGENCE AGENCY ET AL. *v.* HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY. C. A. D. C. Cir. Certiorari granted. Upon the representation of counsel for respondent set forth in her letter of February 18, 1982, and the response of the Solicitor General filed February 24, 1982, the judgment is vacated insofar as it affirms the decision of the United States District Court for the District of Columbia requiring the disclosure of the six documents in question and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit with directions that it instruct the United States District Court to dismiss this aspect of the case as moot. Reported below: 205 U. S. App. D. C. 91, 636 F. 2d 838.

No. 81-5047. RODRIQUEZ *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the Southern District of New York to dismiss the petition for writ of habeas corpus. *Rose* v. *Lundy, ante,* p. 509. JUSTICE STEVENS would grant the petition for writ of certiorari and set case for oral argument. Reported below: 659 F. 2d 1062.

Miscellaneous Orders

No. ——. GITRE *v.* BACHE, HALSEY, STUART, SHIELDS, INC. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES. Motion of the Solicitor General for leave to file a supplemental brief granted. [For earlier order herein, see, *e. g.*, 454 U. S. 1096.]

No. A-710 (81-1589). HUNT *v.* COLLINS. Super. Ct. Ga., Fulton County. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-724. LORDEON *v.* PETERS, COMMISSIONER, DIVISION OF MOTOR VEHICLES, DEPARTMENT OF TRANSPORTATION OF NORTH CAROLINA. Sup. Ct. N. C. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-746 (81-1114). ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. Application of "undisclosed respondents" for an order to keep identities of certain respondents held *in camera*, presented to JUSTICE STEVENS, and by him referred to the Court, granted.

No. 81-731. ARKANSAS ELECTRIC COOPERATIVE CORP. *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Sup. Ct. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81-1055. POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* DUNCAN ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 937.] Motion of respondents to advance case for oral argument and for abridgement of time to file briefs denied.

No. 81-1565. VSL CORP. *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for an order placing the petition for writ of certiorari, brief in opposition, and record under seal denied.

No. 81-6068. IN RE SMILEY. Petition for writ of mandamus denied.

No. 81-6046. IN RE BOWINE. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 81-1320. KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 658 F. 2d 1362.

Certiorari Granted

No. 81-1251. CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS. C. A. 5th Cir. Certiorari granted. Reported below: 654 F. 2d 719.

No. 81-638. HEWITT ET AL. *v.* HELMS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 655 F. 2d 487.

No. 81-827. JEFFERSON COUNTY PHARMACEUTICAL ASSN., INC. *v.* ABBOTT LABORATORIES ET AL. C. A. 5th Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 656 F. 2d 92.

Certiorari Denied. (See also Nos. 81-1315 and 81-6055, *supra.*)

No. 80-704. GIBBONS, TRUSTEE, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 80-2036. JOSEPH *v.* CANNON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 405, 642 F. 2d 1373.

No. 80-6902. STEDMAN *v.* MAYNARD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 81-752. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 653 F. 2d 732.

No. 81-986. McLEMORE'S WHOLESALE & RETAIL STORES, INC. *v.* PAYNE. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 1130.

No. 81-996. MANNEY, BY HIS MOTHER, MANNEY *v.* FARE, LOS ANGELES COUNTY CHIEF PROBATION OFFICER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 1280.

No. 81-1071. VANNIER *v.* UNITED STATES; and

No. 81-1108. HERMANN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 423.

No. 81-1084. ILLINOIS ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 2d 923.

No. 81-1087. ALASKA *v.* HEFFLE ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 633 P. 2d 264.

No. 81-1091. PAUK *v.* BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 654 F. 2d 856.

No. 81-1101. DEPARTMENT OF TRANSPORTATION OF CALIFORNIA ET AL. *v.* SAN DIEGO UNIFIED PORT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 1306.

No. 81-1143. YETTKE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 95 Ill. App. 3d 365, 420 N. E. 2d 194.

No. 81-1157. DOE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 1073.

No. 81-1250. RAILWAY LABOR EXECUTIVES' ASSN. *v.* OGILVIE, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 1149.

No. 81-1294. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* VANSKIKE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 2d 188.

No. 81-1297. LOCAL LODGES 743 ET AL., INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 909.

No. 81-1299. ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-1301. UNITED STATES *v.* DISALVATORE, ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 902.

No. 81-1311. SACKS *v.* INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 920.

No. 81-1321. ROYAL NETHERLANDS STEAMSHIP CO. *v.* SINGER. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 495.

No. 81-1325. GRAHAM ET AL. *v.* KENTUCKY. Cir. Ct. Ky., Hardin County. Certiorari denied.

No. 81-1327. NATIONAL HEALTH AGENCIES *v.* UNITED WAY OF SAN DIEGO COUNTY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 941.

No. 81-1329. BOLLOTIN *v.* SCHWARTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 491.

No. 81-1355. MALONE *v.* RICHARDSON ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1205, 420 N. E. 2d 1211.

No. 81-1362. MONTREAL TRADING LTD. *v.* AMAX, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 661 F. 2d 864.

No. 81-1363. HOLT MARINE TERMINAL, INC. *v.* TRANSPORT INTERNATIONAL POOL, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81-1400. PRESTON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1285.

No. 81-1416. THOMAS *v.* SOARES, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81-1417. THOMAS *v.* PURNELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81-1430. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 81-1435. COLACURCIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 684.

No. 81-1445. PETERS *v.* DIAMOND, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 672 F. 2d 896.

No. 81-1457. CITIZENS AGAINST UFO SECRECY *v.* NATIONAL SECURITY AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 672 F. 2d 893.

No. 81-1459. POSTON *v.* BOLGER, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 912.

No. 81-1465. PRING ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 81-1466. DOYLE *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 668 F. 2d 1365.

No. 81-5677. BIBBY *v.* UNITED STATES; and

No. 81-5790. REED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 658 F. 2d 624.

No. 81-5777. MEFFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 658 F. 2d 588.

No. 81-5858. GRANVIEL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 673.

No. 81-5867. BACON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81-5882. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 73.

No. 81-6025. LEVY *v.* HIGH'S DAIRY STORES ET AL. Sup. Ct. Va. Certiorari denied.

No. 81-6032. FORD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 30 Cal. 3d 209, 635 P. 2d 1176.

No. 81-6039. MARTIN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-6042. MINCEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 130 Ariz. 389, 636 P. 2d 637.

No. 81-6043. POE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— S. W. 2d ——.

No. 81-6047. NOTARO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 81-6048. MORRIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81-6053. HATCH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 81-6057. CODY *v.* UNION ELECTRIC CO. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81-6058. MORRIS *v.* FAULKNER, SHERIFF OF TULSA COUNTY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6060. BETTS *v.* KEEBLER CO. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1043.

No. 81-6063. COLLINS *v.* HOUSEWRIGHT. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 181.

No. 81-6065. JAMES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 81-6066. NYMAN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-6067. MCCOLPIN *v.* BARNES. C. A. 10th Cir. Certiorari denied.

No. 81-6069. MITCHELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 48 Md. App. 779.

No. 81-6071. COGGINS *v.* AUSTIN, WARDEN, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 106.

No. 81-6091. BOZEMAN *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1025.

No. 81-6123. CURRIER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 81-6135. HOOTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 628.

No. 81-6165. MERCADO *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 673 F. 2d 1297.

No. 81-6169. HALE *v.* KANSAS ET AL. C. A. 8th Cir. Certiorari denied.

No. 81-6177. SERE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 81-6178. VANDER PAUWERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81-6179. CAMERON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81-6181. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 286.

No. 81-6185. HOWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 101.

No. 81-6188. MAGILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 2d 69.

No. 81-6189. RAMSEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 1013.

No. 81-6193. TINSLEY *v.* UNITED STATES AIR FORCE. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 81-6195. HENDRIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 590.

No. 81-415. CASBAH, INC., ET AL. *v.* THONE, GOVERNOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 651 F. 2d 551.

No. 81-998. BRACHE ET AL. *v.* COUNTY OF WESTCHESTER ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 658 F. 2d 47.

No. 81-6201. TOWSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81-899. BAXTER ET AL. *v.* MOUZAVIRES. Ct. App. D. C. Certiorari denied. Reported below: 434 A. 2d 988.

JUSTICE WHITE, with whom JUSTICE POWELL joins, dissenting.

In this case, the District of Columbia Court of Appeals concluded that the Due Process Clause permitted the trial court to exercise personal jurisdiction over petitioners, members of a Florida law firm, on the basis of an agreement with respondent, a District of Columbia patent attorney, to assist them in defending a suit filed against one of their clients in a Federal District Court in Florida. The Court of Appeals acknowledged that under *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958), "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." It concluded, however, that, by voluntarily entering into a contractual arrangement with a forum plaintiff, defendant satisfied this standard. The opinion equated the defendant law firm's entering this contract with the solicitation of business by the defendant insurance company in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

The standard of the District of Columbia Court of Appeals would permit a District of Columbia merchant who, in response to a telephone order, sends merchandise to Florida, to sue for the price in the District of Columbia. As I wrote in dissenting from denial of certiorari in *Chelsea House Publishers* v. *Nicholstone Book Bindery*, *ante*, p. 994, and in *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U. S. 907 (1980), the disarray among federal and state courts on the issue of minimal contacts based on contractual dealings continues unabated. This case, which involves services instead of goods, further demonstrates that

this Court should address the issue. I dissent from the denial of certiorari.

No. 81-1011. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* GRANVIEL. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 655 F. 2d 673.

No. 81-1318. CATHOLIC SOCIAL SERVICES OF TUCSON *v.* P. C. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 130 Ariz. 202, 635 P. 2d 187.

No. 81-1012. INSURANCE COMPANY OF NORTH AMERICA *v.* KEENE CORP. ET AL.;

No. 81-1197. HARTFORD ACCIDENT & INDEMNITY CO. *v.* KEENE CORP. ET AL.;

No. 81-1298. AETNA CASUALTY & SURETY CO. *v.* KEENE CORP. ET AL.; and

No. 81-1328. LIBERTY MUTUAL INSURANCE CO. *v.* KEENE CORP. ET AL. C. A. D. C. Cir. Motions of Commercial Union Insurance Cos. and American Home Assurance Co. et al. for leave to file briefs as *amici curiae* in No. 81-1012 granted. Motion of Walbrook Insurance Co., Ltd., et al. for leave to file a brief as *amici curiae* in No. 81-1328 granted. Motions of Armstrong World Industries, Inc., et al. and Home Insurance Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE POWELL would grant certiorari. JUSTICE BRENNAN took no part in the consideration or decision of these petitions and motions. Reported below: —— U. S. App. D. C. ——, 667 F. 2d 1034.

No. 81-1198. MINNESOTA *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 660 F. 2d 1240.

No. 81-1239. STEPHENS ET AL. *v.* BLACK ET UX. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR would grant certiorari. Reported below: 662 F. 2d 181.

No. 81-1349. DELLWAY VILLA OF TENNESSEE, LTD., ET AL. *v.* JORDAN ET AL. C. A. 6th Cir. Motion of respondent Charlie Mai Jordan for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 588.

No. 81-5876. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 622 S. W. 2d 116.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 81-6056 (A-711). MUINA ET AL. *v.* MONTANA ET AL. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. Reported below: 659 F. 2d 1089.

Rehearing Denied

No. 81-819. STAINBROOK *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, 454 U. S. 1146;

No. 81-830. GIESEY *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL., *ante*, p. 908;

No. 81-965. GUTTER *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *ante*, p. 909;

No. 81-5624. ARNOLD *v.* MARSHALL ET AL., *ante*, p. 922;

No. 81-5632. IN RE DOWNS, 454 U. S. 1121;

No. 81-5713. CORTEZ, AKA CORTEZ-ESPINOZA *v.* UNITED STATES, *ante*, p. 923; and

No. 81-5749. MORGAN *v.* MONTGOMERY, WARDEN, GEORGIA STATE PRISON, *ante*, p. 927. Petitions for rehearing denied.

No. 81-5805. CHICCO *v.* CITY OF NEW BEDFORD ET AL., *ante*, p. 924; and

No. 81-5842. MOSS *v.* POLLAND ET AL., *ante*, p. 925. Petitions for rehearing denied.

No. 81-198. INSURANCE COMPANY OF NORTH AMERICA *v.* FORTY-EIGHT INSULATIONS, INC., ET AL., 454 U. S. 1109; and

No. 81-200. AETNA CASUALTY & SURETY CO. *v.* PORTER ET AL., 454 U. S. 1109. Petitions for rehearing denied. JUSTICE BRENNAN and JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

MARCH 10, 1982

Dismissal Under Rule 53

No. 81-741. U. S. MARKETING, INC., ET AL. *v.* IDAHO ET AL. Sup. Ct. Idaho. [Probable jurisdiction noted, 454 U. S. 1140.] Appeal dismissed under this Court's Rule 53.

MARCH 22, 1982

Affirmed on Appeal

No. 81-1356. JONES *v.* MORRIS ET AL. Affirmed on appeal from D. C. S. D. Ohio. Reported below: 541 F. Supp. 11.

Appeals Dismissed

No. 81-5827. IN RE TURNER. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 402 So. 2d 383.

No. 81-6073. FLUKER *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Reported below: 248 Ga. 290, 282 S. E. 2d 112.

No. 81-6097. RICHARDS *v.* CITY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 81-6106. IVEY *v.* ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question.

No. 81-6157. WOLFSON *v.* MURRAY ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 665 F. 2d 1056.

Certiorari Granted—Reversed and Remanded. (See No. 81-1049, *ante*, p. 603.)

Certiorari Granted—Vacated and Remanded. (See also No. 81-844, *ante*, p. 591.)

No. 76-1234. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ROSS ET AL. C. A. 4th Cir.; and

No. 76-1261. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ABRAMS ET AL. C. A. 9th Cir. Upon consideration of the motion to vacate filed by the Solicitor General on March 11, 1982, the judgments of the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Ninth Circuit are vacated and the cases are remanded to the United States District Court for the District of Maryland and the United States District Court for the Central District of California, respectively, with directions to dismiss the causes as moot when the parties jointly so move. Reported below: No. 76-1234, 544 F. 2d 514; No. 76-1261, 547 F. 2d 1062.

Certiorari Granted—Reversed. (See No. 81-362, *ante*, p. 586.)

Miscellaneous Orders

No. — - ——. CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2, ET AL. *v.* CITY OF CHICAGO. Application to direct the Clerk to file the petition for writ of certiorari denied.

No. A-582. WORTLEY *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A-720 (81-1636). FLORIDA *v.* BRADY ET AL. Sup. Ct. Fla. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A-733. OPPENHEIM ET AL. *v.* MOREAU ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-748 (81-1729). NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Application for an injunction, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. The order heretofore entered by JUSTICE MARSHALL on March 4, 1982, is vacated.

No. A-764. CALIFORNIA *v.* RAMOS. Sup. Ct. Cal. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. D-244. IN RE DISBARMENT OF IVLER. Disbarment entered. [For earlier order herein, see 454 U. S. 935.]

No. D-245. IN RE DISBARMENT OF PRESSMAN. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D-246. IN RE DISBARMENT OF KAHN. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D-247. IN RE DISBARMENT OF COSTELLO. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D-251. IN RE DISBARMENT OF GOLD. Disbarment entered. [For earlier order herein, see 454 U. S. 938.]

No. D-252. IN RE DISBARMENT OF RAWLINS. Disbarment entered. [For earlier order herein, see 454 U. S. 1027.]

No. D–253. IN RE DISBARMENT OF CALDWELL. Disbarment entered. [For earlier order herein, see 454 U. S. 1027.]

No. D–257. IN RE DISBARMENT OF GOTKIN. It is ordered that Martin E. Gotkin, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–258. IN RE DISBARMENT OF ROOT. It is ordered that Stanley Roy Root, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–259. IN RE DISBARMENT OF COVEN. It is ordered that Bernard J. Coven, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–260. IN RE DISBARMENT OF BUSSEY. It is ordered that Richard M. Bussey, of Santa Rosa, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–2205. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS *v.* MURRAY. C. A. 7th Cir. [Certiorari granted, 454 U. S. 962.] Motion of Chicago Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted.

No. 81-150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81-546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. D. C. Minn. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of Beneficial Corp. for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied. Motion of Commercial Law League of America to reconsider order denying motion for leave to participate in oral argument as *amicus curiae* denied.

No. 81-213. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HOGAN ET AL. D. C. Mass. [Probable jurisdiction noted, 454 U. S. 891.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 81-280. GENERAL BUILDING CONTRACTORS ASSN., INC. *v.* PENNSYLVANIA ET AL.;

No. 81-330. UNITED ENGINEERS & CONSTRUCTORS, INC. *v.* PENNSYLVANIA ET AL.;

No. 81-331. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* PENNSYLVANIA ET AL.;

No. 81-332. GLASGOW, INC. *v.* PENNSYLVANIA ET AL.; and

No. 81-333. BECHTEL POWER CORP. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 454 U. S. 939.] Motion of Black Economic Survival for leave to file a brief as *amicus curiae* out of time denied.

No. 81-334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of Associated General Contractors of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 81-389. UNION LABOR LIFE INSURANCE CO. *v.* PIRENO; and

No. 81-390. NEW YORK STATE CHIROPRACTIC ASSN. *v.* PIRENO. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1052.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Arizona et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. Motion of petitioner in No. 81-390 to reconsider order denying divided argument denied.

No. 81-406. MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN. C. A. 5th Cir. [Certiorari granted, 454 U. S. 962.] Motion of petitioners for leave to file reply brief out of time granted.

No. 81-750. FIDELITY FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* DE LA CUESTA ET AL. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction noted, *ante*, p. 917.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 81-825. PILLSBURY CO. ET AL. *v.* CONBOY. C. A. 7th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of Mead Corp. for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 81-1374. BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* STENSON. C. A. 2d Cir. Motion of respondent Ellen Stenson for leave to proceed *in forma pauperis* granted.

No. 81-5152. TAYLOR *v.* ALABAMA. Sup. Ct. Ala. [Certiorari granted, 454 U. S. 963.] Motion of petitioner for leave to file reply brief out of time granted.

No. 81-1641 (A-768). REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* BURTON ET AL. Sup. Ct. Cal. Motion of appellants to expedite consideration of the appeal denied. Application to stay enforcement of the judgment of the Supreme Court of California, addressed to JUSTICE WHITE and referred to the Court, denied.

No. 81-5321. ENMUND *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 454 U. S. 939.] Motion of Washington Legal Foundation for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81-1500. IN RE CHING YEE. Petition for writ of common-law certiorari and for all other relief denied.

Certiorari Granted

No. 81-1044. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS. C. A. D. C. Cir. Certiorari granted. Reported below: 214 U. S. App. D. C. 239, 665 F. 2d 1057.

No. 81-1114. ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 659 F. 2d 800.

No. 81-1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC. C. A. 4th Cir. Certiorari granted. Reported below: 649 F. 2d 216.

No. 81-1062. UNITED STATES *v.* EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY. C. A. 9th Cir. Motion of respondent Mary Josephine Vasquez for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 645 F. 2d 836.

No. 81-1404. BRISCOE ET AL. *v.* LAHUE ET AL. C. A. 7th Cir. Motion of petitioners Chris P. Vickers, Sr., and James N. Ballard for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 663 F. 2d 713.

Certiorari Denied. (See also Nos. 81-1500 and 81-6157, *supra.*)

No. 80-2092. SCM CORP. *v.* XEROX CORP. C. A. 2d Cir. Certiorari denied. Reported below: 645 F. 2d 1195.

No. 81-363. KARR *v.* KARR. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 628 P. 2d 267.

No. 81-672. IRWIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 654 F. 2d 671.

No. 81-834. CLARKE ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 81-917. ST. PETER *v.* MARSH, SECRETARY OF THE ARMY. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 249, 659 F. 2d 1133.

No. 81-950. JAMIESON-MCKAMES PHARMACEUTICALS, INC., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 651 F. 2d 532.

No. 81-955. POTOMAC ELECTRIC POWER CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 650 F. 2d 509.

No. 81-1090. RENO, STATE ATTORNEY, ET AL. *v.* ABRAMS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 649 F. 2d 342.

No. 81-1103. THERMOFIL INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 858.

No. 81-1110. SALPETER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81-1106. JOINT APPRENTICESHIP COMMITTEE LOCAL NO. 130, U. A. *v.* EGGLESTON ET AL.;

No. 81-1208. PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY *v.* PLUMMER ET AL.; and

No. 81-1209. CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION NO. 130, U. A. *v.* PLUMMER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 890.

No. 81-1116. O. HOMMEL CO. *v.* FERRO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 340.

No. 81-1142. STUCKEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 494.

No. 81-1168. JENTGEN, TRUSTEE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, 657 F. 2d 1210.

No. 81-1170. BERNOTAS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: —— S. C. ——, 283 S. E. 2d 580.

No. 81-1175. INTERNATIONAL MEDICATION SYSTEMS, LTD. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1110.

No. 81-1186. GREER *v.* CITY OF SEGUIN, TEXAS, ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied.

No. 81-1207. DELTONA CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, 657 F. 2d 1184.

No. 81-1223. CARGO GASOLINE CO. ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 676.

No. 81-1262. MCDONNELL DOUGLAS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 932.

No. 81-1272. SALKIN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 526.

No. 81-1316. MCCUTCHEON *v.* CHICAGO BOARD OF EDUCATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 993, 419 N. E. 2d 451.

No. 81-1323. MURPHY TUGBOAT CO. *v.* SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 2d 1256.

No. 81-1330. OHIO STATE BOARD OF EDUCATION ET AL. *v.* REED ET AL.; and OHIO STATE BOARD OF EDUCATION ET AL. *v.* PENICK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 2d 1219 (first case); 663 F. 2d 24 (second case).

No. 81-1331. COUNTY OF SAN DIEGO *v.* NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1051.

No. 81-1336. PAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 661 F. 2d 1080.

No. 81-1340. F. D. RICH HOUSING OF THE VIRGIN ISLANDS, INC., ET AL. *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 2d 419.

No. 81-1343. ROSENBAUM *v.* ROSENBAUM. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 352, 418 N. E. 2d 939.

No. 81-1344. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 299.

No. 81-1345. SIMONS *v.* SOUTH-WESTERN PUBLISHING CO. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 653.

No. 81-1347. CHIAZOR ET AL. *v.* TRANSWORLD DRILLING CO., LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1015.

No. 81-1348. FALLS STAMPING & WELDING CO. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81-1352. ROMANO'S NETCONG, INC., ET AL. *v.* LERNER, DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81-1354. MUELLER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81-1358. FLEER CORP. *v.* TOPPS CHEWING GUM, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 139.

No. 81-1367. FRIERSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 625 S. W. 2d 872.

No. 81-1369. SCHWANECKE ET AL. *v.* HARRIS COUNTY HOSPITAL DISTRICT. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 81-1375. KERR-MCGEE REFINING CORP. *v.* THOMPSON. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 1380.

No. 81-1377. DRESSER INDUSTRIES, INC. *v.* ALASKA DEPARTMENT OF LABOR. Sup. Ct. Alaska. Certiorari denied. Reported below: 633 P. 2d 998.

No. 81-1383. HASKON, INC., ET AL. *v.* LESUEUR CREAMERY, INC. C. A. 8th Cir. Certiorari denied. Reported below: 660 F. 2d 342.

No. 81-1384. PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION, ET AL. *v.* SULLIVAN. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 2d 443.

No. 81-1386. PACIFIC FIRST FEDERAL SAVINGS & LOAN ASSN. *v.* GUINASSO ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1364.

No. 81-1390. MISKOW, EXECUTOR, ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 205.

No. 81-1407. BENHAM-BLAIR & AFFILIATES, INC., DBA W. R. HOLWAY & ASSOCIATES *v.* CITY OF BROKEN ARROW, OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 450.

No. 81-1410. REHBERGER *v.* DARNELL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1207, 427 N. E. 2d 1056.

No. 81-1415. BUTTERWORTH, SHERIFF OF BROWARD COUNTY, FLORIDA *v.* SEMINOLE TRIBE OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 2d 310.

No. 81-1418. QUALITY AUTO BODY, INC. *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 1195.

No. 81-1419. MADISON *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 32, 661 F. 2d 253.

No. 81-1420. STILL *v.* PERSONNEL BOARD OF JEFFERSON COUNTY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 406 So. 2d 860.

No. 81-1422. SMOKE-CRAFT, INC. *v.* UNITED STEEL WORKERS OF AMERICA, AFL-CIO-CLC. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 1356.

No. 81-1423. WILSON *v.* RENNER, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MINNESOTA (MUTUAL OF OMAHA INSURANCE CO., REAL PARTY IN INTEREST). C. A. 8th Cir. Certiorari denied.

No. 81-1431. JOINT COUNCIL OF TEAMSTERS NO. 42, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 531.

No. 81-1436. PAINTER, SUPERVISOR OF LYONS TOWNSHIP *v.* NEKOLNY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 1164.

No. 81-1442. LEWIS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-1461. CONTRERAS ET AL. *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1267.

No. 81-1462. GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* NALORE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 841.

No. 81-1473. KLINSKI *v.* FOUR WINDS TRAVEL, INC. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 81-1482. KENDALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 126.

No. 81-1499. COLORADO SPANISH PEAKS RANCH, INC. *v.* TRAVELERS INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 759.

No. 81-1509. HINDS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 362.

No. 81-1510. MCLAUGHLIN ET AL. *v.* UNITED STATES; No. 81-6198. TOUCHARD *v.* UNITED STATES; and No. 81-6199. TOUCHARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81-1518. HAYDEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 1152.

No. 81-1530. WOODARD *v.* MARSH, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 989.

No. 81-1542. MAZALESKI *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 670 F. 2d 1235.

No. 81-1567. FAGREY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 504.

No. 81-5017. EDWARDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 430 A. 2d 1321.

No. 81-5614. WEST *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81-5682. PASSMAN *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 559.

No. 81-5756. FASICK *v.* HILTON, WARDEN, TRENTON STATE PRISON. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 914.

No. 81-5759. SANDERS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 635 P. 2d 1023.

No. 81-5795. CARTWRIGHT *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1103.

No. 81-5822. KENDZIA *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81-5887. UNITED STATES EX REL. FULTON *v.* FRANZEN, DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 741.

No. 81-5960. VON LUDWITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81-5961. VON LUDWITZ *v.* LAPPIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-5968. MOSS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 313.

No. 81-5986. WILSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-5988. NETTLES BEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81-6028. SPINNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 498.

No. 81-6044. SPRINGER ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81-6052. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81-6070. LEBRIGHT *v.* CHRISTIAN, UNITED STATES DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6074. ABU-BAKR *v.* KOON ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-6075. LONG *v.* SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 18.

No. 81-6077. MCDONALD *v.* GEORGIA KRAFT CO. Ct. App. Ga. Certiorari denied. Reported below: 160 Ga. App. 696, 288 S. E. 2d 60.

No. 81-6083. JURAS *v.* AMAN COLLECTION SERVICE, INC. Sup. Ct. Mont. Certiorari denied.

No. 81-6087. MINAYA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 360, 429 N. E. 2d 1161.

No. 81-6088. CLARK *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 81-6095. MATHIS *v.* MONTGOMERY, WARDEN, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 295.

No. 81-6100. SKINNER *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81-6102. THORNE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 102, 622 S. W. 2d 178.

No. 81-6103. KINCAID *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 87 Ill. 2d 107, 429 N. E. 2d 508.

No. 81-6105. CELESTINE *v.* MUNICIPAL CORRECTION INSTITUTION. C. A. 8th Cir. Certiorari denied.

No. 81-6107. HUFF *v.* BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81-6108. SIMPSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 81-6111. VENERI *v.* CIRCUIT COURT OF GASCONADE COUNTY ET AL. C. A. 8th Cir. Certiorari denied.

No. 81-6114. BARBER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 794, 441 N. Y. S. 2d 757.

No. 81-6118. NORDSTROM *v.* WALT DISNEY PRODUCTIONS, INC. C. A. 10th Cir. Certiorari denied.

No. 81-6119. JAFFER *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81-6120. BEHLIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 557, 440 N. Y. S. 2d 948.

No. 81-6122. AUSTIN *v.* OSBORNE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 906.

No. 81-6124. TYLER *v.* WOODSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 702.

No. 81-6127. JOHNSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1074.

No. 81-6132. HAMILTON *v.* MAYS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81-6134. HAMPTON *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6136. GRIM ET AL. *v.* OHIO. Ct. App. Ohio, Champaign County. Certiorari denied.

No. 81-6133. SULLIVAN *v.* LANE, ACTING WARDEN, ET AL.; SULLIVAN *v.* LANDHOUISE ET AL.; SULLIVAN *v.* BURGESS ET AL.; SULLIVAN *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL.; and SULLIVAN *v.* JOHNSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-6137. BEARDEN *v.* WHITE, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81-6138. BEACH *v.* LEBEL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1077.

No. 81-6139. BRAY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-6146. COOKS *v.* SPALDING, WARDEN, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 738.

No. 81-6147. HALL *v.* THOMAS. Sup. Ct. Va. Certiorari denied.

No. 81-6148. FRANKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 636 P. 2d 361.

No. 81-6150. FILLYAW *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 104 Wis. 2d 700, 312 N. W. 2d 795.

No. 81-6153. ELLISON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 437 A. 2d 1127.

No. 81-6159. MONTANA *v.* COMMISSIONERS COURT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 19.

No. 81-6160. HOLIFIELD *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 710.

No. 81-6162. IN RE GAINES. C. A. 5th Cir. Certiorari denied.

No. 81-6168. CRATER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1200, 426 N. E. 2d 1287.

No. 81-6173. WHITE *v.* THOMAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 680.

No. 81-6184. BRODY *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE. C. A. 1st Cir. Certiorari denied. Reported below: 664 F. 2d 10.

No. 81-6206. WERNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 896.

No. 81-6208. STOUTE *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 81-6212. BEGAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 504.

No. 81-6217. MATTHEIS *v.* ANDERSON, WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 917.

No. 81-6219. ESPINOSA-FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81-6223. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1032.

No. 81-6228. BUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 532.

No. 81-6233. GHOLSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-6234. TALBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042.

No. 81-6240. KITCHENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81-6251. MELNICK *v.* CITY OF PUEBLO. Dist. Ct. Colo., Pueblo County. Certiorari denied.

No. 81-6257. GALVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-6259. HAWK *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 940.

No. 81-6273. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81-855. ANDERSON, WARDEN *v.* FULLER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 662 F. 2d 420.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Although I believe that *Jackson* v. *Virginia*, 443 U. S. 307, was decided incorrectly, it is not at all clear to me that the Court of Appeals in this case misapplied the dicta in the Court's opinion in *Jackson*. The Court of Appeals did not purport to resolve any conflict in the evidence. Quite properly it attached no weight to the fact that the defendant did not testify, or to the fact that his mother may have testified falsely in support of an alibi defense. Neither of those facts is affirmative evidence of guilt.

Based on their duty to "review the evidence in the light most favorable to the prosecution," 662 F. 2d 420, 423 (CA6 1981), a majority of the judges of the Court of Appeals concluded—as had the District Court and two of five justices of the Michigan Supreme Court—that there was insufficient evidence in the record that the respondent had intended to commit a crime. It is quite misleading to describe the slim record in this case as "a classic case of conflicting evidence,"

post, at 1031, or to imply that these conscientious federal judges chose "to sit as a jury and set aside the lawful jury's findings of fact." *Post*, at 1033. What the Court of Appeals did conclude was that evidence that the respondent, like several other boys, was present at the scene of the crime was legally insufficient to permit any rational trier of fact to find beyond a reasonable doubt that respondent was a participant in that crime. See 662 F. 2d, at 423. The essence of the Court of Appeals decision is explained in the following few paragraphs:

> "The district court correctly concluded that the evidence introduced at petitioner's trial only showed that on the morning of May 18 Fuller was present at the Turner residence along with Zerious Meadows and the other boys. The evidence showed that Fuller looked around while Meadows started the fires. But as Judge Feikens pointed out:
>
> "'This *suggests*, as Jefferey Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew that Zerious Meadows planned to do [*sic*] is simply too meager to support conviction.' (emphasis in original)
>
> "We note that there was no evidence at trial that the 'Molotov cocktail' which started the fire was prepared in advance, or, if it was, whether any of the boys other than Zerious Meadows knew that the 'Molotov cocktail' existed. There was of course no evidence that any of the boys, except Fuller [*sic*], participated in the manufacture of the 'Molotov cocktail'.
>
> "Moreover, there was no direct evidence that the youths approached the Turner house with intent to set the house on fire. Assuming Zerious Meadows had this

intent, however, there was no evidence that it was shared by petitioner or the other boys.

"The only direct evidence supporting the State's contention that Fuller 'stood guard and acted as a lookout' for Zerious Meadows was Jefferey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side 'more than twice.' We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson." *Id.*, at 424.

In my judgment it would not be an appropriate use of this Court's scarce resources to grant certiorari and review every record in which a federal court makes a conscientious effort to apply the dictates of *Jackson* v. *Virginia*. For that reason, without reaching the question whether I would have decided this case the same way the Court of Appeals did had I been a member of that court, I think this Court wisely denies certiorari.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

Respondent Fuller was convicted of felony murder in 1970, following a fire in which two children died. The fire occurred on the morning of May 18, 1970. The prosecution's evidence showed that Fuller served as a lookout while Meadows set the fire. Fuller was 17 years old at the time. A neighbor testified that she saw Fuller, along with a few other boys, standing in front of the Turner house on the morning of the fire. A 14-year-old, Coleman, testified that he saw Fuller and Meadows behind the house. Meadows was on the back porch. As Coleman watched, for 5 or 10 minutes, Meadows stuffed a rag inside a bottle, ignited the rag, and threw the bottle against the house, starting a fire. Meadows then set another fire. Fuller, meanwhile, stood by a gate leading from the backyard to an alley. Coleman testified that Fuller looked up and down the alley while Meadows was setting the fires. Fuller and Meadows then left the yard

through the gate and ran down the alley together. Coleman went to the house of a friend, Martin, and reported that the Turner house was on fire.

The defense moved for a directed verdict of acquittal at the close of the State's evidence. The trial judge ruled that the evidence against Fuller established a prima facie case and denied the motion.

The defense put on one witness, Fuller's mother. She testified that Fuller was at home asleep until 9 o'clock on the morning of the fire; therefore, he could not have been involved in setting the fires. The defense case was based solely on this alibi and an attempt to discredit Coleman's testimony. Defense counsel told the jury that the only real issue in the case was whether Fuller or someone else was standing behind the Turner house.

There was no challenge to the trial judge's instructions on reasonable doubt and the presumption of innocence. This, then, was a classic case of conflicting evidence in which the jury had to pass on the credibility of the witnesses. The jury returned a verdict of guilty. The verdict shows the jury did not believe Fuller's mother and accept his alibi defense. The jury obviously accepted as true the testimony of Coleman and the testimony of two other witnesses who said that they saw Fuller at the scene on the morning of the fire. The trial judge denied a motion for a new trial, and Fuller received a mandatory life sentence as an accessory to murder by arson. Meadows was convicted of first-degree murder in a separate trial.

Fuller appealed directly to the Michigan Court of Appeals, which unanimously affirmed the conviction. *People* v. *Fuller*, 44 Mich. App. 297, 205 N. W. 2d 287 (1973). It held that the evidence was sufficient to convict Fuller because, if the jury believed Coleman, it could reasonably conclude that Fuller acted as a lookout for Meadows. A divided Michigan Supreme Court affirmed. 395 Mich. 451, 236 N. W. 2d 58 (1975). It also noted that evidence was presented, which, if believed by the jury, showed that Fuller acted as a lookout.

In another in a series of cases in which federal courts retry issues of fact and credibility, the District Court for the Eastern District of Michigan granted Fuller's application for a writ of habeas corpus under 28 U. S. C. § 2254. The court purported to apply *Jackson* v. *Virginia*, 443 U. S. 307 (1979). It noted that *Jackson* held that habeas relief could only be granted if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.*, at 324. The District Court then reviewed and reweighed the evidence presented at trial and concluded that the evidence which persuaded 12 jurors, who heard all the evidence and observed the demeanor of *all* the witnesses, was too meager to support the prosecution's contention that Fuller acted as a lookout. The District Court relied heavily on the fact that no evidence was presented to show Fuller knew that Meadows planned to burn the Turner home; Fuller, of course, did not take the stand.

A divided Court of Appeals for the Sixth Circuit affirmed. 662 F. 2d 420 (1981). That court again reweighed the evidence which 12 jurors found sufficient under instructions not questioned. Like the District Court, two of the members of the panel concluded that there was insufficient evidence presented to establish that Fuller knew Meadows intended to commit arson.

Dissenting, Judge Weick cogently contended that the federal courts were improperly usurping the function of the state-court jury. If the jury which saw and heard the witnesses chose to believe Coleman's testimony, it was reasonable to infer that Fuller acted as a lookout for Meadows. The jury clearly chose to believe Coleman, just as it chose to disbelieve Fuller's alibi.

The District Court and the Court of Appeals incorrectly applied *Jackson*. There we held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a rea-

sonable doubt." 443 U. S., at 319. It is sheer nonsense to suggest that, on this record, the 12 jurors acted irrationally. With all respect, I suggest that the District Court and the Court of Appeals' majority forgot that it is the function of the jury to determine who is telling the truth. Judges betray their function when they arrogate themselves over the legal factfinder. Either we accept the jury system with the risk of human fallibility or we ought to change the structure of the system and redefine the standard of review under the habeas corpus statutes. The District Court and the Court of Appeals did not view the evidence in the light most favorable to the prosecution, as the law and their oaths require. If they had, they could not have rationally concluded that the jury could not reasonably reach the result it reached. Instead, the courts reweighed Coleman's testimony, noting that he was young, that he had been placed in a youth house because he ran away from home, and that he attended a "special school." Put simply—and bluntly, as this case demands—the federal judges who set aside this state-court judgment acted like jurors, not jurists.

This Court cannot sit as a court of errors to correct every mistake by other courts. But the decision here warrants consideration by this Court because the courts have misapplied *Jackson* in a way that threatens to lead to reversals of state-court criminal convictions whenever a federal court chooses to sit as a jury and set aside the lawful jury's findings of fact. There was a flagrant refusal here to review the evidence in the light most favorable to the prosecution, as the law commands. *Jackson* did not authorize such gross interference with the functioning of state criminal justice systems.

I would grant certiorari and reverse the decision below, with appropriate reminders to my colleagues as to certain fundamental propositions concerning their role. Our heavy docket is an insufficient reason to allow this erroneous judgment to stand.

No. 81-871. AMERICAN PETROLEUM INSTITUTE ET AL. *v.* GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.; and

No. 81-1019. CITY OF HOUSTON, TEXAS *v.* GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 214 U. S. App. D. C. 358, 665 F. 2d 1176.

No. 81-959. SAXTON, MOTHER AND NATURAL GUARDIAN OF DENNIS ET AL. *v.* DENNIS. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 309 N. W. 2d 298.

No. 81-1152. STANDARD OIL COMPANY OF CALIFORNIA *v.* WILTSHIRE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 652 F. 2d 837.

No. 81-1341. DEL RIO LAND, INC., ET AL. *v.* CITY OF PHOENIX ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81-1371. HOOPA VALLEY TRIBE OF INDIANS *v.* SHORT ET AL.; and

No. 81-1373. UNITED STATES *v.* SHORT ET AL. Ct. Cl. Motion of Quinault Indian Nation for leave to file a brief as *amicus curiae* in No. 81-1371 granted. Motion of National Congress of American Indians et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: —— Ct. Cl. ——, 661 F. 2d 150.

No. 81-1406. GREENE *v.* GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT. Ct. App. N. Y. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE POWELL would grant certiorari, vacate the judgment, and remand the case for further consideration in light of *In re R. M. J.*, *ante*, p. 191. Reported below: 54 N. Y. 2d 118, 429 N. E. 2d 390.

No. 81-1421. SEDELBAUER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction. Reported below: —— Ind. ——, 428 N. E. 2d 206.

No. 81-5908. ZEIGLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 365.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner seeks review of the State Supreme Court's decision upholding his murder conviction and death sentence. He argues that his conviction and death sentence should be set aside because they were based in part on evidence obtained in flagrant violation of his Fourth Amendment rights. He objects to the State Supreme Court's holding that, by calling the Chief of Police for assistance, he consented to a broad-ranging 12-day search of his furniture store. Because I believe that this petition raises serious Fourth Amendment claims[1] and offers an opportunity for this Court to clarify the

[1] Petitioner also objects that his alleged consent to a search of his home was not voluntary. The morning after the crimes, police asked to see peti-

standards for consent to search under *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), I dissent from the denial of certiorari.[2]

On December 24, 1975, four persons were killed at a furniture store owned by petitioner. Petitioner's wife, her parents, and another person had been shot to death, and petitioner had been shot in the abdomen and was seriously wounded. That night, shortly after the shootings, petitioner called the local Police Chief, a personal friend of petitioner, and requested immediate assistance. The Police Chief testified: "He told me that he had been shot. I said, what happened. He said please come help me, hurry." In response to this call, the police entered the store, found petitioner, who was bleeding badly, and rushed him to the hospital. The police found four bodies, searched for the killer, and secured the building.

Later that night, a local detective arrived to direct the investigation. The store was searched again that night and repeatedly over the next *12 days*. No effort was made to ob-

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tioner in the hospital, but were refused admission because of his physical and emotional condition. Petitioner had come out of surgery only six hours earlier, was under the influence of anesthesia, and had recently been given morphine for pain. The officers drafted a consent form and asked two nurses to obtain petitioner's signature. The nurses awoke petitioner and told him that the police would like to search his home and would like him to sign the form, which they read to him. Although the nurses testified that he was coherent when he signed the form, petitioner stated that he had no recollection of signing.

As a result of this purported consent, the police searched petitioner's home and seized numerous items of evidence that were introduced at trial. These circumstances—the extraction of consent from a recuperating and drugged patient in a hospital bed—demand the most careful scrutiny before the consent may be deemed voluntary. If the petition for certiorari were granted, I would address this issue as well.

[2] Because I continue to believe that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would also grant the petition for certiorari in this case and vacate the judgment below insofar as it leaves undisturbed the death sentence.

tain a warrant until January 6, 1976. On December 26, police made a warrantless entry into petitioner's office, which was separated from the area where the victims were found, breaking two locks in the process. They went through petitioner's personal papers, checkbooks, and corporate records, and seized several documents. In searching through one of petitioner's desks, police found an insurance policy that petitioner had taken out on his wife's life. A second policy was seized in a search the next day. The two policies were introduced at trial to support the State's theory that petitioner had a pecuniary motive for killing his wife. On January 2, police searched the store yet again. They entered a backroom separated from the area in which the victims had been found, searched the inside of a closed storage cabinet, and seized a large amount of damaging evidence that was introduced at trial.

The detective testified that in conducting these warrantless searches, he relied on a so-called crime scene exception to the warrant requirement. He specifically stated that he did *not* have petitioner's consent to all of the searches. The trial court upheld the searches under this crime scene rationale. Although the State Supreme Court recognized that a crime scene exception is inconsistent with *Mincey* v. *Arizona*, 437 U. S. 385 (1978), it nevertheless upheld the searches, reasoning that the police were at the store at the "invitation" of petitioner. 402 So. 2d 365, 372 (Fla. 1981).[3]

The decision below stretches the consent exception to the warrant requirement beyond recognition. Particularly when the defendant's life hangs in the balance, courts should be careful that convictions are not based on illegally obtained evidence. Here, the conclusion that a seriously wounded de-

[3] The State contends that petitioner shot himself and called the police as part of a deliberate scheme to pin the blame on another. This contention is irrelevant to the scope of petitioner's consent. Whether or not the call for help was self-serving, the question remains whether it can reasonably be construed as a consent to a search unlimited in time and location.

fendant who requests police aid thereby consents to an unlimited 12-day search of his business premises ignores the relevant context of the consent—the need for immediate medical assistance—and amounts to a rule that a cry for help waives all Fourth Amendment protection. I would set the case for plenary argument.

No. 81-6082. RUFFIN *v.* AUSTIN, WARDEN, GEORGIA STATE PRISON. Super. Ct. Ga., Tatnall County;

No. 81-6131. EVANS *v.* VIRGINIA. Sup. Ct. Va.;

No. 81-6143. ROOK *v.* NORTH CAROLINA. Sup. Ct. N. C.; and

No. 81-6151. CUNNINGHAM *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81-6131, 222 Va. 766, 284 S. E. 2d 816; No. 81-6143, 304 N. C. 201, 283 S. E. 2d 732; No. 81-6151, 248 Ga. 558, 284 S. E. 2d 390.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80-6843. HIGH *v.* GEORGIA, *ante*, p. 927;

No. 81-23. HUTTO, DIRECTOR, VIRGINIA STATE DEPARTMENT OF CORRECTIONS, ET AL. *v.* DAVIS, 454 U. S. 370;

No. 81-1013. JOHNSON *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (BANK OF AMERICA ET AL., REAL PARTIES IN INTEREST), *ante*, p. 921;

No. 81-1078. GELLER *v.* MERIT SYSTEMS PROTECTION BOARD ET AL., *ante*, p. 901;

No. 81-5566. DENARDO *v.* MURPHY, 454 U. S. 1096;

No. 81-5801. WALLACE *v.* GEORGIA, *ante*, p. 927;

No. 81-5831. LEUSCHNER *v.* MARYLAND, *ante*, p. 951; and

No. 81-5841. SABIR *v.* RAINIER NATIONAL BANK, 454 U. S. 1157. Petitions for rehearing denied.

No. 81-5621. JOHNSON *v.* AETNA CASUALTY & SURETY COMPANY OF HARTFORD, CONNECTICUT, ET AL., 454 U. S. 1118. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

MARCH 23, 1982

Miscellaneous Order

No. 81-1724. UPHAM ET AL. *v.* SEAMON ET AL. D. C. E. D. Tex. Motion of appellants to expedite is granted insofar as the appellees are directed to file motions to dismiss or affirm on or before Monday, March 29, 1982.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1039 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* BURTON ET AL.

ON APPLICATION FOR STAY

No. A-768 (81-1641). Decided March 11, 1982

An application for a stay, pending appeal, of the California Supreme Court's judgment—which held that a statewide referendum petition had effectively suspended the operation of California statutes redistricting congressional districts after the 1980 census, but that the June 8, 1982, primary election nonetheless should be conducted in accordance with the districts established by those statutes—is denied. Even assuming that the California Supreme Court wrongly interpreted the effect of a pertinent federal statute, that court's judgment appears to be based on adequate and independent state grounds, and this Court has no jurisdiction to review decisions based on such grounds.

JUSTICE REHNQUIST, Circuit Justice.

Applicants ask that I stay, pending their appeal therefrom, the judgment of the Supreme Court of California entered on January 28, 1982, in mandate proceeding S. F. No. 24354. That proceeding concerns certain redistricting statutes enacted by the California Legislature in response to the 1980 decennial census which allotted California two additional congressional seats, the effect upon such statutes of a petition calling for their review in a statewide referendum, and the congressional districts to be used by the State in the interim. The California Supreme Court held that the referendum petition effectively suspended the operation of the redistricting statutes, but that the June 8, 1982, primary election nonetheless should be conducted in accordance with the district boundaries set forth in those statutes. *Assembly of State of*

California v. *Deukmejian*, 30 Cal. 3d 638, 639 P. 2d 939 (1982).

Applicants argue that the June election should be conducted according to district boundaries in effect prior to the 1980 census, with the two new seats to be filled by at-large elections. They contend that the California Supreme Court erred when it held that 2 U. S. C. § 2c, which requires that each Representative be elected from a separate district, superseded 2 U. S. C. § 2a(c)(2), which requires that newly allotted seats be filled by at-large elections if the State has not completed redistricting. Applicants assert that this holding merits review by this Court, and they present such arguments in a jurisdictional statement filed simultaneously with this application.

Even if the applicants are correct in their contention that the California Supreme Court wrongly interpreted the effect of § 2c—a question on which I express no opinion—I think it is highly unlikely that this Court will give plenary consideration to their appeal. In addition to construing provisions of the United States Code, the decision of the California Supreme Court recites several state-law reasons for its holding that the boundaries of the new redistricting scheme should be followed in the June election.* Thus, the judgment appears to be based on adequate and independent state grounds. Of course, this Court has no jurisdiction to review decisions based on adequate, nonfederal grounds. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 281 (1961). Accordingly, the application for a stay of the judgment is denied, and the application for expedited oral argument is referred to the full Court.

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*It does not appear that a contrary holding on the federal statutory question would alter the validity of the state grounds, for 2 U. S. C. § 2a(c)(2) by its terms applies only "[u]ntil a State is redistricted *in the manner provided by the law thereof*." (Emphasis added.)

KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. v. DAGGETT ET AL.

ON APPLICATION FOR STAY

No. A-783 (81-2057). Decided March 15, 1982

An application for a stay, pending appeal, of the District Court's judgment—which declared that a New Jersey statute creating new election districts for United States Representatives in response to the 1980 census was unconstitutional because of population variances among the districts, and which enjoined any primary or general congressional elections under the statute—is granted. There is a reasonable probability that four Justices of this Court will consider the issue of the proper interpretation of the controlling standard of *Kirkpatrick* v. *Preisler*, 394 U. S. 526, concerning permissible population variances to be sufficiently meritorious to note probable jurisdiction, and there is a fair prospect of reversal of the District Court's judgment. Moreover, applicants will suffer irreparable harm if the stay is not granted, and apportionment plans created by the legislature are to be preferred to judicially constructed plans.

JUSTICE BRENNAN, Circuit Justice.

Applicants, the Speaker of the New Jersey Assembly, the President of the New Jersey Senate, and eight Members of the United States House of Representatives from New Jersey, have applied to me for a stay pending this Court's review on appeal of the judgment of a three-judge District Court for the District of New Jersey entered March 3, 1982. *Daggett* v. *Kimmelman* —— F. Supp. ——. The judgment declared unconstitutional 1982 N. J. Laws, ch. 1, which creates districts for the election of the United States Representatives from New Jersey, and enjoined the defendant state officers from conducting primary or general congressional elections under the terms of that statute.

On the basis of the 1980 decennial census, the number of United States Representatives to which New Jersey is entitled has been decreased from 15 to 14. Consequently the

New Jersey Legislature was required to apportion 14 congressional districts. Chapter 1 is the product of the state legislature's effort to meet that requirement. The District Court found that in drafting ch. 1 the legislature was concerned not only with drawing districts of equal population as an "aspirational" goal but also with recognizing such factors as the preservation of the cores of pre-existing districts, the preservation of municipal boundary lines, and the preservation of the districts of incumbent Democratic Congressmen. Chapter 1 creates 14 congressional districts with an overall absolute range of deviation of 3,674 people and an overall relative range of deviation of 0.6984% from the "ideal" map of 14 districts of 526,059 persons each. There were, however, several other proposals brought before the legislature that yielded total deviations less than 0.6984%. The opinion for the majority of the District Court says of these:

> "For example, the Roeck plan contained a total deviation of .3250%, and only .2960% after it was amended. The DiFrancesco plan . . . had a total deviation of .1253%. The Hardwick plan . . . contained a total deviation of .4515%. The Bennett plan . . . and the Kavanaugh plan . . . contain total deviations of .1369% and .0293%, respectively." —— F. Supp., at ——.

All three judges of the District Court agreed that the constitutionality of 1982 N. J. Laws, ch. 1, was to be determined under the standard announced in *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and its progeny, *e. g.*, *White* v. *Weiser*, 412 U. S. 783 (1973). But the judges divided 2 to 1 on what that standard is. The majority read *Kirkpatrick* as holding that, even if 0.6984% was to be regarded as a *de minimis* variance,

> "P. L. 1982, c. 1 can withstand constitutional attack only if the population variances 'are unavoidable despite a good-faith effort to achieve absolute equality . . . .' *Kirkpatrick*, 394 U. S. at 531. It is clear that the .6984% population deviation of P. L. 1982, c. 1 is not un-

avoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%." —— F. Supp., at ——.

The dissenting judge, on the other hand, read *Kirkpatrick* to suggest:

"[V]ariances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts. . . . [*Kirkpatrick* is to be read to announce] a prohibition against toleration of *de minimis* dilutions of relative representation rather than as a prohibition against toleration of *de minimis* population variances which have no statistically relevant effect on relative representation. A plus-minus deviation of 0.6984% falls within the latter category." —— F. Supp., at ——.

The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey Legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably "statistically insignificant" variances from the constitutional ideal of absolute precision.

The principles that control my determination as Circuit Justice of this in-chambers application were stated in *Rostker* v. *Goldberg*, 448 U. S. 1306 (1980) (BRENNAN, J., in chambers):

"Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable

probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*, at 1308 (citations omitted).

The importance of a definitive answer from this Court as to the proper interpretation of the *Kirkpatrick* standard is self-evident: Doubtless all 50 States would be assisted by that answer in any review of the apportionment of congressional seats in consequence of the 1980 census. My task is not to adjudicate this application on my own view of the merits of that question, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction of this appeal, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless it does seem to me that there is a reasonable probability that jurisdiction of the appeal will be noted, and that there is a fair prospect of reversal.

As to the third *Rostker* requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to

the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.

Accordingly, I am today entering an order granting the application for a stay pending the filing of a jurisdictional statement and, if probable jurisdiction is noted, final disposition of the appeal.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

DEATH OF JUSTICE FORTAS

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 28, 1982

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

Before we open our regular proceedings this morning on this, the last day of oral argument for the 1981 Term, we pause to note with sadness, the death of our colleague former Justice Abe Fortas in his 72nd year. Justice Fortas served on this Court from 1965 to 1969 after a rich and unusually varied experience in government, in private practice and a variety of activities relating to the law. He served as a legal adviser to the United Nations Organization and the American delegation to that Conference at San Francisco, as a visiting professor of law at the Yale Law School and a periodic lecturer at other law schools. His career in government at a very early age included service as General Counsel of the Public Works Administration under President Roosevelt and as Under Secretary of the Interior. After his return to private practice, he served from 1970 until the time of his death as a member of the very important Committee on Appellate Rules of the Judicial Conference of the United States. He had appeared as counsel at this lectern often, and his final appearance in this Court was on March 22, 1982—barely two weeks before his death.

The record will show that the recess of the Court on this final day of oral argument of the Term will be in memory of Mr. Justice Fortas, and in the October Term coming, there will be the traditional memorial service in this Chamber.

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INDEX

(Vol. 456 U. S., Part 2)

AGENTS' APPARENT AUTHORITY. See **Antitrust Acts.**

AGGRAVATING CIRCUMSTANCES WARRANTING DEATH SENTENCE. See **Criminal Law.**

ALIENS. See **Freedom of Information Act.**

ANTIFRAUD PROVISIONS OF COMMODITY EXCHANGE ACT. See **Commodity Exchange Act.**

ANTITRUST ACTS.

American Society of Mechanical Engineers—Liability for agents' acts.—Petitioner, a nonprofit membership corporation that promulgates engineering codes which are frequently incorporated by reference in federal regulations and state and local laws, is civilly liable for antitrust violations of its agents committed within scope of their apparent authority; thus petitioner was liable for antitrust injuries suffered by respondent where response of petitioner's subcommittee to letter of inquiry from respondent's competitor (one of whose officials was vice chairman of subcommittee) declared in effect that respondent's product was unsafe, and where response was used by competitor to discourage customers from buying respondent's product. American Society of Mechanical Engineers v. Hydrolevel Corp., p. 556.

APPARENT AUTHORITY OF AGENTS. See **Antitrust Acts.**

ARMED FORCES. See **Federal Water Pollution Control Act.**

BILLS OF LADING. See **Interstate Commerce Act.**

BOILERS SAFETY CODE. See **Antitrust Acts.**

BROKERS. See **Commodity Exchange Act.**

BUSINESS AGENTS OF UNIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

CAPITAL PUNISHMENT. See **Criminal Law.**

CARRIERS. See **Interstate Commerce Act.**

CERTIFICATION OF STATE-LAW QUESTION TO STATE COURT. See **Criminal Law.**

CITIZENSHIP INFORMATION. See **Freedom of Information Act.**

CIVIL RIGHTS ACT OF 1964.

Employment discrimination—Federal-court action—Effect of state-court judgment.—In a federal-court employment discrimination action under Act, District Court was required, under "full faith and credit" provisions of 28 U. S. C. § 1738, to give preclusive effect to a New York court's decision upholding rejection of petitioner's discrimination claim by state agency to which, as required by Act, claim had been referred by Equal Employment Opportunity Commission, where New York's administrative and judicial procedures for handling such claims satisfied due process requirements of Fourteenth Amendment. Kremer v. Chemical Construction Corp., p. 461.

Employment discrimination—Seniority system—Disparate impact.—Under § 703(h) of Act, which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a bona fide seniority system if such differences are not "the result of an intention to discriminate because of race," a showing of a disparate impact alone, without discriminatory purpose, is insufficient to invalidate a system, even though result may be to perpetuate pre-Act discrimination. Pullman-Standard v. Swint, p. 273.

Employment discrimination—Seniority system—Review of District Court's finding.—In an action against an employer and certain unions—where District Court found that differences in treatment of employees under seniority system did not result from an intent to discriminate against blacks and that system thus satisfied requirements of § 703(h) of Act—Court of Appeals erred in concluding that District Court's finding was one of "ultimate fact" not subject to clearly-erroneous standard of review under Federal Rule of Civil Procedure 52(a), and in independently determining that differences in treatment resulted from intentional discrimination; question of intent to discriminate is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. Pullman-Standard v. Swint, p. 273.

CLEARLY-ERRONEOUS STANDARD OF REVIEW. See **Civil Rights Act of 1964.**

COLLATERAL ESTOPPEL. See **Civil Rights Act of 1964.**

COLORADO. See **Jurisdiction.**

COMITY. See **Civil Rights Act of 1964.**

COMMODITY EXCHANGE ACT.

Antifraud provisions—Price manipulation—Implied causes of action.—Private persons have an implied right of action under Act against their brokers, futures commission merchants, and mercantile exchanges for violation of Act's antifraud provisions and its provisions designed to prevent price manipulation. Merrill Lynch, Pierce, Fenner & Smith v. Curran, p. 353.

COMMODITY FUTURES TRADING COMMISSION ACT OF 1974. See **Commodity Exchange Act.**

COMMON CARRIERS. See **Interstate Commerce Act.**

CONSIGNOR'S LIABILITY FOR FREIGHT CHARGES. See **Interstate Commerce Act.**

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1964.**

Due process—Eviction of tenants—Service of process.—State deprived appellees, tenants in a public housing project, of property without due process where, pursuant to a Kentucky statute, service of process in forcible entry and detainer actions against appellees was made only by posting summonses on their apartment doors and where appellees claimed that they never saw summonses and did not know of eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them and their opportunity for appeal had lapsed. Greene v. Lindsey, p. 444.

CREDIT REGULATIONS OF INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

CRIMINAL LAW.

Death sentence—Invalidity of one of aggravating circumstances found by jury.—In federal habeas corpus proceedings by state prisoner challenging constitutionality of Georgia death sentence that was upheld by Georgia Supreme Court, which, while setting aside jury's finding of one statutory aggravating circumstance, had concluded that sentence was not impaired since evidence supported jury's findings of two other aggravating circumstances, this Court will, pursuant to a Georgia statute, certify question to Georgia Supreme Court as to what premises of state law supported conclusion that death sentence was not impaired by invalidity of one of aggravating circumstances found by jury. Zant v. Stephens, p. 410.

DEATH SENTENCES. See **Criminal Law.**

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Education Amendments of 1972.**

DEPARTMENT OF STATE. See **Freedom of Information Act.**

DISCHARGE OF NAVY ORDNANCE INTO WATERS. See **Federal Water Pollution Control Act.**

DISCHARGE OF UNION BUSINESS AGENTS. See **Labor-Management Reporting and Disclosure Act of 1959.**

DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

DISCRIMINATION AGAINST BLACKS. See **Civil Rights Act of 1964.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964; Education Amendments of 1972.**

DISCRIMINATION IN FEDERALLY FUNDED EDUCATION PROGRAMS. See **Education Amendments of 1972.**

DISCRIMINATION ON BASIS OF NATIONAL ORIGIN. See **Civil Rights Act of 1964.**

DISCRIMINATION ON BASIS OF SEX. See **Education Amendments of 1972.**

DUE PROCESS. See **Civil Rights Act of 1964; Constitutional Law.**

EDUCATION AMENDMENTS OF 1972.

Federally funded education programs—Sex discrimination against employees.—Section 901(a) of Title IX of Amendments—which provides that "no person" shall, on basis of sex, be denied benefits of, or be subjected to discrimination under, any federally funded education program—prohibits such programs from discriminating against not only students but also such programs' employees, and Health, Education, and Welfare Department's regulations prohibiting such employment discrimination are valid. North Haven Bd. of Ed. v. Bell, p. 512.

ELECTION OF UNION OFFICERS. See **Labor-Management Reporting and Disclosure Act of 1959.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Education Amendments of 1972; Labor-Management Reporting and Disclosure Act of 1959.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Education Amendments of 1972.**

EVICTIONS. See **Constitutional Law.**

EXEMPTION 6 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act.**

FEDERALLY FUNDED EDUCATION PROGRAMS. See **Education Amendments of 1972.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Civil Rights Act of 1964.**

FEDERAL-STATE RELATIONS. See **Civil Rights Act of 1964; Criminal Law.**

FEDERAL WATER POLLUTION CONTROL ACT.

Navy's discharge of ordnance into waters—Failure to obtain permit—Injunctive relief.—In an action alleging violation of Act by Navy's discharge of ordnance into waters near island used for air-to-ground weapons train-

FEDERAL WATER POLLUTION CONTROL ACT—Continued.

ing, wherein District Court found that water quality was not harmed but ordered Navy to comply with Act by applying for permit from Environmental Protection Agency, Act did not withdraw District Court's equitable discretion so as to require it to enjoin Navy's operations pending consideration of permit application. Weinberger v. Romero-Barcelo, p. 305.

FINAL JUDGMENTS. See **Jurisdiction.**

FORCIBLE ENTRY AND DETAINER ACTIONS. See **Constitutional Law.**

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1964; Constitutional Law.**

FRAUD. See **Commodity Exchange Act.**

FREEDOM OF ASSEMBLY. See **Labor-Management Reporting and Disclosure Act of 1959.**

FREEDOM OF INFORMATION ACT.

Exemption 6—Iranian nationals—Possession of passports.—Information sought by respondent from petitioner State Department, consisting of documents indicating whether certain Iranian nationals held valid United States passports, satisfied "similar files" requirement of Act's Exemption 6, relating to personnel and medical files and "similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and petitioner's denial of disclosure request should have been sustained upon a showing that release of information would constitute a clearly unwarranted invasion of personal privacy. Department of State v. Washington Post Co., p. 595.

FREEDOM OF SPEECH. See **Labor-Management Reporting and Disclosure Act of 1959.**

FREIGHT CHARGES. See **Interstate Commerce Act.**

FULL FAITH AND CREDIT. See **Civil Rights Act of 1964.**

FUTURES TRADING. See **Commodity Exchange Act.**

GENDER-BASED DISCRIMINATION. See **Education Amendments of 1972.**

GEORGIA. See **Criminal Law.**

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Education Amendments of 1972.**

IMPLIED CAUSES OF ACTION. See **Commodity Exchange Act.**

INJUNCTIONS. See **Federal Water Pollution Control Act.**

INTERSTATE COMMERCE ACT.

Railroad freight charges—Consignor's liability.—Although petitioner, a common carrier by rail, violated Interstate Commerce Commission's credit

INTERSTATE COMMERCE ACT—Continued.

regulations promulgated under § 3(2) of Act by delivering shipments to consignee without first collecting freight charges or checking consignee's credit standing, such violation did not bar petitioner's collection of freight charges from respondent consignor who had not executed "nonrecourse clause" in bills of lading and thus was primarily liable for freight charges. Southern Pacific Transportation Co. v. Commercial Metals Co., p. 336.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

IRANIAN NATIONALS. See **Freedom of Information Act.**

JURISDICTION.

Supreme Court—Review of "final" judgments.—Supreme Court has no jurisdiction under 28 U. S. C. § 1257, which provides for review of "final" judgments, to review Colorado Supreme Court's judgment remanding case for trial. O'Dell v. Espinoza, p. 430.

KENTUCKY. See **Constitutional Law.**

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

Union business agents—Discharge after election of union president.—Sections 101(a)(1) and (2) of Act, which guarantee equal voting rights and rights of free speech and assembly to union members, and § 609, which forbids a union to discipline a member for exercising any right under Act, were not violated when petitioner union members were discharged from their appointed positions as business agents for respondent local union by respondent union president following his election over a candidate supported by petitioners. Finnegan v. Leu, p. 431.

LABOR UNIONS. See **Civil Rights Act of 1964; Labor-Management Reporting and Disclosure Act of 1959.**

LANDLORD AND TENANT. See **Constitutional Law.**

MECHANICAL ENGINEERS' SOCIETY. See **Antitrust Acts.**

MERCANTILE EXCHANGES. See **Commodity Exchange Act.**

NAVY'S DISCHARGE OF ORDNANCE INTO WATERS. See **Federal Water Pollution Control Act.**

NEW YORK. See **Civil Rights Act of 1964.**

"NONRECOURSE CLAUSE" IN BILLS OF LADING. See **Interstate Commerce Act.**

NOTICE OF EVICTION. See **Constitutional Law.**

PASSPORTS. See **Freedom of Information Act.**

PATRONAGE DISCHARGES OF UNION EMPLOYEES. See **Labor-Management Reporting and Disclosure Act of 1959.**

POLLUTION. See **Federal Water Pollution Control Act.**

PRICE MANIPULATION. See **Commodity Exchange Act.**

PRINCIPAL AND AGENT. See **Antitrust Acts.**

PRISONERS. See **Criminal Law.**

PRIVATE CAUSES OF ACTION. See **Commodity Exchange Act.**

PROFESSIONAL SOCIETIES. See **Antitrust Acts.**

PUBLIC DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964.**

RAILROAD FREIGHT CHARGES. See **Interstate Commerce Act.**

REGULATIONS OF DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Education Amendments of 1972.**

REGULATIONS OF INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

RES JUDICATA. See **Civil Rights Act of 1964.**

SAFETY CODES. See **Antitrust Acts.**

SCHOOL BOARD EMPLOYEES. See **Education Amendments of 1972.**

SENIORITY SYSTEMS. See **Civil Rights Act of 1964.**

SERVICE OF PROCESS. See **Constitutional Law.**

SEX DISCRIMINATION. See **Education Amendments of 1972.**

SHERMAN ACT. See **Antitrust Acts.**

SPECULATORS IN FUTURES CONTRACTS. See **Commodity Exchange Act.**

STATE DEPARTMENT. See **Freedom of Information Act.**

SUMMONSES. See **Constitutional Law.**

SUPREME COURT. See also **Jurisdiction.**

Notation of the death of Justice Fortas (resigned), p. III.

TENANTS' RIGHT TO EVICTION NOTICE. See **Constitutional Law.**

UNIONS. See **Civil Rights Act of 1964; Labor-Management Reporting and Disclosure Act of 1959.**

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964.**

VOTING RIGHTS OF UNION MEMBERS. See **Labor-Management Reporting and Disclosure Act of 1959.**

WATER BOILERS SAFETY CODE. See **Antitrust Acts.**

WATER POLLUTION. See **Federal Water Pollution Control Act.**

WEAPONS TRAINING. See **Federal Water Pollution Control Act.**

WITHHOLDING PUBLIC DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

WORDS AND PHRASES.

1. "*Discipline.*" § 609, Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 529. Finnegan v. Leu, p. 431.

2. "*No person.*" § 901(a), Education Amendments of 1972, 20 U. S. C. § 1681(a). North Haven Bd. of Ed. v. Bell, p. 512.

3. "*Personnel and medical files and similar files.*" Freedom of Information Act, 5 U. S. C. § 552(b)(6). Department of State v. Washington Post Co., p. 595.

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 456 U. S., Parts 1 and 2)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Abbott Laboratories; Jefferson County Pharmaceutical Assn. *v.*	959
ABC; Hyppolite *v.*	979
Abeita *v.* Gutierrez	930
Abu-Bakr *v.* Reed	963
Adams; Johnson *v.*	981
Adams Extract Co.; Mead Corp. *v.*	937
Addison *v.* Chester	967
Addison Savmor, Inc. *v.* United States	965
Adkinson *v.* Campbell	928
Ad World, Inc.; Doylestown *v.*	975
Aetna Casualty & Surety Co. *v.* Keene Corp.	951
Africa *v.* Pennsylvania	908
Agurs *v.* Keller	947
Ah Lo *v.* Hawaii	981
Ahmed *v.* Eikerenkoetter	979
Air Pollution Control Comm'n *v.* Gorsuch	972
Alabama; Ballenger *v.*	907
Alabama; Berry *v.*	934
Alabama; Smith *v.*	947
Alabama; Streeter *v.*	932
Alabama; Woods *v.*	975
Alabama Hospital Assn. *v.* United States	943
Alaska; Ivey *v.*	950

Page
Alaska Marine Trucking *v.* Carnation Co. 964
Albert *v.* United States 916
Alford *v.* Lubbock 975
Allen *v.* Iowa 909
Allen; Lane *v.* 928
Allen Park *v.* Michigan 927
Allied International, Inc.; Longshoremen *v.* 212
Allison *v.* Continental Group, Inc. 906
Allnutt *v.* United States 905
Amalgamated. For labor union, see name of trade.
Aman Collection Service, Inc.; Juras *v.* 950
American Airlines; Murnane *v.* 915
American Bank & Trust Co. *v.* Dallas County 970
American Commercial Lines, Inc. *v.* Griffith 914
American Cyanamid Co. *v.* Oil Workers 969
American Medical Assn. *v.* Federal Trade Comm'n 941,966
American Society of Mechanical Engineers *v.* Hydrolevel Corp. .. 556
American Tobacco Co. *v.* Patterson 63
Aminoil, USA, Inc.; Oliver *v.* 916
Amsted Industries, Inc.; Baker *v.* 945
Andersen *v.* United States 929
Anderson *v.* Celebrezze 960
Anderson *v.* Conner 937
Anderson; Conner *v.* 917
Anderson *v.* Flateau 956
Anderson *v.* United States 916
Angelilli *v.* United States 939
Anglomar Bulkcarriers, Ltd.; Maecom S.A., Geneva *v.* 977
Antonelli *v.* Chicago Police Dept. 909
Antonelli *v.* United States 918
Apachito *v.* Watt 963
Appleby *v.* WTIC–FM Radio Station 933
Arizona *v.* California 912
Arizona; Chambers *v.* 931
Arizona; Hartford *v.* 933
Arizona; Ortiz *v.* 984
Arizona; Watson *v.* 981
Arkansas *v.* Mississippi 912
Arkansas; Singleton *v.* 938
Arrow Transportation Co. *v.* United States 915
Arroyo *v.* New York 979
Artway, *In re* 920
Artway *v.* Kramer 948
Associated Gen. Contractors of Cal. *v.* Cal. Council of Carpenters 903

Page
Athena Products, Ltd. *v.* U. S. Postal Service 915
Atherton *v.* Atherton 947
Atkins *v.* Eldridge 910
Atkinson *v.* Atkinson 905,965
Atkinson *v.* Goelz 905,965
Atlanta *v.* Owen 972
Atlantic Container Line; Yellow Forwarding Co. *v.* 962
Attorney General; Boyden *v.* 982
Attorney General; Gaines *v.* 949
Au *v.* Financial Plaza of the Pacific 952
Au *v.* Kelly 952
Auwaerter, *In re* 902
Avagliano *v.* Sumitomo Shoji America, Inc. 912
Avagliano; Sumitomo Shoji America, Inc. *v.* 912
Avedisian *v.* Hubbard 939
Avon *v.* United States 982
B. *v.* Illinois 963
Bacik *v.* Pennsylvania 967
Bagnariol *v.* United States 962
Baird, *In re* 982
Baker *v.* Amsted Industries, Inc. 945
Baker *v.* Estelle 908
Baker; Raymond International, Inc. *v.* 983
Balash *v.* New York City Employees' Retirement System 952
Baldwin *v.* Blackburn 950
Baldwin *v.* Minnesota Comm'r of Revenue 929
Ballenger *v.* Alabama 907
Balsley *v.* Gulley 974
Banco de Credito Rural Argentino *v.* Banque Arabe et Int'l 966
Bankers Trust Co. *v.* BP Oil, Inc. 961
Bank of Mount Vernon; McNew *v.* 974
Bank of Texas *v.* Childs 970
Banque Arabe et Int'l D'Investissement; Banco de Credito *v.* 966
Barbee *v.* Mitchell 979
Barham *v.* United States 947
Barnes; McColpin *v.* 919
Barnes *v.* United States 962
Barrett; Dallas County *v.* 936
Barrett; Thomas *v.* 925
Barry; Madison *v.* 985
Bass *v.* Texas 965
Bassett *v.* Virginia 938
Battaglia *v.* Union County Welfare Bd. 965
Bautista *v.* California 916

Page

Beach *v.* Kapner 980
Beachwood *v.* Central Motors, Inc. 976
Beasley *v.* Oklahoma 934
Beatty, *In re* 902
Beckstrom *v.* California 916
Bedford Associates *v.* United States 914
Belasco *v.* California 979
Bell; North Haven Bd. of Ed. *v.* 512
Bell; Perini *v.* 107
Benavidez *v.* United States 983
Benjamin S. *v.* Kuriansky 956
Bergman *v.* Burton 953
Berry *v.* Alabama 934
Best Investment Co. *v.* Dallas 921
Beyer; Diaz *v.* 904,985
Bilford *v.* Florida 920
Bingaman *v.* King 940
Birden *v.* Smith 948
Black; Stephens *v.* 950
Blackburn; Baldwin *v.* 950
Blackburn; Taylor *v.* 917
Blake; Hall *v.* 983
B & L Distribution Center *v.* Teamsters 911,974
Bledsoe *v.* United States 934
Blinken *v.* Maryland 973
Block *v.* United States 907
Blue Dot Investment, Inc.; Jerguson *v.* 946
Blum *v.* Yaretsky 903
Board of Comm'rs, Adams Cty. Pub. Hosp. Dist. No. 1; Ritter *v.* 969
Board of County Comm'rs of Weld County; Howard *v.* 927,968
Board of Directors, Bur Oak Library; Chaka *v.* 931
Board of Ed., Kings Park School Dist. No. 5; Savastano *v.* 974
Board of Governors, FRS; Option Advisory Service, Inc. *v.* 976
Board of Trustees, Internal Imp. Tr. Fund of Fla. *v.* Mobil Oil 956
Board of Trustees of Insts. of Higher Ed. *v.* Miss. Council on H. R. 971
Board of Trustees of Michigan State Univ.; Hildebrand *v.* 910
Bob Jones Univ. *v.* United States 922
Bobo *v.* ITT, Continental Baking Co. 933
Bochniak; Illinois *v.* 939
Bolger *v.* Youngs Drug Products Corp. 970
Bollotin *v.* Schwartz 950
Booth *v.* United States 978
Boss *v.* United States 946
Boston *v.* Difanis 979

Page
Bowen *v.* Zant 939
Bowers *v.* St. Louis Southwestern R. Co. 946
Bowles *v.* United States 982
Bowman *v.* United States 961
Bowman *v.* Wisconsin 931
Bowsher *v.* Merck & Co. 925
Bowsher; Merck & Co. *v.* 925
Boyden *v.* Smith 982
Boyer, *In re* 904
BP Oil, Inc.; Bankers Trust Co. *v.* 961
Brennin *v.* Kirby 908
Brent *v.* Maryland 908
Brewer *v.* United States 977
Brian Lee W. *v.* California 980
Bridgeport; Bridgeport Ed. Assn. *v.* 976
Bridgeport Ed. Assn. *v.* Bridgeport 976
Bright *v.* United States 926
Briscoe, *In re* 959
Briscoe *v.* Lahue 912
Britt *v.* United States 935
Broderick *v.* United States 928
Bronston *v.* United States 915
Brookline; Loeterman *v.* 906
Brooksher *v.* Harrel 963
Brotherhood. For labor union, see name of trade.
Brown, *In re* 957
Brown *v.* Engle 931
Brown *v.* Harris 948
Brown *v.* Hartlage 45
Brown *v.* United States 925,935
Browning-Ferris Industries of Georgia, Inc. *v.* United States 936
Brummitt *v.* United States 977
Brunswick Corp. *v.* Federal Trade Comm'n 915
Bryant; Ceat S.p.A., Pneumatici *v.* 944
Bryant; Maryland *v.* 949
Bucheit *v.* Laudenberger 940
Bureau of Revenue of N. M.; Ramah Navajo School Bd. *v.* 921
Burkburnett; Helton *v.* 940
Burlington Northern Inc. Pension Plan; Quinn *v.* 928
Burrell *v.* Union Correctional Institute 931
Burroughs Corp.; Kramarsky *v.* 924
Burton; Bergman *v.* 953
Burton; Republican National Committee *v.* 941

379-671 O—83——2

Page
Bustillos *v.* California 930
Butcher *v.* California 932
Butler *v.* United States 939
Butterworth; Kines *v.* 980
C. *v.* California 981
Calhoun *v.* United States 946
California; Arizona *v.* 912
California; Bautista *v.* 916
California; Beckstrom *v.* 916
California; Belasco *v.* 979
California; Brian Lee W. *v.* 980
California; Bustillos *v.* 930
California; Butcher *v.* 932
California; Campbell *v.* 930
California; David Lynn C. *v.* 981
California *v.* Grace Brethren Church 942
California; Harrison *v.* 934
California; Moreno *v.* 908
California; Valenzano *v.* 934
California; Vineberg *v.* 945
California *ex rel.* Cooper *v.* Mitchell Brothers' Santa Ana Theater 920
California State Bd. of Equalization *v.* United States 901,985
California State Council of Carpenters; Assoc. Gen. Contractors *v.* 903
Calvert *v.* Iowa 930
Camellia Corp. *v.* Cornell 901
Campbell; Adkinson *v.* 928
Campbell *v.* California 930
Campbell *v.* Gunn 931
Canda *v.* United States 909
Canham *v.* Oberlin College 977
Cann *v.* Ford Motor Co. 960
Cantrell *v.* United States 978
Carapella *v.* United States 935
Carlson; Green *v.* 918,982
Carlson; King *v.* 909
Carmen; Williams *v.* 919
Carnation Co.; Alaska Marine Trucking *v.* 964
Carow; Omernick *v.* 933
Carpenter *v.* Jamerson 901
Carpenters; Huber & Antilla Construction *v.* 977
Carpenters *v.* Pease Co. 974
Carpenters; Summit Valley Industries, Inc. *v.* 903
Carter *v.* Jago 980
Casbah, Inc. *v.* Thone 950

Page
Cashell *v.* United States 915
Caterpillar Tractor Co.; Chicago Bridge & Iron Co. *v.* 958
Cavalieri *v.* United States 973
Ceat S.p.A., Pneumatici *v.* Bryant 944
Celebrezze; Anderson *v.* 960
Central Bank of Nigeria; Verlinden B. V. *v.* 913
Central Motors, Inc.; Beachwood *v.* 976
Cervi *v.* Georgia 938
Chaka *v.* Board of Directors, Bur Oak Library 931
Chaka *v.* Leighton 933
Chambers *v.* Arizona 931
Chaney *v.* Oklahoma 919
Chang *v.* Texas Youth Council 909
Charmer Industries, Inc.; Liquor Salesmen *v.* 973
Chase *v.* Maggio 979
Chase Manhattan Bank, N.A. *v.* Vishipco Line 924
Chatham Ventures, Inc. *v.* Federal Deposit Ins. Corporation 972
Cheatham *v.* Florida 962
Chemical Construction Corp.; Kremer *v.* 461
Chester; Addison *v.* 967
Chia *v.* Westinghouse Electric Corp. 945
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 958
Chicago Police Dept.; Antonelli *v.* 909
Childers *v.* Illinois 939
Childs; Bank of Texas *v.* 970
Childs; Wynnewood Bank & Trust *v.* 970
Ching Yee, *In re* 951
Chouinard *v.* New Mexico 930
Christian; LeBright *v.* 939
Christopher *v.* Florida 910
Cianci *v.* Division of Liquor Control 915
Cia. Pervana de Vapores, S.A.; Rex *v.* 926
Cincinnati *v.* Jones 946
City. See name of city.
Claiborne Hardware Co.; NAACP *v.* 958
Clairton School Dist.; Strinich *v.* 982
Clark *v.* Los Angeles 927
Clark *v.* Municipal Employees Credit Union of Baltimore 939
Clawson; Griffith *v.* 962
Clayton Brokerage Co. of St. Louis, Inc. *v.* Leist 353
Clements; Terrazas *v.* 902
Coastal Petroleum Co. *v.* Mobil Oil Corp. 956
Coastal Petroleum Co. *v.* United States 915
Cochran *v.* United States 915

Page
Cochrane & Bresnahan *v.* Smith 961
Cohen *v.* Kentucky Bar Assn..... 921
Cohen; Smith *v.* 948
Cole *v.* Ohio..... 906
Colling; Friendly Retirement Center, Inc. *v.* 911
Collins; Dallas County *v.* 936
Collins *v.* Zant 950
Combs *v.* Florida..... 984
Commercial Metals Co.; Southern Pacific Transportation Co. *v.* .. 336
Commissioner; Hall *v.*..... 944
Commissioner *v.* Tufts 960
Commissioner; Unvert *v.*..... 961
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Community Television of Southern California *v.* Gottfried .. 913,923,958
Compton; Horton *v.*..... 909
Comptroller General of U. S. *v.* Merck & Co..... 925
Comptroller General of U. S.; Merck & Co. *v.* 925
Conboy; Pillsbury Co. *v.* 923
Connecticut; Johnson *v.* 911
Conner *v.* Anderson 917
Conner; Anderson *v.*..... 937
Connor *v.* Phillips 939
Conroy; Regan *v.*..... 945
Conroy *v.* United States..... 918
Container Corp. of America *v.* Franchise Tax Bd. 960,969
Continental Group, Inc.; Allison *v.* 906
Continental Illinois Nat. Bank & Trust Co. of Chicago; Weit *v.*... 938
Conway *v.* Oklahoma..... 977
Conway *v.* United States 912
Cook *v.* United States..... 982
Cooper *v.* Mitchell Brothers' Santa Ana Theater 920
Cornell; Camellia Corp. *v.*..... 901
Corriz; Naranjo *v.*..... 971
Cotton Belt Ins. Co. *v.* United States..... 978
Cotton Petroleum Corp. *v.* Edwards..... 936
Coulter; Michelin Tire Corp. *v.* 906
County. See name of county.
Courier-Journal *v.* McCall 975
Coven *v.* United States 916
Coward *v.* United States 946
Creasy *v.* Virginia 911
Creditors' Committee #1; Tanaka *v.*..... 977
Crossman *v.* United States 977

Page
Crumpacker *v.* Indiana Supreme Court Disciplinary Comm'n 941
Culhane *v.* Harris 978
Cunningham *v.* Georgia 965
Curran; Merrill Lynch, Pierce, Fenner & Smith, Inc. *v.* 353
Cuyler; Oliver *v.* 947
Cyphers, *In re* 957
Daggett; Karcher *v.* 901
Dallas; Best Investment Co. *v.* 921
Dallas County; American Bank & Trust Co. *v.* 970
Dallas County *v.* Barrett 936
Dallas County *v.* Collins 936
Darwin *v.* United States 907
David Lynn C. *v.* California 981
Davis *v.* Parratt 979
Davis *v.* United Air Lines 965
Davis *v.* United States 930
De Baca; Schmedt *v.* 926
DeFazio, *In re* 956
DeFrancis, *In re* 957
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 923
Delano; Kitch *v.* 946
DeLeon; Jacob Bros., Inc. *v.* 952
Delta Air Lines; Kramarsky *v.* 924
Dently *v.* Irvin 948
Department of Energy; Wiggins Brothers, Inc. *v.* 905
Department of Labor and Human Resources; Hernandez *v.* 950
Department of State *v.* Washington Post Co. 595
De Vincent, *In re* 924
DeWitt *v.* Manson 948
Diaz *v.* Beyer 904,985
Dickerson *v.* New Banner Institute, Inc. 923
Difanis; Boston *v.* 979
Director of penal or correctional institution. See name or title of director.
Director, U. S. Bureau of Prisons; Veteto *v.* 935
District Court. See U. S. District Court.
District Grievance Committee of State Bar of Tex.; McInnis *v.* 976
District Judge. See U. S. District Judge.
Division of Liquor Control; Cianci *v.* 915
Dixon *v.* MacDougall 919
Donovan, *In re* 912
Douglas *v.* Florida 976
Douglas *v.* Long 932
Doylestown *v.* Ad World, Inc. 975

Page
Drake Univ.; Eaton *v.* 939
Draper *v.* Merit Systems Protection Bd. 929
Draper *v.* Prescott 947
Dredge General G. L. Gillespie *v.* Merchants National Bank 966
Drefke, *In re* 969
Drysdale *v.* Keith 917
DuBrook, Inc.; W. B. Gibson Co. *v.* 945
Duckworth; Jacks *v.* 984
Dudley *v.* U. S. District Court 981
Dykema *v.* United States 983
Eagerton; Exchange Oil & Gas Corp. *v.* 970
Eagerton; Exxon Corp. *v.* 970
Eaton *v.* Drake Univ. 939
Edinburgh Ins. Co.; Lubin *v.* 945
Edwards; Cotton Petroleum Corp. *v.* 936
Edwards *v.* Louisiana 945
Edward W. Minte Co. *v.* Murphy 962
Edwin M. Green, Inc.; Fla. Marble Polishers H. & W. Tr. Fund *v.* 973
Eicke *v.* Eicke 970
Eikelbloom; McColpin *v.* 947
Eikerenkoetter; Ahmed *v.* 979
Eilberg, *In re* 903,969
Eldridge; Atkins *v.* 910
Electrical Workers *v.* United States 952
Elizabeth; Groff *v.* 980
Ellis *v.* Illinois 907
Ellsworth *v.* United States 944
Energy Reserves Group, Inc. *v.* Kansas Power & Light Co. 904
Engle; Brown *v.* 931
Engle *v.* Hughes 107
Engle *v.* Isaac 107
Engle; Lewis *v.* 980
Engle; Nelson *v.* 908
Engle; Turner *v.* 908
Enmund *v.* Florida 904
EEOC; Ford Motor Co. *v.* 923
EEOC; Hawkins *v.* 929
EEOC; Southwestern Baptist Theological Seminary *v.* 905
Equifax Services, Inc.; Lamb *v.* 927
Erika, Inc.; United States *v.* 201
Espinosa; Rusk *v.* 951
Espinoza; O'Dell *v.* 430
Estelle; Baker *v.* 908
Estelle; Linton *v.* 935

Page
Estelle; McKinney *v.* 937
Estelle; Pousson *v.* 917
Estelle; Smith *v.* 911
Estelle; Thomas *v.* 933,947
Estelle; Williams *v.* 932
Everett; Williams *v.* 963
Every *v.* Louisiana 931
Exchange Oil & Gas Corp. *v.* Eagerton 970
Exxon Corp. *v.* Eagerton 970
Factors Etc., Inc. *v.* Pro Arts, Inc. 927
Fair *v.* Zant 984
Farina *v.* United States 943
Federal Communications Comm'n *v.* Gottfried 913,923,958
Federal Communications Comm'n; RKO General, Inc. *v.* 927
Federal Deposit Ins. Corporation; Chatham Ventures, Inc. *v.* 972
Federal Election Comm'n; Machinists *v.* 974
Federal Election Comm'n *v.* National Right to Work Committee . 914
Federal Energy Regulatory Comm'n; Mitchell Energy Corp. *v.* .. 974
Federal Energy Regulatory Comm'n; Pub. Util. Comm'n of Colo. *v.* 944
Federal Trade Comm'n; American Medical Assn. *v.* 941,966
Federal Trade Comm'n; Brunswick Corp. *v.* 915
Federal Trade Comm'n; Southwest Sunsites, Inc. *v.* 973
Federated Publications, Inc. *v.* Swedberg 984
Feinberg *v.* United States 944
Feldman, *In re* 956
Fendler *v.* United States 937
Ferber; New York *v.* 942
Ferro Corp.; O. Hommel Co. *v.* 965
Fiacco; United Technologies Corp. *v.* 976
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 923
Financial Plaza of the Pacific; Au *v.* 952
Fince *v.* United States 982
Finley *v.* Murray 604
Finnegan *v.* Leu 431
First National Bank of St. Paul *v.* Minnesota, by Lord 967
Fisher *v.* United States 943
Flateau; Anderson *v.* 956
Flight Attendants *v.* Trans World Airlines 940
Flipside, Hoffman Estates, Inc.; Hoffman Estates *v.* 950
Florida; Bilford *v.* 920
Florida; Cheatham *v.* 962
Florida; Christopher *v.* 910
Florida; Combs *v.* 984
Florida; Douglas *v.* 976

Page
Florida; Enmund *v.* 904
Florida; Jones *v.* 962
Florida; Masser *v.* 984
Florida; Odom *v.* 925
Florida; Ragno *v.* 940
Florida; Sandini *v.* 926
Florida; Sayers *v.* 981
Florida; Sireci *v.* 984
Florida; Smith *v.* 951,984
Florida; Tafero *v.* 939
Florida Dept. of Labor and Employment Security; Paschal *v.* 981
Florida Marble Polishers Health & Welf. Tr. Fund *v.* Green, Inc. 973
Florida State Univ. *v.* Joshi 972
Flowers *v.* Scully 949
Flynn *v.* United States 930
Fogg; Johnson *v.* 907
Fogg *v.* United States 905
Fordees Corp. *v.* Vulcan, Inc. 906
Ford Motor Co.; Cann *v.* 960
Ford Motor Co. *v.* Equal Employment Opportunity Comm'n 923
Forston *v.* Orange Unified School Dist. 980
Foster *v.* United States 977
Founding Church of Scientology *v.* United States 926
Founding Church of Scientology of Washington *v.* Regan 976
400 E. Baltimore Street, Inc. *v.* Maryland 926
Frady; United States *v.* 152
Franchise Tax Bd.; Container Corp. of America *v.* 960,969
Frangella Mushroom Farms, Inc. *v.* United States 916
Frank *v.* Illinois 927
Franklin *v.* Zant 938
Freeman *v.* United States 962
Friendly Retirement Center, Inc. *v.* Colling 911
Gaines *v.* Illinois 959
Gaines *v.* Smith 949
Gallagher *v.* United States 962
Gap Stores, Inc. *v.* Sailor Music 945
Garner; Memphis Bank & Trust Co. *v.* 943
Garner *v.* United States 905
Garrison; Medley *v.* 947
Gay *v.* P. K. Lindsay Co. 975
G. B. *v.* Illinois 963
General Atomic Co. *v.* United Nuclear Corp. 939
General Motors Corp.; Skelton *v.* 974
General Motors Corp.; Toyota Motor Co. *v.* 937

Page
Generix Drug Corp.; United States *v.* 942,958
Georgia; Cervi *v.* 938
Georgia; Cunningham *v.* 965
Georgia; Gilreath *v.* 984
Georgia; Godfrey *v.* 919
Georgia; McCord *v.* 929
Georgia-Pacific Corp. *v.* Lyman Lamb Co. 971
Geraldo *v.* Ohio 962
Getto; Illinois Bell Telephone Co. *v.* 946
Gibbons; Railway Labor Executives' Assn. *v.* 939
Gibson *v.* United States 978
Gibson; Washington *v.* 968
Gibson Co. *v.* DuBrook, Inc. 945
Gilbert *v.* South Carolina 984
Gilbert *v.* United States 946
Gillette *v.* Miner 914
Gilliland *v.* Los Angeles County 967
Gilliland *v.* Palmdale 967
Gilliland *v.* United States 905
Gilreath *v.* Georgia 984
Gilstrap; Lee *v.* 907
Glass *v.* Pennsylvania 932
Glenn *v.* United States 963
Godfrey *v.* Georgia 919
Goelz; Atkinson *v.* 905,965
Goldblatt *v.* Vogel 934,985
Golden *v.* United States 919
Goldsboro Christian Schools, Inc. *v.* United States 922
Gonsalves *v.* United States 909
Goodstein *v.* United States 905
Gorsuch; Pennsylvania *v.* 972
Gorsuch; West Virginia *ex rel.* Air Pollution Control Comm'n *v.* 972
Gottfried; Community Television of Southern California *v.* 913,923,958
Gottfried; Federal Communications Comm'n *v.* 913,923,958
Governor of Ark.; Wells *v.* 906
Governor of Neb.; Casbah, Inc. *v.* 950
Governor of N. M.; Bingaman *v.* 940
Governor of Tex.; Terrazas *v.* 902
Grace Brethren Church; California *v.* 942
Grace Brethren Church *v.* United States 942
Grace Brethren Church; United States *v.* 942
Grand Laboratories, Inc. *v.* Schweiker 927
Grant, *In re* 956
Grant *v.* United States 934

Page
Grant *v.* Washington Public Employment Relations Comm'n 955
Gray *v.* United States 919
Green, *In re* 924
Green *v.* Carlson 918,982
Green *v.* Ohio 939
Green *v.* Regan 937
Green *v.* Warden 934
Green *v.* Wilkerson 935
Green *v.* Zant 939
Greene *v.* Lindsey 444
Green, Inc.; Fla. Marble Polishers Health & Welf. Trust Fund *v.* .. 973
Grendel's Den, Inc.; Larkin *v.* 913
Grentec, Inc.; Stevenson *v.* 943
Griffin *v.* Kentucky 930
Griffin *v.* United States 949
Griffith; American Commercial Lines, Inc. *v.* 914
Griffith *v.* Clawson 962
Griffith *v.* Griffith 962
Groff *v.* Elizabeth 980
Gruman; Plotkin *v.* 948
Guerrero *v.* United States 964
Gulf Oil Corp. *v.* Petrol Stops Northwest 983
Gulley; Balsley *v.* ..... 9[illegible]4
Gunn; Campbell *v.* 931
Gutierrez; Abeita *v.* 930
Haberland *v.* Pennsylvania 932
Habluetzel; Mills *v.* 91
Halbert *v.* United States 934
Hall *v.* Blake 983
Hall *v.* Commissioner 944
Hall *v.* Hall 916
Hall *v.* New York City Transit Authority 932
Hall *v.* Thomas 950
Hamilton *v.* Mays 985
Hammersmith, *In re* 902
Hampton *v.* Waters 931
Hance *v.* Zant 965
Hanson, *In re* 904
Harlow *v.* Sargent 928
Harrel; Brooksher *v.* 963
Harris; Brown *v.* 948
Harris; Culhane *v.* 978
Harris; Hayes *v.* 930
Harris; McKee *v.* 917

Page
Harris County; Xerox Corp. *v.* 913
Harrison *v.* California 934
Hartford *v.* Arizona 933
Hartford Accident & Indemnity Co. *v.* Keene Corp. 951
Hartlage; Brown *v.* 45
Hasting *v.* United States 978
Hasting; United States *v.* 971
Hatch *v.* Madsen 962
Hathorn *v.* Lovorn 922
Hauschild; Honda Motor Co. *v.* 961
Hawaii; Ah Lo *v.* 981
Hawaiian Airlines *v.* National Mediation Bd. 929
Hawkins *v.* Equal Employment Opportunity Comm'n 929
Hayes *v.* Harris 930
Hayward *v.* U. S. Parole Comm'n 935
Hebel *v.* United States 946
Hedrick; Vance *v.* 978
Hegwood *v.* United States 982
Heinold Commodities, Inc. *v.* Leist 353
Hejl *v.* Texas 933
Helgesen *v.* United States 929
Helton *v.* Burkburnett 940
Hensley; Washington Metropolitan Area Transit Authority *v.* 904
Herman & MacLean *v.* Huddleston 914,958
Herman & MacLean; Huddleston *v.* 914,958
Hernandez *v.* Department of Labor and Human Resources 950
H & H Operations, Inc.; Peachtree City *v.* 961
Higgins; Rafter *v.* 920
High's Dairy Stores; Levy *v.* 939
Hildebrand *v.* Board of Trustees of Michigan State Univ. 910
Hinchy, Witte, Wood, Anderson & Hodges; Vaughn *v.* 962
Hoffman Estates *v.* The Flipside, Hoffman Estates, Inc. 950
Holiday Inn *v.* Liquor Control Comm'n of Ohio 902
Holman, *In re* 902
Holober, *In re* 902
Holsey *v.* McCauley 981
Hommel Co. *v.* Ferro Corp. 965
Honda Motor Co. *v.* Hauschild 961
Hoover, *In re* 959
Hope; Shearson Hayden Stone, Inc. *v.* 910
Horton *v.* Compton 909
Housewright; Pennington *v.* 918
Housewright; Smith *v.* 978
Howard *v.* Board of County Comm'rs of Weld County 927,968

Page
Howard; Tarver *v.* 932
Howard *v.* United States 919
Howell; Raulerson *v.* 919
Howell *v.* Tanner 918
Howell *v.* United States 931
Hubbard *v.* United States 926
Huber & Antilla Construction *v.* Carpenters 977
Huddleston *v.* Herman & MacLean 914,958
Huddleston; Herman & MacLean *v.* 914,958
Hughes; Engle *v.* 107
Hughes Tool Co.; Smith International, Inc. *v.* 976
Hunter; Missouri *v.* 914
Hunter; Sinclair *v.* 981
Huntington Memorial Hospital *v.* Missirlian 906
Husted *v.* Illinois 945
Hutto; Pouncy *v.* 933
Hydrolevel Corp.; American Society of Mechanical Engineers *v.* 556
Hyppolite *v.* ABC 979
Illinois *v.* Bochniak 939
Illinois; Childers *v.* 939
Illinois; Ellis *v.* 907
Illinois; Frank *v.* 927
Illinois; Gaines *v.* 959
Illinois; G. B. *v.* 963
Illinois; Husted *v.* 945
Illinois; Martin-Trigona *v.* 934
Illinois; McMurtry *v.* 943
Illinois; Reimnitz *v.* 906
Illinois; Rodriguez *v.* 947
Illinois Bell Telephone Co. *v.* Getto 943
Illinois Central Gulf R. Co.; Pandil *v.* 975
Immer *v.* Puerto Rico Maritime Shipping Authority 906,985
Incorporated Trustees of Gospel Worker Society *v.* United States 944
Indiana; Kentucky *v.* 958
Indiana Supreme Court Disciplinary Comm'n; Crumpacker *v.* 941
Ingram; United States *v.* 904,923
Innis *v.* Rhode Island 930,942
In re. See name of party.
Insurance Co. of North America *v.* Keene Corp. 951
International. For labor union, see name of trade.
Interstate Commerce Comm'n; Nitrochem, Inc. *v.* 905
Iowa; Allen *v.* 909
Iowa; Calvert *v.* 930
Iowa; Koop *v.* 979

Page
Irvin; Dently *v.* 948
Irwin *v.* United States 907
Isaac; Engle *v.* 107
ITT, Continental Baking Co.; Bobo *v.* 933
Ivey *v.* Alaska 950
Jacks *v.* Duckworth 984
Jackson, *In re* 913
Jackson *v.* O'Lone 933
Jackson *v.* United States 978
Jacob Bros., Inc. *v.* DeLeon 952
Jaffee *v.* United States 972
Jago; Carter *v.* 980
Jago; Papp *v.* 984
Jago; Wilson *v.* 948
Jamerson; Carpenter *v.* 901
Jefferson County Pharmaceutical Assn. *v.* Abbott Laboratories .. 959
Jerald *v.* O'Rourke 948
Jerguson *v.* Blue Dot Investment, Inc. 946
Jernigan *v.* Rose 933
Johns-Manville Corp.; Steinhardt *v.* 967
Johns-Manville Sales Corp.; Rosenberg *v.* 967
Johnson *v.* Adams 981
Johnson *v.* Connecticut 911
Johnson *v.* Fogg 907
Joint Legis. Comm. for Performance Review of Miss. *v.* Phillips 960
Jones; Cincinnati *v.* 946
Jones *v.* Florida 962
Jones *v.* Leidinger 950
Jones *v.* United States 909,918
Joshi; Florida State Univ. *v.* 972
J. P. Stevens & Co. *v.* National Labor Relations Bd. 924
Judge, Boyd Circuit Court, Division II; Meco, Inc. *v.* 969
Judge, Burlington County Court; Artway *v.* 948
Judge, Fifteenth Judicial Circuit of Fla.; Beach *v.* 980
Juras *v.* Aman Collection Service, Inc. 950
Juvenile Dept. of Klamath County; Maffey *v.* 911
Kansas Power & Light Co.; Energy Reserves Group, Inc. *v.* 904
Kansas Supreme Court; Phelps *v.* 944
Kapner; Beach *v.* 980
Karcher *v.* Daggett 901
Karr *v.* Karr 985
Keene Corp.; Aetna Casualty & Surety Co. *v.* 951
Keene Corp.; Hartford Accident & Indemnity Co. *v.* 951
Keene Corp.; Insurance Co. of North America *v.* 951

Page
Keene Corp.; Liberty Mutual Ins. Co. *v.* 951
Keith; Drysdale *v.* 917
Keller; Agurs *v.* 947
Kelly; Au *v.* 952
Kelly *v.* Louisiana 925
Kentucky; Griffin *v.* 930
Kentucky *v.* Indiana 958
Kentucky; Kessinger *v.* 911
Kentucky; Ohio *v.* 958
Kentucky; Payne *v.* 909
Kentucky; Stinnett *v.* 933
Kentucky Bar Assn.; Cohen *v.* 921
Kessinger *v.* Kentucky 911
Kibler *v.* United States 961
Kidder County Social Service Bd.; Ripplinger *v.* 963
Kilcoyne *v.* Morgan 928
Kimberlin *v.* United States 964
Kines *v.* Butterworth 980
King; Bingaman *v.* 940
King *v.* Carlson 909
Kirby; Brennin *v.* 908
Kirkpatrick; Schatzle *v.* 904,966
Kitch *v.* Delano 946
Kitchen, *In re* 903
Knyff *v.* United States 977
Kolender *v.* Lawson 959
Koniag, Inc. *v.* Stratman 901
Koop *v.* Iowa 979
Kramarsky *v.* Burroughs Corp. 924
Kramarsky *v.* Delta Air Lines 924
Kramarsky *v.* Metropolitan Life Ins. Co. 924
Kramer; Artway *v.* 948
Kremer *v.* Chemical Construction Corp. 461
Kuriansky; Benjamin S. *v.* 956
Labor Union. See name of trade.
Lacey *v.* United States 961
Lackey *v.* Rose 933
LaComb; Orwoll *v.* 913,966
LaGrange; McLaughlin *v.* 979
Lahue; Briscoe *v.* 912
LaMantia *v.* New York 948
Lamb *v.* Equifax Services, Inc. 927
LaMountain *v.* Raines 948
Lane *v.* Allen 928

Page
Langkam, *In re* 957
Larkin *v.* Grendel's Den, Inc. 913
Larson *v.* Valente 228
Laudenberger; Bucheit *v.* 940
Lawson; Kolender *v.* 959
Lazzara *v.* United States 943
Leaf *v.* United States 960
Lebovitz *v.* United States 929
LeBright *v.* Christian 939
Lee *v.* Gilstrap 907
Lee *v.* United States 918,919,925
Lehr *v.* Robertson 970
Leidinger; Jones *v.* 950
Leighton; Chaka *v.* 933
Leist; Clayton Brokerage Co. of St. Louis, Inc. *v.* 353
Leist; Heinold Commodities, Inc. *v.* 353
Leist; New York Mercantile Exchange *v.* 353
Leu; Finnegan *v.* 431
Levenson *v.* United States 944
Levy *v.* High's Dairy Stores 939
Lewis *v.* Engle 980
Liberty Mutual Ins. Co. *v.* Keene Corp. 951
Liburdi; Narel *v.* 928
Lieberman *v.* University of Chicago 937
Lindsay Co.; Gay *v.* 975
Lindsey; Greene *v.* 444
Lindsey *v.* United States 908
Linger, *In re* 907
Linton *v.* Estelle 935
Liquor Control Comm'n of Ohio; Holiday Inn *v.* 902
Liquor Control Comm'n of Ohio; Queensgate Investment Co. *v.* 902
Liquor Salesmen *v.* Charmer Industries, Inc. 973
Lo *v.* Hawaii 981
Local. For labor union, see name of trade.
Lockheed Aircraft Corp. *v.* United States 913
Locklear *v.* United States 917
Loeterman *v.* Brookline 906
Loge *v.* United States 944
London *v.* United States 982
Long; Douglas *v.* 932
Longshoremen *v.* Allied International, Inc. 212
Lord; First National Bank of St. Paul *v.* 967
Los Angeles; Clark *v.* 927
Los Angeles Airways; Lummis *v.* 939

Page
Los Angeles County; Gilliland *v.* 967
Louisiana; Edwards *v.* 945
Louisiana; Every *v.* 931
Louisiana; Kelly *v.* 925
Louisiana; Richardson *v.* 963
Lovorn; Hathorn *v.* 922
Lowe *v.* New York City Dept. of Social Services 938
Lubbock; Alford *v.* 975
Lubin *v.* Edinburgh Ins. Co. 945
Lucas; Tapp *v.* 972
Lucky; Williams *v.* 921
Lummis *v.* Los Angeles Airways 939
Lyman Lamb Co.; Georgia-Pacific Corp. *v.* 971
Lyman Lamb Co.; Weyerhaeuser Co. *v.* 971
Macaluso *v.* United States 943
MacDonald; United States *v.* 1
MacDougall; Dixon *v.* 919
MacDougall; Ward *v.* 949
Machinists *v.* Federal Election Comm'n 974
Machinists *v.* Terrell 955
Machinists; Terrell *v.* 972
Madison *v.* Barry 985
Madsen; Hatch *v.* 962
Maecom S.A., Geneva *v.* Anglomar Bulkcarriers, Ltd. 977
Maffey *v.* Oregon *ex rel.* Juvenile Dept. of Klamath County 911
Maggio; Chase *v.* 979
Maggio; McZeal *v.* 948
Maggio; Tubbs *v.* 932
Mahroom *v.* Marsh 916
Mangiameli *v.* United States 918
Manitowoc Engineering Co. *v.* Terry 928
Manson; DeWitt *v.* 948
Marchese *v.* United States 930
Marin *v.* Myers 906
Marquez *v.* United States 929
Marsh; Mahroom *v.* 916
Marshall; Young *v.* 908
Martin; Weaver *v.* 962
Martin *v.* Wyrick 947
Martino *v.* United States 929,949
Martin-Trigona *v.* Illinois 934
Maryland; Blinken *v.* 973
Maryland; Brent *v.* 908
Maryland *v.* Bryant 949

Page
Maryland; 400 E. Baltimore Street, Inc. *v.* 926
Mastrangelo *v.* United States 973
Matherne *v.* Terrebonne Parish Police Jury 972
Maxwell *v.* United States 982
Mayo *v.* United States 949
Mayor of Albuquerque *v.* Espinosa 951
Mayor of District of Columbia; Madison *v.* 985
Mays; Hamilton *v.* 985
Mazaleski *v.* Schweiker 985
McBee *v.* United States 949
McCall; Courier-Journal *v.* 975
McCarthy; Silver Bulk Shipping, Inc. *v.* 914
McCauley; Holsey *v.* 981
McClatchy Newspapers *v.* United States 983
McClatchy Newspapers *v.* U. S. District Court 983
McClure; Schweiker *v.* 188
McCollom *v.* United States 934
McColpin *v.* Barnes 919
McColpin *v.* Eikelbloom 947
McCord *v.* Georgia 929
McCrary *v.* Smith 963
McDonald *v.* Thompson 981
McElroy *v.* United States 965
McInnis *v.* District Grievance Committee of State Bar of Tex. ... 976
McKee *v.* Harris 917
McKinney *v.* Estelle 937
McLaughlin *v.* LaGrange 979
McLaughlin *v.* United States 931
McMurtry *v.* Illinois 943
McNew *v.* Bank of Mount Vernon 974
McShane *v.* United States 928
McZeal *v.* Maggio 948
Mead Corp. *v.* Adams Extract Co. 937
Mechler *v.* Texas 933
Meco, Inc. *v.* Sinnette 969
Medley *v.* Garrison 947
Medved *v.* United States 963
Melichar *v.* Ost 927
Memphis Bank & Trust Co. *v.* Garner 943
Merchants Nat. Bank of Mobile; Dredge General G. L. Gillespie *v.* 966
Merchants Refrigerating Co. of California *v.* United States 973
Merck & Co. *v.* Bowsher 925
Merck & Co.; Bowsher *v.* 925
Merit Systems Protection Bd.; Draper *v.* 929

379-671 O—83——3

Page
Merrill Lynch, Pierce, Fenner & Smith, Inc. *v.* Curran..... 353
Messer *v.* Florida..... 984
Metropolitan Atlanta Transit Authority; Transit Union *v.*..... 912
Metropolitan Life Ins. Co.; Kramarsky *v.* 924
Michelin Tire Corp. *v.* Coulter 906
Michigan; Allen Park *v.* 927
Miller; Owens *v.*..... 908
Miller *v.* United States..... 907,964
Miller *v.* Webster..... 960
Mills *v.* Habluetzel..... 91
Miner; Gillette *v.* 914
Minis *v.* United States 946
Minneapolis Public Schools; Taylor *v.* 978
Minnesota; Travelers Express Co. *v.* 920
Minnesota, by Lord; First National Bank of St. Paul *v.*..... 967
Minnesota Comm'r of Revenue; Baldwin *v.* 929
Minte Co. *v.* Murphy 962
Missirlian; Huntington Memorial Hospital *v.*..... 906
Mississippi; Arkansas *v.*..... 912
Mississippi *v.* Phillips 960
Mississippi Council on Hum. Rel.; Trustees of Insts. of Higher Ed. *v.* 971
Mississippi State Highway Comm'n; Pine Belt Land Co. *v.*..... 961
Missouri *v.* Hunter 914
Missouri; Turner *v.*..... 931
Missouri; White *v.*..... 963
Mitchell; Barbee *v.* 979
Mitchell Brothers' Santa Ana Theater; California *ex rel.* Cooper *v.* 920
Mitchell Energy Corp. *v.* Federal Energy Regulatory Comm'n... 974
Mizell *v.* Welsh..... 941
Mobile Mechanical Contractors Assn.; Sheet Metal Workers *v.* ... 975
Mobil Oil Corp.; Bd. of Trustees of Internal Imp. Tr. Fund *v.*..... 956
Mobil Oil Corp.; Coastal Petroleum Co. *v.*..... 956
Molders *v.* Terrell 968
Monosso *v.* Wisconsin 931
Montag *v.* Outboard Marine Corp. 975
Montedison S.p.A. *v.* Phillips Petroleum Co. 915
Montez *v.* United States..... 973
Moore *v.* Nebraska 984
Moore *v.* United States 917,981
Moreno *v.* California 908
Morgado *v.* United States 943
Morgan; Kilcoyne *v.* 928
Moritz, *In re*..... 957
Morris; Nash *v.* 932

Page
Morris *v.* Slappy 904,942
Mount Vernon Memorial Park *v.* Securities and Exchange Comm'n 961
Muhammad *v.* United States 947
Municipal Employees Credit Union of Baltimore; Clark *v.* 939
Murnane *v.* American Airlines 915
Murphy; Edward W. Minte Co. *v.* 962
Murray; Finley *v.* 604
MWP Limited Partnership; Whitelaw *v.* 919
Myers; Marin *v.* 906
Myers; Washington *v.* 921
Najar *v.* Oman 959
Nance *v.* United States 918
Naranjo *v.* Corriz 971
Narel *v.* Liburdi 928
Nash *v.* Morris 932
NAACP *v.* Claiborne Hardware Co. 958
National Assn. of Greeting Card Publishers *v.* U. S. Postal Service 925
National Labor Relations Bd.; J. P. Stevens & Co. *v.* 924
National Labor Relations Bd.; Pepsi-Cola Distrg. Co. of Knoxville *v.* 936
National Labor Relations Bd.; Shepard *v.* 970
National Labor Relations Bd.; Tomy Corp. *v.* 929
National Mediation Bd.; Hawaiian Airlines *v.* 929
National Right To Work Committee; Federal Election Comm'n *v.* 914
Natural Resources Defense Council, Inc. *v.* New York City 920
Nebraska; Moore *v.* 984
Nelson *v.* Engle 908
Nevada; Princess Sea Industries *v.* 926
Neville; South Dakota *v.* 971
New Banner Institute, Inc.; Dickerson *v.* 923
New Mexico; Chouinard *v.* 930
New Mexico *v.* United States 926
New Mexico *ex rel.* Rock *v.* Stowers 911
New York; Arroyo *v.* 979
New York *v.* Ferber 942
New York; LaMantia *v.* 948
New York; Richards *v.* 980
New York; Vigorito *v.* 928
New York; Webb *v.* 964
New York City; Natural Resources Defense Council, Inc. *v.* 920
New York City Dept. of Social Services; Lowe *v.* 938
New York City Employees' Retirement System; Balash *v.* 952
New York City Transit Authority; Hall *v.* 932
New York Mercantile Exchange *v.* Leist 353
Nickerson *v.* Wright 982

Page
Nitrochem, Inc. *v.* Interstate Commerce Comm'n 905
North Carolina; Seagle *v.* 964
North Carolina; Williams *v.* 932
Northern States Power Co. *v.* United States 965
North Haven Bd. of Ed. *v.* Bell 512
North River Ins. Co. *v.* Scali, McCabe, Sloves, Inc. 976
Northside Realty Associates, Inc. *v.* United States 936
Norwood *v.* Woodard 917
Nzongola *v.* Nzongola 933
Oberlin College; Canham *v.* 977
O'Brien *v.* United States 909,925
Oceanic Navigation Corp. *v.* Sarauw 914
O'Dell *v.* Espinoza 430
Odom *v.* Florida 925
O'Grady *v.* Watt 905
Ohio; Cole *v.* 906
Ohio; Geraldo *v.* 962
Ohio; Green *v.* 939
Ohio *v.* Kentucky 958
Ohio; Widner *v.* 934
O. Hommel Co. *v.* Ferro Corp. 965
Oil Workers; American Cyanamid Co. *v.* 969
Oklahoma; Beasley *v.* 934
Oklahoma; Chaney *v.* 919
Oklahoma; Conway *v.* 977
Oklahoma; Pisano *v.* 963
Oklahoma; Shabazz *v.* 931
Oliver *v.* Aminoil, USA, Inc. 916
Oliver *v.* Cuyler 947
O'Lone; Jackson *v.* 933
Oman; Najar *v.* 959
Omernick *v.* Carow 933
Option Advisory Service, Inc. *v.* Board of Governors, FRS 976
Orange Unified School Dist.; Forston *v.* 980
Oregon *ex rel.* Juvenile Dept. of Klamath County; Maffey *v.* 911
O'Rourke; Jerald *v.* 948
Ortiz *v.* Arizona 984
Orwoll *v.* LaComb 913,966
Ost; Melichar *v.* 927
Outboard Marine Corp.; Montag *v.* 975
Owen; Atlanta *v.* 972
Owens *v.* Miller 908
Oxman *v.* Pennsylvania 975
Pace *v.* United States 964

Page
Palermo *v.* United States 943
Palmdale; Gilliland *v.* 967
Pandil *v.* Illinois Central Gulf R. Co. 975
Panther Valley Coin Exchange *v.* United States 907
Papp *v.* Jago 984
Parcell *v.* United States 949
Parma *v.* Record Revolution, No. 6, Inc. 968
Parma *v.* United States 926
Parratt; Davis *v.* 979
Parsons; Stedman *v.* 932
Paschal *v.* Florida Dept. of Labor and Employment Security 981
Patterson; American Tobacco Co. *v.* 63
Payne *v.* Kentucky 909
Payne *v.* Smith 932
Peachtree City *v.* H & H Operations, Inc. 961
Pearson *v.* United States 977
Pease Co.; Carpenters *v.* 974
Pelczarski *v.* Sullivan 917
Pena *v.* United States 978
Penn *v.* Pennsylvania 980
Pennington *v.* Housewright 918
Pennsylvania; Africa *v.* 908
Pennsylvania; Bacik *v.* 967
Pennsylvania; Glass *v.* 932
Pennsylvania *v.* Gorsuch 972
Pennsylvania; Haberland *v.* 932
Pennsylvania; Oxman *v.* 975
Pennsylvania; Penn *v.* 980
Pennsylvania; Siger *v.* 975
Pennzoil Co. *v.* Public Service Comm'n of W. Va. 959
Pentzien, Inc.; Watkins *v.* 944
Pepsi-Cola Distributing Co. of Knoxville *v.* NLRB 936
Perez; Wainwright *v.* 910,985
Perini *v.* Bell 107
Perini; Scott *v.* 909
Perry; Zarcone *v.* 979
Peterson *v.* United States 982
Petrol Stops Northwest; Gulf Oil Corp. *v.* 983
Petrusch *v.* Teamsters 911,974
Phelps *v.* Kansas Supreme Court 944
Phelps; Tyler *v.* 935
Phillips; Connor *v.* 939
Phillips; Joint Legis. Comm. for Performance Review of Miss. *v.* 960
Phillips; Mississippi *v.* 960

Page
Phillips Petroleum Co.; Montedison S.p.A. *v.* 915
Phillips Petroleum Co.; Standard Oil Co. (Indiana) *v.* 915
Pillsbury Co. *v.* Conboy 923
Pine Belt Land Co. *v.* Mississippi State Highway Comm'n 961
Pisano *v.* Oklahoma 963
P. K. Lindsay Co.; Gay *v.* 975
Plaintiffs' Steering Committee; Three J Farms, Inc. *v.* 936
Plaquemines Parish Mosquito Control Dist. *v.* United States 926
Pleasant Grove *v.* Wheeler 973
Plotkin *v.* Gruman 948
Porter *v.* Texas 965
Pouncy *v.* Hutto 933
Pousson *v.* Estelle 917
Prescott; Draper *v.* 947
President and Fellows of Harvard College; Rice *v.* 928
Press-Enterprise Co. *v.* Superior Court of Cal., San Diego County. 939
Princess Sea Industries *v.* Nevada 926
Pro Arts, Inc.; Factors Etc., Inc. *v.* 927
Procter & Gamble Co.; Purex Corp. *v.* 983
Public Service Comm'n of W. Va.; Pennzoil Co. *v.* 959
Public Utilities Comm'n of Colo. *v.* FERC 944
Puerto Rico; Thayer *v.* 939
Puerto Rico Maritime Shipping Authority; Immer *v.* 906,985
Pullman-Standard *v.* Swint 273
Purex Corp. *v.* Procter & Gamble Co. 983
Queensgate Investment Co. *v.* Liquor Control Comm'n of Ohio ... 902
Quinn *v.* Burlington Northern Inc. Pension Plan 928
Rafter *v.* Higgins 920
Ragno *v.* Florida 940
Railroad Signalmen; St. Louis Southwestern R. Co. *v.* 945
Railway Labor Executives' Assn. *v.* Gibbons 939
Raines; LaMountain *v.* 948
Ramah Navajo School Bd. *v.* Bureau of Revenue of N. M. 921
Raulerson *v.* Howell 919
Raymer *v.* United States 944
Raymond International, Inc. *v.* Baker 983
Record Revolution, No. 6, Inc.; Parma *v.* 968
Reed; Abu-Bakr *v.* 963
Reed; Ross *v.* 921
Reed *v.* Webster 980
Regan *v.* Conroy 945
Regan; Founding Church of Scientology of Washington *v.* 976
Regan; Green *v.* 937
Reilly *v.* Schweiker 916

Page
Reimnitz *v.* Illinois 906
Rembert, *In re* 942
Republican National Committee *v.* Burton 941
Republic National Bank of New York; Sabet *v.* 976
Rex *v.* Cia. Pervana de Vapores, S.A. 926
Rhode Island; Innis *v.* 930,942
Rhodes *v.* United States 983
Rhodes *v.* U. S. Navy 911
Ribotsky *v.* United States 951
Rice *v.* President and Fellows of Harvard College 928
Richards *v.* New York 980
Richardson *v.* Louisiana 963
Richenberger; Westover *v.* 964
Riden *v.* U. S. Nuclear Regulatory Comm'n 916
Ripplinger *v.* Kidder County Social Service Bd. 963
Ritter *v.* Board of Comm'rs of Adams Cty. Public Hospital Dist. 969
Rivenburgh *v.* United States 905
Rivers *v.* Rosenthal & Co. 968
RKO General, Inc. *v.* Federal Communications Comm'n 927
Robbins; White-Wilson Medical Clinic, Inc. *v.* 969
Robertson; Lehr *v.* 970
Rock *v.* Stowers 911
Rodgers; United States *v.* 904,923
Rodriguez *v.* Illinois 947
Rogers *v.* White 928
Romero-Barcelo; Weinberger *v.* 305
Roots *v.* Wainwright 980
Rose; Jernigan *v.* 933
Rose; Lackey *v.* 933
Rose; Union-Mechling Corp. *v.* 953
Rose; Western Maryland R. Co. *v.* 952
Rosenbaum *v.* Rosenbaum 985
Rosenberg *v.* Johns-Manville Sales Corp. 967
Rosenthal & Co.; Rivers *v.* 968
Rosofsky; Schweiker *v.* 959
Ross *v.* Reed 921
Ross *v.* United States 919
Rossi; Weinberger *v.* 25
Rowe *v.* United States 978
Rusk *v.* Espinosa 951
Russello *v.* United States 943
Rylander; United States *v.* 943
S. *v.* Kuriansky 956
Sabet *v.* Republic National Bank of New York 976

Page
Sacramento Bee *v.* United States 983
Sacramento Bee *v.* U. S. District Court 983
Sadlowski; Steelworkers *v.* 902
Sailor Music; The Gap Stores, Inc. *v.* 945
St. Louis Southwestern R. Co.; Bowers *v.* 946
St. Louis Southwestern R. Co. *v.* Railroad Signalmen 945
Salazar *v.* San Francisco Bay Area Rapid Transit Dist. 960
Salazar *v.* United States 907
Salman *v.* Swanson 917,964
Sanchez *v.* Schweiker 943
Sanders *v.* United States 964
Sandini *v.* Florida 926
San Francisco Bay Area Rapid Transit Dist.; Salazar *v.* 960
Sarauw; Oceanic Navigation Corp. *v.* 914
Sargent; Harlow *v.* 928
Satterwhite *v.* United States 915
Saunders *v.* Weiner 932
Savastano *v.* Board of Ed., Kings Park School Dist. No. 5 974
Sayers *v.* Florida 981
Scali, McCabe, Sloves, Inc.; North River Ins. Co. *v.* 976
Scarborough *v.* United States 977
Schatzle *v.* Kirkpatrick 904,966
Schiavo Bros., Inc. *v.* United States Gypsum Co. 961
Schmedt *v.* De Baca 926
Schroeder *v.* United States 930
Schwartz; Bollotin *v.* 950
Schweiker; Grand Laboratories, Inc. *v.* 927
Schweiker; Mazaleski *v.* 985
Schweiker *v.* McClure 188
Schweiker; Reilly *v.* 916
Schweiker *v.* Rosofsky 959
Schweiker; Sanchez *v.* 943
Scionti *v.* United States 943
SCM Corp. *v.* Xerox Corp. 985
Scott *v.* Perini 909
Scully; Flowers *v.* 949
Seagle *v.* North Carolina 964
Seamon; Upham *v.* 37,938
Sears; Transportation Union *v.* 964
Secretary of Army; Mahroom *v.* 916
Secretary of Defense *v.* Romero-Barcelo 305
Secretary of Defense *v.* Rossi 25
Secretary of Education; North Haven Bd. of Ed. *v.* 512
Secretary of Education; West Virginia *v.* 941

Page
Secretary of Energy; Cotton Petroleum Corp. *v.* 936
Secretary of Health and Human Services; Grand Laboratories *v.* .. 927
Secretary of Health and Human Services; Mazaleski *v.* 985
Secretary of Health and Human Services *v.* McClure 188
Secretary of Health and Human Services; Reilly *v.* 916
Secretary of Health and Human Services *v.* Rosofsky 959
Secretary of Health and Human Services; Sanchez *v.* 943
Secretary of Interior; Apachito *v.* 963
Secretary of Interior; O'Grady *v.* 905
Secretary of State of Mo.; Schatzle *v.* 904,966
Secretary of State of Ohio; Anderson *v.* 960
Secretary of Treasury; Founding Church of Scientology *v.* 976
Secretary of Treasury; Green *v.* 937
Securities and Exchange Comm'n; Mount Vernon Memorial Park *v.* 961
Security Industrial Bank; United States *v.* 903,922
Sells Engineering, Inc.; United States *v.* 960
Sentinel Government Securities *v.* United States 924,977
Shabazz *v.* Oklahoma 931
Shaffner *v.* United States 946
Shearson Hayden Stone, Inc. *v.* Hope 910
Sheet Metal Workers *v.* Mobile Mechanical Contractors Assn. 975
Shelby, *In re* 913
Sheldon *v.* Sheldon 941
Shepard *v.* National Labor Relations Bd. 970
Siger *v.* Pennsylvania 975
Siller Bros., Inc. *v.* United States 925
Silver Bulk Shipping, Inc. *v.* McCarthy 914
Simer *v.* United States 917
Sinclair *v.* Hunter 981
Singleton *v.* Arkansas 938
Sinnette; Meco, Inc. *v.* 969
Sinow; Szijarto *v.* 908
Sireci *v.* Florida 984
Skelton *v.* General Motors Corp. 974
Slappy; Morris *v.* 904,942
Smith *v.* Alabama 947
Smith; Birden *v.* 948
Smith; Boyden *v.* 982
Smith; Cochrane & Bresnahan *v.* 961
Smith *v.* Cohen 948
Smith *v.* Estelle 911
Smith *v.* Florida 951,984
Smith; Gaines *v.* 949
Smith *v.* Housewright 978

Page
Smith; McCrary *v.* 963
Smith; Payne *v.* 932
Smith *v.* Wade 924
Smith International, Inc. *v.* Hughes Tool Co. 976
Snisky *v.* United States 907
Socialist Workers Party; Stewart *v.* 907
Souness *v.* Veterans Administration 911
South Carolina; Gilbert *v.* 984
South Carolina; Thompson *v.* 938
South Dakota *v.* Neville 971
Southern Pacific Transportation Co. *v.* Commercial Metals Co. 336
Southwestern Baptist Theological Seminary *v.* EEOC 905
Southwest Sunsites, Inc. *v.* Federal Trade Comm'n 973
Speaker, N. J. Assembly *v.* Daggett 901
Standard Drywall, Inc. *v.* United States 927
Standard Oil Co. (Indiana) *v.* Phillips Petroleum Co. 915
State. See name of State.
Staton *v.* Wainwright 909
Stedman *v.* Parsons 932
Steelworkers *v.* Sadlowski 902
Steelworkers *v.* Swint 273
Steinhardt *v.* Johns-Manville Corp. 967
Stephens *v.* Black 950
Stephens; Zant *v.* 410
Stevens & Co. *v.* National Labor Relations Bd. 924
Stevenson *v.* Grentec, Inc. 943
Stewart *v.* Socialist Workers Party 907
Stinnett *v.* Kentucky 933
Stoute *v.* United States 950
Stowers; New Mexico *ex rel.* Rock *v.* 911
Strager *v.* U. S. District Court 949
Stratman; Koniag, Inc. *v.* 901
Streeter *v.* Alabama 932
Strinich *v.* Clairton School Dist. 982
Sullivan; Pelczarski *v.* 917
Sumitomo Shoji America, Inc. *v.* Avagliano 912
Sumitomo Shoji America, Inc.; Avagliano *v.* 912
Summit Valley Industries, Inc. *v.* Carpenters 903
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court of Cal., San Diego County; Press-Enterprise Co. *v.* 939
Swanson; Salman *v.* 917,964
Swedberg; Federated Publications, Inc. *v.* 984
Swint; Pullman-Standard *v.* 273

Page
Swint; Steelworkers *v.* 273
Szijarto *v.* Sinow 908
Tafero *v.* Florida 939
Tanaka *v.* Creditors' Committee #1 977
Tangren *v.* Wackenhut Services, Inc. 916
Tanner; Howell *v.* 918
Tapp *v.* Lucas 972
Tarver *v.* Howard 932
Taylor *v.* Blackburn 917
Taylor *v.* Minneapolis Public Schools 978
Taylor *v.* United States 918
Taylor *v.* Virginia 906
Teamsters; B & L Distribution Center *v.* 911,974
Teamsters; Petrusch *v.* 911,974
Tennessee *v.* Webb 910
Terrazas *v.* Clements 902
Terrebonne Parish Police Jury; Matherne *v.* 972
Terrell *v.* Machinists 972
Terrell; Machinists *v.* 955
Terrell; Molders *v.* 968
Terry; Manitowoc Engineering Co. *v.* 928
Texas; Bass *v.* 965
Texas; Hejl *v.* 933
Texas; Mechler *v.* 933
Texas; Porter *v.* 965
Texas; Vanderbilt *v.* 910
Texas; Wade *v.* 964
Texas; Walker *v.* 963
Texas; White *v.* 938
Texas; Williams *v.* 908
Texas Youth Council; Chang *v.* 909
Tham *v.* United States 944
Thayer *v.* Puerto Rico 939
The Flipside, Hoffman Estates, Inc.; Hoffman Estates *v.* 950
The Gap Stores, Inc. *v.* Sailor Music 945
Thomas *v.* Barrett 925
Thomas *v.* Estelle 933,947
Thomas; Hall *v.* 950
Thompson; McDonald *v.* 981
Thompson *v.* South Carolina 938
Thompson *v.* United States 935
Thompson; White *v.* 941
Thone; Casbah, Inc. *v.* 950
Three J Farms, Inc. *v.* Plaintiffs' Steering Committee 936

Page
Tolerton *v.* United States 949
Tolliver *v.* United States 935
Tomy Corp. *v.* National Labor Relations Bd. 929
Torres *v.* United States 973
Town. See name of town.
Toyota Motor Co. *v.* General Motors Corp. 937
Transit Union *v.* Metropolitan Atlanta Transit Authority 912
Transportation Union *v.* Sears 964
Trans World Airlines; Flight Attendants *v.* 940
Trapp, *In re* 967
Travelers Express Co. *v.* Minnesota 920
Treasurer of Minn.; First National Bank of St. Paul *v.* 967
Trifa *v.* United States 975
Trimmer *v.* Van Bomel 918
Tubbs *v.* Maggio 932
Tufts; Commissioner *v.* 960
Turner *v.* Engle 908
Turner *v.* Missouri 931
Tyler *v.* Phelps 935
Tyler *v.* Tyler 917
Union. For labor union, see name of trade.
Union Correctional Institute; Burrell *v.* 931
Union County Welfare Bd.; Battaglia *v.* 965
Union-Mechling Corp. *v.* Rose 952
United. For labor union, see name of trade.
United Air Lines; Davis *v.* 965
United Nuclear Corp.; General Atomic Co. *v.* 939
United Parcel Service of America, Inc. *v.* U. S. Postal Service ... 925
United States. See name of other party.
U. S. Coast Guard; Yates *v.* 901
U. S. District Court; Dudley *v.* 981
U. S. District Court; McClatchy Newspapers *v.* 983
U. S. District Court; Sacramento Bee *v.* 983
U. S. District Court; Strager *v.* 949
U. S. District Judge; LeBright *v.* 939
United States Gypsum Co.; Schiavo Bros., Inc. *v.* 961
U. S. Navy; Rhodes *v.* 911
U. S. Nuclear Regulatory Comm'n; Riden *v.* 916
U. S. Parole Comm'n; Hayward *v.* 935
U. S. Postal Service; Athena Products, Ltd. *v.* 915
U. S. Postal Service; National Assn. of Greeting Card Publishers *v.* 925
U. S. Postal Service; United Parcel Service of America, Inc. *v.* .. 925
United Technologies Corp. *v.* Fiacco 976
University of Chicago; Lieberman *v.* 937

Page
Unvert *v.* Commissioner 961
Upham *v.* Seamon 37,938
Valente; Larson *v.* 226
Valenzano *v.* California 934
Van Bomel; Trimmer *v.* 918
Vance *v.* Hedrick 978
Vanderbilt *v.* Texas 910
Vaughn *v.* Hinchy, Witte, Wood, Anderson & Hodges 962
Veatch *v.* United States 946
Verlinden B. V. *v.* Central Bank of Nigeria 913
Veterans Administration; Souness *v.* 911
Veteto *v.* Director, U. S. Bureau of Prisons 935
Vigorito *v.* New York 928
Villalta *v.* United States 916
Vineberg *v.* California 945
Virginia; Bassett *v.* 938
Virginia; Creasy *v.* 911
Virginia; Taylor *v.* 906
Vishipco Line; Chase Manhattan Bank, N.A. *v.* 924
Vogel; Goldblatt *v.* 934,985
Voorhies *v.* United States 929
VSL Corp. *v.* United States 974
Vulcan, Inc.; Fordees Corp. *v.* 906
W. *v.* California 980
Wackenhut Services, Inc.; Tangren *v.* 916
Wade; Smith *v.* 924
Wade *v.* Texas 964
Wade *v.* United States 934
Wainwright *v.* Perez 910,985
Wainwright; Roots *v.* 980
Wainwright; Staton *v.* 909
Wajert, *In re* 957
Valgren *v.* United States 962
Walker *v.* Texas 963
Walker *v.* United States 934
Ward *v.* MacDougall 949
Warden. See also name of warden.
Warden; Green *v.* 934
Washington *v.* Gibson 968
Washington *v.* Myers 921
Washington *v.* United States 970
Washington; Watkins *v.* 949
Washington Metropolitan Area Transit Authority *v.* Hensley 904
Washington Metropolitan Area Transit Authority; White *v.* 948

Page
Washington Post Co.; U. S. Department of State *v.* 595
Washington Public Employment Relations Comm'n; Grant *v.* 955
Waters; Hampton *v.* 931
Watkins *v.* Pentzien, Inc. 944
Watkins *v.* Washington 949
Watson *v.* Arizona 981
Watt; Apachito *v.* 963
Watt; O'Grady *v.* 905
W. B. Gibson Co. *v.* DuBrook, Inc. 945
Weaver *v.* Martin 962
Webb *v.* New York 964
Webb; Tennessee *v.* 910
Webster; Miller *v.* 960
Webster; Reed *v.* 980
Webster *v.* United States 935
Weinberger *v.* Romero-Barcelo 305
Weinberger *v.* Rossi 25
Weiner; Saunders *v.* 932
Weit *v.* Continental Illinois Nat. Bank & Trust Co. of Chicago ... 938
Welch *v.* United States 915
Wells *v.* White 906
Welsh; Mizell *v.* 941
Wencke, *In re* 912
Western Maryland R. Co. *v.* Rose 952
Westinghouse Electric Corp.; Chia *v.* 945
Westover *v.* Richenberger 964
West Virginia *v.* Secretary of Education 941
West Virginia *ex rel.* Air Pollution Control Comm'n *v.* Gorsuch .. 972
Weyerhaeuser Co. *v.* Lyman Lamb Co. 971
Wheeler; Pleasant Grove *v.* 973
White *v.* Missouri 963
White; Rogers *v.* 928
White *v.* Texas 938
White *v.* Thompson 941
White *v.* Washington Metropolitan Area Transit Authority 948
White; Wells *v.* 906
Whitelaw *v.* MWP Limited Partnership 919
White-Wilson Medical Clinic, Inc. *v.* Robbins 969
Widner *v.* Ohio 934
Wiga *v.* United States 918
Wiggins Brothers, Inc. *v.* Department of Energy 905
Wilkerson; Green *v.* 935
Williams, *In re* 924
Williams *v.* Carmen 919
Williams *v.* Estelle 932

Page
Williams *v.* Everett 963
Williams *v.* Lucky 921
Williams *v.* North Carolina 932
Williams *v.* Texas 908
Williams *v.* United States 978,983
Wilson *v.* Jago 948
Wilson *v.* United States 917,979,985
Wisconsin; Bowman *v.* 931
Wisconsin; Monosso *v.* 931
Woodard; Norwood *v.* 917
Woods *v.* Alabama 975
Wooton *v.* United States 978
Wright; Nickerson *v.* 982
WTIC–FM Radio Station; Appleby *v.* 933
Wynnewood Bank & Trust *v.* Childs 970
Wyrick; Martin *v.* 947
Xerox Corp. *v.* Harris County 913
Xerox Corp.; SCM Corp. *v.* 985
Yaretsky; Blum *v.* 903
Yates *v.* U. S. Coast Guard 901
Yee, *In re* 951
Yellow Forwarding Co. *v.* Atlantic Container Line 962
Young *v.* Marshall 908
Young *v.* United States 943
Youngs Drug Products Corp.; Bolger *v.* 970
Zambito *v.* United States 982
Zant; Bowen *v.* 939
Zant; Collins *v.* 950
Zant; Fair *v.* 984
Zant; Franklin *v.* 938
Zant; Green *v.* 939
Zant; Hance *v.* 965
Zant *v.* Stephens 410
Zarcone *v.* Perry 979

PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. v. SWINT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1190. Argued January 19, 1982—Decided April 27, 1982*

Respondent black employees, brought suit in Federal District Court against petitioners, their employer and certain unions, alleging that Title VII of the Civil Rights Act of 1964 was violated by a seniority system maintained by petitioners. The District Court found that the differences in terms, conditions, or privileges of employment resulting from the seniority system "are 'not the result of an intention to discriminate' because of race or color" and held, therefore, that the system satisfied the requirements of § 703(h) of the Act. That section provides that it shall not be an unlawful employment practice for an employer to apply different compensation standards or different terms, conditions, or privileges of employment "pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race." The Court of Appeals reversed, holding that the differences in treatment of employees under the seniority system resulted from an intent to discriminate and thus violated § 703(h). Although recognizing that Federal Rule of Civil Procedure 52(a) requires that a District Court's findings of fact not be set aside unless clearly erroneous, the Court of Appeals concluded that a finding of discrimination or nondiscrimination under § 703(h) was a finding of "ultimate fact" that the court would review by making "an independent determination of [the] allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous."

Held: The Court of Appeals erred in the course of its review of the District Court's judgment. Pp. 276–283.

(a) Under § 703(h), a showing of a disparate impact alone is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. Absent a discriminatory purpose, the operation of a seniority system is not an unlawful employment practice even if the system has some discriminatory consequences. Pp. 276–277.

(b) Rule 52(a) does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts. While the Rule

*Together with No. 80-1193, *United Steelworkers of America, AFL-CIO, et al.* v. *Swint et al.*, also on certiorari to the same court.

379-671 O—83——4

does not apply to conclusions of law, here the District Court was not faulted for applying an erroneous definition of intentional discrimination. Rather, it was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race for purposes of § 703(h). That question is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Pp. 285–290.

(c) While the Court of Appeals correctly stated the controlling clearly-erroneous standard of Rule 52(a), its conclusion that the challenged seniority system was unprotected by § 703(h) was the product of the court's improper independent consideration of the totality of the circumstances it found in the record. When the Court of Appeals concluded that the District Court had erred in failing to consider certain relevant evidence, it improperly made its own determination based on such evidence. When a district court's finding as to discriminatory intent under § 703(h) is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance. Pp. 290–293.

624 F. 2d 525, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a statement concurring in part, *post*, p. 293. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined except as to Part I, *post*, p. 293.

Michael H. Gottesman argued the cause for petitioners. With him on the briefs for petitioners in No. 80–1193 were *Robert M. Weinberg, Laurence Gold, Jerome A. Cooper, Bernard Kleiman*, and *Carl B. Frankel*. *Samuel H. Burr* and *C. V. Stelzenmuller* filed briefs for petitioner in No. 80–1190.

Elaine Jones argued the cause for respondents. With her on the brief were *Jack Greenberg, James M. Nabrit III, Judith Reed, Barry L. Goldstein*, and *C. Lani Gunier*.†

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JUSTICE WHITE delivered the opinion of the Court.

Respondents were black employees at the Bessemer, Ala., plant of petitioner, Pullman-Standard (the Company), a manufacturer of railway freight cars and parts. They brought suit against the Company and the union petitioners—the United Steelworkers of America, AFL–CIO–CLC, and its Local 1466 (collectively USW)—alleging violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), and 42 U. S. C. § 1981.[1] As they come here, these cases involve only the validity, under Title VII, of a seniority system maintained by the Company and USW. The District Court found "that the differences in terms, conditions or privileges of employment resulting [from the seniority system] are 'not the result of an intention to discriminate' because of race or color," App. to Pet. for Cert. in No. 80–1190, p. A–147 (hereinafter App.), and held, therefore, that the system satisfied the requirements of § 703(h) of the Act. The Court of Appeals for the Fifth Circuit reversed:

> "Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U. S. C. 2000e–2(h)." 624 F. 2d 525, 533–534 (1980).

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stance L. Dupre, Philip B. Sklover, and *Vella M. Fink* filed a brief for the United States et al. as *amici curiae* urging affirmance.

Robert E. Williams and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae.*

[1] In their original complaint, besides challenging the seniority system discussed in this opinion, plaintiffs also alleged discrimination in job assignments and promotions and the failure to post publicly a list of changes in assignments. These were all brought as "class" issues. Two charges of individual discrimination were also brought. The Court of Appeals held that the Company had violated Title VII in making job assignments and in selecting foremen. In granting certiorari, we declined to review those aspects of the decision.

We granted the petitions for certiorari filed by USW and by the Company, 451 U. S. 906 (1981), limited to the first question presented in each petition: whether a court of appeals is bound by the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the bona fides of the seniority system. We conclude that the Court of Appeals erred in the course of its review and accordingly reverse its judgment and remand for further proceedings.

I

Title VII is a broad remedial measure, designed "to assure equality of employment opportunities." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). The Act was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). "Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters* v. *United States*, 431 U. S. 324, 349 (1977) (hereinafter *Teamsters*). The Act's treatment of seniority systems, however, establishes an exception to these general principles. Section 703(h), 78 Stat. 257, as set forth in 42 U. S. C. § 2000e–2(h), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race."

Under this section, a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 82 (1977), we summarized the effect of § 703(h) as follows: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." Thus, any challenge to a seniority system under Title VII will require a trial on the issue of discriminatory intent: Was the system adopted because of its racially discriminatory impact?

This is precisely what happened in these cases. Following our decision in *Teamsters*, the District Court held a new trial on the limited question of whether the seniority system was "instituted or maintained contrary to Section 703(h) of the new Civil Rights Act of 1964." App. A-125.[2] That court concluded, as we noted above and will discuss below, that the system was adopted and maintained for purposes wholly independent of any discriminatory intent. The Court of Appeals for the Fifth Circuit reversed.

II

Petitioners submit that the Court of Appeals failed to comply with the command of Rule 52(a) that the findings of fact of a district court may not be set aside unless clearly erroneous. We first describe the findings of the District Court and the Court of Appeals.

Certain facts are common ground for both the District Court and the Court of Appeals. The Company's Bessemer plant was unionized in the early 1940's. Both before and after unionization, the plant was divided into a number of different operational departments.[3] USW sought to represent

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[2] The procedural history of these cases is rather complex. The original complaint was filed in 1971. Since that time the case has been tried three times and has twice been reviewed by the Court of Appeals.

[3] In 1941, prior to unionization, the Bessemer plant was divided into 20

all production and maintenance employees at the plant and was elected in 1941 as the bargaining representative of a bargaining unit consisting of most of these employees. At that same time, the International Association of Machinists and Aerospace Workers (IAM) became the bargaining representative of a unit consisting of five departments.[4] Between 1941 and 1944, IAM ceded certain workers in its bargaining unit to USW. As a result of this transfer, the IAM bargaining unit became all white.

Throughout the period of representation by USW, the plant was approximately half black. Prior to 1965, the Company openly pursued a racially discriminatory policy of job assignments. Most departments contained more than one job category and as a result most departments were racially mixed. There were no lines of progression or promotion within departments.

The seniority system at issue here was adopted in 1954.[5] Under that agreement, seniority was measured by length of continuous service in a particular department.[6] Seniority was originally exercised only for purposes of layoffs and hirings within particular departments. In 1956 seniority was formally recognized for promotional purposes as well. Again, however, seniority, with limited exceptions, was only exercised within departments; employees transferring to

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departments. By 1954, there were 28 departments—26 USW units and 2 IAM units. The departments remained essentially unchanged after 1954.

[4] The International Brotherhood of Electrical Workers (IBEW) gained representation status for two small departments. The IBEW unit was all white. IBEW, however was decertified in 1946 and its members were reabsorbed into a department represented by USW.

[5] A departmental seniority system was part of the initial collective-bargaining agreement between the Company and USW in 1942. Between 1947 and 1954, however, the seniority system changed from one based on departments to one based upon particular occupations within departments. In 1954, the system went back to a departmental base.

[6] The only exceptions, until 1972 (see n. 7, *infra*), were for employees transferring at the request of the Company or for those electing transfer in lieu of layoff.

new departments forfeited their seniority. This seniority system remained virtually unchanged until after this suit was brought in 1971.[7]

The District Court approached the question of discriminatory intent in the manner suggested by the Fifth Circuit in *James* v. *Stockham Valves & Fittings Co.*, 559 F. 2d 310 (1977). There, the Court of Appeals stated that under *Teamsters* "the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue." 559 F. 2d, at 352. There were, in its view, however, four particular factors that a court should focus on.[8]

First, a court must determine whether the system "operates to discourage all employees equally from transferring between seniority units." *Ibid.* The District Court held that the system here "was facially neutral and . . . was applied equally to all races and ethnic groups." App. A–132. Although there were charges of racial discrimination in its application, the court held that these were "not substantiated by the evidence." *Id.*, at A–133. It concluded that the system "applied equally and uniformly to all employees, black and white, and that, given the approximately equal number

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[7] In 1972, the Company entered into an agreement with the Department of Labor to bring its employment practices into compliance with Executive Order No. 11246, 3 CFR 339 (1964–1965 Comp.). This provided an exception to the departmental limit on seniority, allowing certain black employees to make interdepartmental transfers without any loss of seniority.

[8] The Fifth Circuit relied upon the following passage in *Teamsters*, 431 U. S., at 355–356:

"The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. . . . The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that that seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose."

This passage was of course not meant to be an exhaustive list of all the factors that a district court might or should consider in making a finding of discriminatory intent.

of employees of the two groups, it was quantitatively neutral as well." *Id.*, at A-134.[9]

Second, a court must examine the rationality of the departmental structure, upon which the seniority system relies, in light of the general industry practice. *James, supra*, at 352. The District Court found that linking seniority to "departmental age" was "the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular." App. A-137. Furthermore, it found the basic arrangement of departments at the plant to be rationally related to the nature of the work and to be "consistent with practices which were . . . generally followed at other unionized plants throughout the country." *Id.*, at A-136—A-137. While questions could be raised about the necessity of certain departmental divisions, it found that all of the challenged lines of division grew out of historical circumstances at the plant that were unrelated to racial discrimination.[10] Although unionization did produce an all-white IAM bargaining unit, it found that USW "cannot be charged with racial bias in its response to the IAM situation. [USW] sought to represent all workers, black and white, in the plant." *Id.*, at A-145. Nor could the Company be charged with any racial discrimination that may have existed in IAM:

> "The company properly took a 'hands-off' approach towards the establishment of the election units . . . . It bargained with those unions which were afforded repre-

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[9] The court specifically declined to make any finding on whether the no-transfer provision of the seniority system had a greater relative effect on blacks than on whites, because of qualitative differences in the departments in which they were concentrated. It believed that such an inquiry would have been inconsistent with the earlier Fifth Circuit opinion in this case.

[10] In particular, the court focused on the history of the unionization process at the plant and found certain of the departmental divisions to be based on the evolving relationship between USW and IAM.

sentational status by the NLRB and did so without any discriminatory animus." *Id.*, at A-146.

Third, a court had to consider "whether the seniority system had its genesis in racial discrimination," *James, supra*, at 352, by which it meant the relationship between the system and other racially discriminatory practices. Although finding ample discrimination by the Company in its employment practices and some discriminatory practices by the union,[11] the District Court concluded that the seniority system was in no way related to the discriminatory practices:

> "The seniority system . . . had its genesis . . . at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objectives of a union which—unlike most structures and institutions of the era—was not an arm of a segregated society. Nor did it foster the discrimination . . . which was being practiced by custom in the plant." App. A-144.

Finally, a court must consider "whether the system was negotiated and has been maintained free from any illegal purpose." *James, supra*, at 352. Stating that it had "carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years," App. A-146, the court found that the system was untainted by any discriminatory purpose. Thus, although the District

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[11] With respect to USW, the District Court found that "[u]nion meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated." It also found, however, that "[w]hile possessing some of the trappings taken from an otherwise segregated society, the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations." App. A-142, A-143.

Court focused on particular factors in carrying out the analysis required by § 703(h), it also looked to the entire record and to the "totality of the system under attack." *Id.*, at A-147.

The Court of Appeals addressed each of the four factors of the *James* test and reached the opposite conclusion. First, it held that the District Court erred in putting aside qualitative differences between the departments in which blacks were concentrated and those dominated by whites, in considering whether the system applied "equally" to whites and blacks.[12] This is a purported correction of a legal standard under which the evidence is to be evaluated.

Second, it rejected the District Court's conclusion that the structure of departments was rational, in line with industry practice, and did not reflect any discriminatory intent. Its discussion is brief but focuses on the role of IAM and certain characteristics unique to the Bessemer plant. The court concluded:

> "The record evidence, generally, indicates arbitrary creation of the departments by the company since unionization and an attendant adverse affect on black workers. The individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice, are indicative of attempts to maintain one-race departments." 624 F. 2d, at 532.

In reaching this conclusion, the Court of Appeals did not purport to be correcting a legal error, nor did it refer to or expressly apply the clearly-erroneous standard.

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[12] It does not appear to us that the District Court actually found a qualitative difference but held it to be irrelevant. The relevant passage of the District Court opinion read as follows: "By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could . . . attempt to measure the relative effect of the no-transfer rule on white and black employees . . . . It may well be that a somewhat greater impact was felt by blacks than whites although . . . this conclusion is by no means certain." *Id.*, at A-134.

Third, in considering the "genesis" of the system, the Court of Appeals held that the District Court erred in holding that the motives of IAM were not relevant.[13] This was the correction of a legal error on the part of the District Court in excluding relevant evidence. The court did not stop there, however. It went on to hold that IAM was acting out of discriminatory intent—an issue specifically not reached by the District Court—and that "considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." *Ibid.*

Fourth, despite this conclusion under the third *James* factor the Court of Appeals then recited, but did not expressly set aside or find clearly erroneous, the District Court's findings with respect to the negotiation and maintenance of the seniority system.

The court then announced that "[h]aving carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is 'bona fide' within the meaning of § 703(h) of Title VII, we reject the district court's finding." 624 F. 2d, at 533. Elaborating on its disagreement, the Court of Appeals stated:

> "An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made. There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I. A. M. in 1941 was to exclude black workers from its bargaining unit.

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[13] The original complaint in this case did not mention IAM. Prior to the first trial, respondents sought and received leave to amend their complaint to add IAM as a Rule 19 defendant, "insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company." Order of the District Court, June 4, 1974 (Joint App. 29).

> That goal was ultimately reached when maneuvers by the I. A. M. and U. S. W. resulted in an all-white I. A. M. unit. The U. S. W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.
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> "The district court might have reached a different conclusion had it given the I. A. M.'s role in the creation and establishment of the seniority system its due consideration." *Ibid.* (footnote omitted).

Having rejected the District Court's finding, the court made its own findings as to whether the USW seniority system was protected by § 703(h):

> "We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U. S. W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U. S. C. § 2000e–2(h)." *Id.*, at 533–534.

In connection with its assertion that it was convinced that a mistake had been made, the Court of Appeals, in a footnote, referred to the clearly-erroneous standard of Rule 52(a). *Id.*, at 533, n. 6.[14] It pointed out, however, that if findings

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[14] In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), this Court characterized the clearly-erroneous standard as follows:

"are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." *Ibid.* Finally, quoting from *East* v. *Romine, Inc.*, 518 F. 2d 332, 339 (CA5 1975), the Court of Appeals repeated the following view of its appellate function in Title VII cases where purposeful discrimination is at issue:

> "'Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U. S. C. A. § 2000e–2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.'" 624 F. 2d, at 533, n. 6.

III

Pointing to the above statement of the Court of Appeals and to similar statements in other Title VII cases coming from that court,[15] petitioners submit that the Court of Ap-

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"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We note that the Court of Appeals quoted this passage at the conclusion of its analysis of the District Court opinion. *Supra*, at 283.

[15] See *Jackson* v. *City of Killeen*, 654 F. 2d 1181, 1184 (1981); *Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F. 2d 1130, 1147 (1981); *Wilkins* v. *University of Houston*, 654 F. 2d 388, 390 (1981); *Lindsey* v. *Mississippi Research & Development Center*, 652 F. 2d 488, 492 (1981); *Rohde* v. *K.O. Steel Castings, Inc.*, 649 F. 2d 317, 320 (1981); *Joshi* v. *Florida State University*, 646 F. 2d 981, 986 (1981); *Phillips* v. *Joint Legislative Committee*, 637 F. 2d 1014, 1024 (1981); *Danner* v. *United States Civil Service Comm'n*, 635 F. 2d 427, 430–431 (1981); *Thompson* v. *Leland Police Dept.*, 633 F. 2d 1111, 1112 (1980); *Crawford* v. *Western Electric Co.*, 614 F. 2d 1300, 1311 (1980); *Burdine* v. *Texas Dept. of Community Af-*

peals made an independent determination of discriminatory purpose, the "ultimate fact" in this case, and that this was error under Rule 52(a). We agree with petitioners that if the Court of Appeals followed what seems to be the accepted rule in that Circuit, its judgment must be reversed.[16]

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fairs, 608 F. 2d 563, 566 (1979); *Williams* v. *Tallahassee Motors, Inc.*, 607 F. 2d 689, 690 (1979); *Parson* v. *Kaiser Aluminum & Chemcial Corp.*, 575 F. 2d 1374, 1382 (1978); *Causey* v. *Ford Motor Co.*, 516 F. 2d 416, 420–421 (1975); *East* v. *Romine, Inc.*, 518 F. 2d 332, 338–339 (1975).

[16] There is some indication in the opinions of the Court of Appeals for the Fifth Circuit (see n. 15, *supra*) that the Circuit rule with respect to "ultimate facts" is only another way of stating a standard of review with respect to mixed questions of law and fact—the ultimate "fact" is the statutory, legally determinative consideration (here, intentional discrimination) which is or is not satisfied by subsidiary facts admitted or found by the trier of fact. As indicated in the text, however, the question of intentional discrimination under § 703(h) is a pure question of fact. Furthermore, the Court of Appeals' opinion in this case appears to address the issue as a question of fact unmixed with legal considerations.

At the same time, this Court has on occasion itself indicated that findings on "ultimate facts" are independently reviewable. In *Baumgartner* v. *United States*, 322 U. S. 665 (1944), the issue was whether or not the findings of the two lower courts satisfied the clear-and-convincing standard of proof necessary to sustain a denaturalization decree. The Court held that the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess. The Court referred to the finding as one of "ultimate" fact, which in that case involved an appraisal of the strength of the entire body of evidence. The Court said that the significance of the clear-and-convincing proof standard "would be lost" if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts not open to review here." *Id.*, at 671.

The Fifth Circuit's rule on appellate consideration of "ultimate facts" has its roots in this discussion in *Baumgartner*. In *Galena Oaks Corp.* v. *Scofield*, 218 F. 2d 217 (CA5 1954), in which the question was whether the gain derived from the sale of a number of houses was to be treated as capital gain or ordinary income, the Court of Appeals relied directly on *Baumgartner* in holding that this was an issue of "ultimate fact" that an appellate

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

The Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination.[17] It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a

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court may review free of the clearly-erroneous rule. *Causey* v. *Ford Motor Co.*, *supra*, at 421, relying on *Galena Oaks Corp.* v. *Scofield*, *supra*, said that "although discrimination *vel non* is essentially a question of fact, it is, at the same time, the ultimate issue for resolution in this case" and as such, was deemed to be independently reviewable. The passage from *East* v. *Romine, Inc.*, *supra*, at 339, which was repeated in the case before us now, *supra*, at 285, rested on the opinion in *Causey* v. *Ford Motor Co.*

Whatever *Baumgartner* may have meant by its discussion of "ultimate facts," it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a). *Baumgartner*'s discussion of "ultimate facts" referred not to pure findings of fact—as we find discriminatory intent to be in this context—but to findings that "clearly impl[y] the application of standards of law." 322 U. S., at 671.

[17] As we noted above, the Court of Appeals did at certain points purport to correct what it viewed as legal errors on the part of the District Court. The presence of such legal errors may justify a remand by the Court of Appeals to the District Court for additional factfinding under the correct legal standard. *Infra*, at 291–292.

pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact.

The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. See *Baumgartner* v. *United States*, 322 U. S. 665, 671 (1944). Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion. For the reasons that follow, however, we have little doubt about the factual nature of § 703(h)'s requirement that a seniority system be free of an intent to discriminate.

Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 534 (1979), the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly-erroneous rule. In *Commissioner* v. *Duberstein*, 363 U. S. 278 (1960), the Court held that the principal criterion for identifying a gift under the applicable provision of the Internal Revenue Code was the intent or motive of the donor—"one that inquires what the basic reason for his conduct was in fact." *Id.*, at 286. Resolution of that issue determined the ultimate issue of whether a gift had been made. Both issues were held to be questions of fact subject to the clearly-erroneous rule. In *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949), an antitrust case, the Court referred to "[f]indings as to the design, motive and intent with which men act" as peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52.

Justice Black's dissent in *Yellow Cab* suggested a contrary approach. Relying on *United States* v. *Griffith*, 334 U. S.

100 (1948), he argued that it is not always necessary to prove "specific intent" to restrain trade; it is enough if a restraint is the result or consequence of a defendant's conduct or business arrangements. Such an approach, however, is specifically precluded by § 703(h) in Title VII cases challenging seniority systems. Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by § 703(h) may be presumed from such an impact. As § 703(h) was construed in *Teamsters*, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. That finding appears to us to be a pure question of fact.

This is not to say that discriminatory impact is not part of the evidence to be considered by the trial court in reaching a finding on whether there was such a discriminatory intent as a factual matter.[18] We do assert, however, that under § 703(h) discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent.[19] Discrimi-

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[18] See, *e. g.*, *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 580 (1978): "Proof that [an employer's] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided."

[19] We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i. e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority

379-671 O—83——5

natory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Insofar as the Fifth Circuit assumed otherwise, it erred.

IV

Respondents do not directly defend the Fifth Circuit rule that a trial court's finding on discriminatory intent is not subject to the clearly-erroneous standard of Rule 52(a).[29] Rather, among other things, they submit that the Court of Appeals recognized and, where appropriate, properly applied Rule 52(a) in setting aside the findings of the District Court. This position has force, but for two reasons it is not persuasive.

First, although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a), the acknowledgment came late in the court's opinion. The court had not expressly referred to or applied Rule 52(a) in the course of disagreeing with the District Court's resolution of the factual issues deemed relevant under *James* v. *Stockham*

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in the Circuits on both sides of this question. Compare *United States ex rel. Johnson* v. *Johnson*, 531 F. 2d 169, 174, n. 12 (CA3 1976); *Stafos* v. *Jarvis*, 477 F. 2d 369, 372 (CA10 1973); and *Johnson* v. *Salisbury*, 448 F. 2d 374, 377 (CA6 1971), with *Rogers* v. *Bates*, 431 F. 2d 16, 18 (CA8 1970); and *Pennsylvania Casualty Co.* v. *McCoy*, 167 F. 2d 132, 133 (CA5 1948). There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court, *e. g.*, *Bogardus* v. *Commissioner*, 302 U. S. 34, 39 (1937); *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491 (1937); *Helvering* v. *Rankin*, 295 U. S. 123, 131 (1935). But cf., *Commissioner* v. *Duberstein*, 363 U. S. 278, 289 (1960); *Commissioner* v. *Heininger*, 320 U. S. 467, 475 (1943).

[29] Neither does the dissent contend that Rule 52(a) is inapplicable to findings of discriminatory intent. Rather, it contends, that the Rule was properly applied by the Court of Appeals.

Valves & Fittings Co., 559 F. 2d 310 (1977).[21] Furthermore, the paragraph in which the court finally concludes that the USW seniority system is unprotected by § 703(h) strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Second and more fundamentally, when the court stated that it was convinced that a mistake had been made, it then not only identified the mistake but also the source of that mistake. The mistake of the District Court was that on the record there could be no doubt about the existence of a discriminatory purpose. The source of the mistake was the District Court's failure to recognize the relevance of the racial purposes of IAM. Had the District Court "given the I. A. M.'s role in the creation and establishment of the seniority system its due consideration," it "might have reached a different conclusion." *Supra*, at 284.

When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:

> "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance

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[21] In particular, in regard to the second *James* factor—whether the departmental structure was rational or in line with industry practice—the Court of Appeals did not focus on the evidentiary basis for any particular finding of the District Court. It appeared to make an independent examination of the record and arrive at its own conclusion contrary to that of the District Court. Likewise, in dealing with the genesis of the seniority system and whether or not the negotiation or maintenance of the system was tainted with racial discrimination, the Court of Appeals, while identifying what it thought was legal error in failing to consider the racial practices and intentions of IAM, did not otherwise overturn any of the District Court's findings as clearly erroneous.

> this factual dispute which had not been considered by the District Court." *DeMarco* v. *United States*, 415 U. S. 449, 450, n. (1974).[22]

Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 331–332 (1974). All of this is elementary. Yet the Court of Appeals, after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings as to the intent of IAM and the significance, if any, of such a finding with respect to the intent of USW itself. Instead, the Court of Appeals made its own determination as to the motives of IAM, found that USW had acquiesced in the IAM conduct, and apparently concluded that the foregoing was sufficient to remove the system from the protection of § 703(h).[23]

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[22] See 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.06[2] (1982) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made"); *Rule* v. *International Assn. of Bridge Workers*, 568 F. 2d 558, 568 (CA8 1978); *Chicano Police Officer's Assn.* v. *Stover*, 552 F. 2d 918, 921 (CA10 1977); *O'Neal* v. *Gresham*, 519 F. 2d 803, 805 (CA4 1975); *Burch* v. *International Assn. of Machinists & Aerospace Workers, AFL–CIO*, 433 F. 2d 561 (CA5 1970); *General Electric Credit Corp.* v. *Robbins*, 414 F. 2d 208 (CA8 1969).

[23] IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in this case. A discriminatory intent on the part of IAM, therefore, does not control the outcome of this case. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of USW.

Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. As we have previously said, however, the premise for this conclusion is infirm: whether an ultimate fact or not, discriminatory intent under § 703(h) is a factual matter subject to the clearly-erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, concurring in part.

Except to the extent that the Court's preliminary comments on the burden of sustaining "any challenge to a seniority system under Title VII," *ante*, at 277, are inconsistent with the views I expressed separately in *American Tobacco Co.* v. *Patterson*, *ante*, p. 86, I join the Court's opinion.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins except as to Part I, dissenting.

In 1971, a group of Negro employees at Pullman-Standard's Bessemer, Ala., plant brought this class action against Pullman-Standard, the United Steelworkers of America and its Local 1466 (USW), and the International Association of Machinists and its Local 372 (IAM). The plaintiffs alleged, *inter alia*, that the departmental seniority system negotiated

by both unions discriminated against Negroes in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), and the Civil Rights Act of 1866, 42 U. S. C. § 1981. In 1974, the District Court for the Northern District of Alabama concluded that the seniority system did not operate to discriminate against Negroes. A unanimous panel of the Fifth Circuit reversed. The court ruled that the District Court had committed several errors of law, including failure to give proper weight to the role of the IAM, and had relied on patently inaccurate factual conclusions. *Swint* v. *Pullman-Standard*, 539 F. 2d 77, 95–96 (1976). On remand, the District Court again ruled that the seniority system was immune from attack under Title VII, this time finding that respondents had failed to show discriminatory intent as required by this Court's decision in *Teamsters* v. *United States*, 431 U. S. 324 (1977). *Ante*, at 275. The Fifth Circuit again unanimously rejected the conclusion of the District Court. 624 F. 2d 525 (1980). The majority now reverses the Fifth Circuit's second unanimous decision on the ground that the Court of Appeals did not pay sufficient homage to the "clearly erroneous" rule, Fed. Rule Civ. Proc. 52(a), in concluding that the seniority system at Pullman-Standard was the product of intentional discrimination against Negroes. Because I cannot agree with the premise of the majority's decision to remand this case for yet another trial, or with its application of that premise to the facts of this case, I respectfully dissent.

I

The majority premises its holding on the assumption that "'absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.'" *Ante*, at 277, quoting *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 82 (1977). As I have previously indicated, I do not find anything in the relevant statutory language or legislative

history to support the proposition that § 703(h) of Title VII immunizes a seniority system that perpetuates past discrimination, as the system at issue here clearly does, simply because the plaintiffs are unable to demonstrate to this Court's satisfaction that the system was adopted or maintained for an invidious purpose. See *Teamsters* v. *United States*, *supra*, at 377–394 (opinion of MARSHALL, J.). In my opinion, placing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates the clearly expressed will of Congress and effectively "freeze[s] an entire generation of Negro employees into discriminatory patterns that existed before the Act." *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (ED Va. 1968) (Butzner, J.).

II

Even if I were to accept this Court's decision to impose this novel burden on Title VII plaintiffs, I would still be unable to concur in its conclusion that the Fifth Circuit's decision should be reversed for failing to abide by Rule 52(a). The majority asserts that the Court of Appeals in this case ignored the clearly-erroneous rule and made an independent determination of discriminatory purpose. I disagree. In my view, the court below followed well-established legal principles both in rejecting the District Court's finding of no discriminatory purpose and in concluding that a finding of such a purpose was compelled by all of the relevant evidence.

The majority concedes, as it must, that the "Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a)." *Ante*, at 290. In a footnote to its opinion, the Court of Appeals plainly states that findings of fact may be overturned only if they are either "clearly erroneous" or "made under an erroneous view of controlling legal principles." 624 F. 2d, at 533, n. 6. Furthermore, as the majority notes, *ante*, at 283, the Court of Appeals justified its decision to reject the District Court's finding that the senior-

ity system was not the result of purposeful discrimination by stating: "An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the *definite and firm conviction that a mistake has been made.*" 624 F. 2d, at 533 (emphasis added; footnote omitted).[1] I frankly am at a loss to understand how the Court of Appeals could have expressed its conclusion that the District Court's finding on the issue of intent was clearly erroneous with any more precision or clarity.

The majority rejects the Court of Appeals' clear articulation and implementation of the clearly-erroneous rule on the apparent ground that in the course of correctly setting forth the requirements of Rule 52(a), the court also included the following quotation from its prior decision in *East* v. *Romine, Inc.*, 518 F. 2d 332, 339 (1975):

> "'Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U. S. C. A. § 2000e–2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. [Cites omitted]. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.'" 624 F. 2d, at 533, n. 6.

The only question presented by this case, therefore, is whether this reference to *East* v. *Romine, Inc.*, should be read as negating the Court of Appeals' unambiguous ac-

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[1] As the majority acknowledges, *ante*, at 284–285, n. 14, this Court stated in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), that a finding of fact is clearly erroneous if "the reviewing court on the entire evidence is left with *the definite and firm conviction that a mistake has been committed*" (emphasis added).

knowledgment of the "controlling standard of Rule 52." *Ante*, at 290. The majority bases its affirmative answer to that question on two factors. First, the majority contends that the Court of Appeals must not have properly respected the clearly-erroneous rule because its acknowledgment that Rule 52(a) supplied the controlling standard "came late in the court's opinion." *Ante*, at 290. Second, the Court of Appeals not only "identified the mistake" that it felt had been made, "but also the source of that mistake." *Ante*, at 291. If the Court of Appeals had really been applying the clearly-erroneous rule, it should have abided by the "usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Ante*, at 293.

Neither of these arguments justifies the majority's conclusion that this case must be remanded for a fourth trial on the merits. I am aware of no rule of decision embraced by this or any other court that places dispositive weight on whether an accurate statement of controlling principle appears "early" or late in a court's opinion. Nor does the majority suggest a bases for this unique rule of interpretation. So long as a court acknowledges the proper legal standard, I should think it irrelevant whether it chooses to set forth that standard at the beginning or at the end of its opinion. The heart of the majority's argument, therefore, is that the failure to remand the action to the District Court after rejecting its conclusion that the seniority system was "bona fide" within the meaning of § 703(h) indicates that the Court of Appeals did not properly follow the clearly-erroneous rule. Before addressing this issue, however, it is necessary to examine the nature of the finding of "intent" required by this Court in *Teamsters*, the procedure that courts of appeals should follow in reviewing a district court's finding on intent, and the extent to which the court below adhered to that procedure in this case.

The District Court examined the four factors approved by the Fifth Circuit in *James* v. *Stockham Valves & Fittings*

Co., 559 F. 2d 310 (1977), cert. denied, 434 U. S. 1034 (1978), to determine whether the departmental seniority system at Pullman-Standard was adopted or maintained for a discriminatory purpose. Although indicating that these four factors are not the only way to demonstrate the existence of discriminatory intent,[2] the Court today implicitly acknowledges that proof of these factors satisfies the requirements of *Teamsters*.[3] In particular, the majority agrees that a finding of discriminatory intent sufficient to satisfy *Teamsters* can be based on circumstantial evidence, including evidence of discriminatory impact. See *ante*, at 289; see also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266, 267 (1977).

Given the nature of this factual inquiry, the court of appeals must first determine whether the district court applied correct legal principles and therefore *considered* all of the legally relevant evidence presented by the parties. This, as the majority acknowledges, is a "legal" function that the court of appeals must perform in the first instance. *Ante*, at 282, 283. Second, the court of appeals must determine whether the district court's finding with respect to intent is *supported* by all of the legally relevant evidence. This, the Court holds today, is generally a factual determination limited by the dictates of Rule 52(a). Finally, if the court of appeals sets aside the district court's finding with respect to intent, either because that finding is clearly erroneous or because it is based on an erroneous legal standard, it may determine, in the interest of judicial economy, whether the le-

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[2] Contrary to the majority's suggestion, *ante*, at 279, n. 8, I find nothing in the Fifth Circuit's decision in *James* v. *Stockham Valves & Fittings Co.* to imply that these factors constitute the only relevant criteria for determining discriminatory intent.

[3] This conclusion would seem to be compelled since, as the majority notes, the *James* factors are nothing more than a summary of the criteria examined by this Court in *Teamsters*, 431 U. S., at 355–356.

gally relevant evidence presented to the district court "permits only one resolution of the factual issue." *Ante*, at 292. If only one conclusion is possible, the reviewing court is free to find the existence of the fact in question as a matter of law. See *Bigelow* v. *Virginia*, 421 U. S. 809, 826–827 (1975); *Levin* v. *Mississippi River Fuel Corp.*, 386 U. S. 162, 170 (1967).

A common-sense reading of the opinion below demonstrates that the Court of Appeals followed precisely this course in examining the issue of discriminatory intent. Even the majority concedes that the Court of Appeals determined that the District Court committed "legal error" by failing to consider all of the relevant evidence in resolving the first and the third *James* factors. *Ante*, at 282, 283. With respect to the first *James* factor—whether the system inhibits all employees equally from transferring between seniority units—the District Court found that the departmental system "locked" both Negro and white workers into departments by discouraging transfers. The District Court acknowledged that Negroes might suffer a greater impact because the company's previous discriminatory policy of openly maintaining "Negro" jobs and "white" jobs had caused Negroes to be concentrated in less desirable positions. The District Court concluded, however, that this differential impact was irrelevant in determining whether the seniority system operated neutrally. The Court of Appeals properly held that the District Court erred in failing to consider the fact that the departmental system locked Negroes into less desirable jobs.

Similarly, as for the third *James* factor—whether the seniority system had its genesis in racial discrimination—the District Court rejected respondents' argument that the motives of the IAM were relevant. It concluded that the USW could not be charged with the racial bias of the IAM. The Court of Appeals held that this conclusion was erroneous because the "motives and intent of the I. A. M. in 1941 and 1942

are significant in consideration of whether the seniority system has its genesis in racial discrimination." 624 F. 2d, at 532.[4]

As the majority acknowledges, where findings of fact "'are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand.'" *Ante*, at 285, quoting 624 F. 2d, at 533, n. 6; see also *Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 323 (1974); *United States* v. *General Motors Corp.*, 384 U. S. 127, 141, n. 16 (1966); *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 194, n. 9 (1963); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960); *Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 356, n. 15 (CA5 1972). Having found that the District Court's findings as to the first and third *James* factors were made under an erroneous view of controlling legal principles, the Court of Appeals was *compelled* to set aside those findings free of the requirements of the clearly-erroneous rule.[5] But once these two findings were set aside, the District Court's conclusion that the departmental system was bona fide within the meaning of § 703(h) also had to be rejected, since that conclusion was based at least in part on its erroneous determinations concerning the first and the third *James* factors.

At the very least, therefore, the Court of Appeals was entitled to remand this case to the District Court for the pur-

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[4] As the majority indicates in a footnote, *ante*, at 292, n. 23, the discriminatory motive of the IAM is "relevant . . . to the extent that it may shed light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in this case." I do not read the Court of Appeals opinion in this case as holding anything more than that if the USW participated in establishing a system that was designed for the purpose of perpetuating past discrimination, the third *James* factor would be satisfied. Given that the IAM is a party to this litigation, its participation in the creation of the seniority system can hardly be deemed irrelevant.

[5] It is therefore irrelevant that the Court of Appeals did not specifically hold that the District Court's other factual findings were clearly erroneous.

pose of reexamining the bona fides of the seniority system under proper legal standards. However, as we have often noted, in some cases a remand is inappropriate where the facts on the record are susceptible to only one reasonable interpretation. See *Dayton Board of Education* v. *Brinkman*, 443 U. S 526, 534–537 (1979); *Bigelow* v. *Virginia*, *supra*, at 826–827. In such cases, "[e]ffective judicial administration" requires that the court of appeals draw the inescapable factual conclusion itself, rather than remand the case to the district court for further needless proceedings. *Levin* v. *Mississippi River Fuel Corp.*, 386 U. S., at 170. Such action is particularly appropriate where the court of appeals is in as good a position to evaluate the record evidence as the district court. The major premise behind the deference to trial courts expressed in Rule 52(a) is that findings of fact "depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949); see also *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952). Indeed Rule 52(a) expressly acknowledges the importance of this factor by stating that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Consequently, this Court has been especially reluctant to resolve factual issues which depend on the credibility of witnesses. See generally *United States* v. *Oregon State Medical Society*, *supra*, at 332.

In the case before the Court today this usual deference is not required because the District Court's findings of fact were entirely based on documentary evidence.[6] As we

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[6] Only two witnesses testified during the brief hearing that the District Court conducted on the question whether the seniority system at Pullman-Standard was immune under § 703(h). Both of these witnesses were long-time Negro employees of Pullman-Standard who testified on behalf of *respondents* concerning racial segregation at the plant and by the USW. There is no indication in the District Court's opinion that it relied upon the

noted in *United States* v. *General Motors Corp.*, *supra*, at 141, n. 16, "the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) . . . , plays only a restricted role [in] a 'paper case.'" See also *Jennings* v. *General Medical Corp.*, 604 F. 2d 1300, 1305 (CA10 1979) ("When the findings of a trial court are based on documentary, rather than oral evidence, they do not carry the same weight on appellate review"); *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (CA2 1950).[7]

I believe that the Court of Appeals correctly determined that a finding of discriminatory intent was compelled by the documentary record presented to the District Court. With respect to three of the four *James* factors, the Court of Appeals found overwhelming evidence of discriminatory intent. First, in ruling that the District Court erred by not acknowledging the legal significance of the fact that the seniority system locked Negroes into the least remunerative jobs in the company, the Court of Appeals determined that such disproportionate impact demonstrated that the system did not "'operat[e] to discourage all employees equally from transferring between seniority units.'" 624 F. 2d, at 530, quoting

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testimony of these two witnesses in concluding that the system was bona fide within the meaning of § 703(h). The remainder of the record before the District Court consisted entirely of 139 exhibits submitted by respondents, the company, and the unions concerning the development and maintenance of the seniority system from 1940 through the 1970's.

[7] This is not to say that the clearly-erroneous rule does not apply to "document" cases. See *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 194, n. 9 (1963). However, "when the decision of the court below rests upon an incorrect reading of an undisputed document, [the appellate] court is free to substitute its own reading of the document." *Eutectic Corp.* v. *Metco, Inc.*, 579 F. 2d 1, 5 (CA2 1978). See also *McKensie* v. *Sea Land Service*, 551 F. 2d 91 (CA5 1977); *Best Medium Pub. Co.* v. *National Insider, Inc.*, 385 F. 2d 384 (CA7 1967), cert. denied, 390 U. S. 955 (1968); *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495 (CA3 1959), cert. denied, 363 U. S. 812 (1960).

James v. *Stockham Valves & Fittings Co.*, 559 F. 2d, at 352. Second, noting that "[n]o credible explanation ha[d] been advanced to sufficiently justify" the existence of two separate Die & Tool Departments and two separate Maintenance Departments, a condition not found at any other Pullman-Standard plant, or the creation of all-white and all-Negro departments at the time of unionization and in subsequent years, the Court of Appeals concluded that the second *James* factor had not been satisfied.[8] 624 F. 2d, at 533. Finally, with respect to the third *James* factor the Court of Appeals found that once the role of the IAM was properly recognized, it was "crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." 624 F. 2d, at 532.[9]

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[8] Although the majority is correct in stating that the Court of Appeals did not "refer to or *expressly* apply the clearly-erroneous standard" in reaching this conclusion, *ante*, at 282 (emphasis added), the appellate court's adherence to the requirements of Rule 52(a) is nevertheless apparent from the following statement:

"The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on *no other considerations than the objective to separate the races.*" 624 F. 2d, at 531 (emphasis added).

In my opinion, this statement is sufficient to satisfy the requirements of Rule 52(a), particularly in light of the Court of Appeals' general acknowledgment that it was bound by the clearly-erroneous rule. See *supra*, at 296–297.

[9] Whether or not the Court of Appeals expressly ruled on the fourth *James* factor is irrelevant. As the Court of Appeals clearly stated, its conclusion was based on "the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard." 624 F. 2d, at 533; see also *id.*, at 532 ("It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter"), and *id.*,

After reviewing all of the relevant record evidence presented to the District Court, the Court of Appeals concluded: "There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose." *Id.*, at 533. Because I fail to see how the Court of Appeals erred in carrying out its appellate function, I respectfully dissent from the majority's decision to prolong respondents' 11-year quest for the vindication of their rights by requiring yet another trial.

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at 533 ("We consider significant in our decision . . . conditions of racial discrimination which affected the negotiation and renegotiation of the system . . ."). Even assuming that the District Court was correct in concluding that the system had been *maintained* free of any illegal purpose, the Court of Appeals was entitled to conclude that discriminatory intent had been demonstrated on the basis of other relevant evidence.

WEINBERGER, SECRETARY OF DEFENSE, ET AL. v. ROMERO-BARCELO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-1990. Argued February 23, 1982—Decided April 27, 1982

The Navy, in the course of using an island off the Puerto Rico coast for air-to-ground weapons training, has discharged ordnance into the waters surrounding the island, when pilots missed land targets and accidentally bombed the waters or intentionally bombed water targets. Respondents sued in Federal District Court to enjoin the Navy's operations, alleging violation of, *inter alia*, the Federal Water Pollution Control Act (FWPCA). The District Court, while finding that the discharges have not harmed the quality of the water, held that the Navy had violated the FWPCA by discharging ordnance into the waters without first obtaining a permit from the Environmental Protection Agency, and ordered the Navy to apply for a permit but refused to enjoin the operations pending consideration of the permit application. The Court of Appeals vacated and remanded with instructions to order the Navy to cease the violation until it obtained a permit, holding that the FWPCA withdrew the District Court's equitable discretion to order relief other than an immediate prohibitory injunction.

Held: The FWPCA does not foreclose completely the exercise of a district court's discretion, but, rather than requiring the court to issue an injunction for any and all statutory violations, permits the court to order relief it considers necessary to secure prompt compliance with the Act, which relief can include, but is not limited to, an order of immediate cessation. Pp. 311–320.

(a) The grant of jurisdiction to a court to ensure compliance with a statute does not suggest an absolute duty to grant injunctive relief under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. Pp. 311–313.

(b) Here, an injunction is not the only means of ensuring compliance, *TVA* v. *Hill*, 437 U. S. 153, distinguished, since the FWPCA provides, for example, for fines and criminal penalties. While the FWPCA's purpose in preserving the integrity of the Nation's waters is to be achieved by compliance with the Act, including compliance with the permit requirements, in this case the discharge of the ordnance has not polluted

379-671 O—83——6

the waters, and, although the District Court refused to enjoin the discharge, it neither ignored the statutory violation nor undercut the purpose and function of the permit system. The FWPCA's prohibition against discharge of pollutants can be overcome by the very permit the Navy was ordered to seek. Pp. 313–316.

(c) The statutory scheme as a whole contemplates the exercise of discretion and balancing of equities, and suggests that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction. Pp. 316–318.

(d) The provision of the FWPCA permitting the President to exempt federal facilities from compliance with the permit requirements does not indicate congressional intent to limit the court's discretion. The Act permits the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve *compliance* with the Act, whereas the exemption permits *noncompliance* by federal agencies in extraordinary circumstances. Pp. 318–319.

(e) Nor does the legislative history suggest that Congress intended to deny courts their traditional equitable discretion. P. 319.

643 F. 2d 835, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 321. STEVENS, J., filed a dissenting opinion, *post*, p. 322.

Elinor H. Stillman argued the cause for petitioners. On the briefs were *Solicitor General Lee, Acting Assistant Attorney General Liotta, Edward J. Shawaker, Anne S. Almy, Thomas E. Flynn*, and *Richard M. Cornelius*.

John A. Hodges argued the cause for respondents. With him on the brief were *Hector Reichard de Cardona*, Secretary of Justice of Puerto Rico, *Gerardo A. Carlo, Timothy L. Harker*, and *Lawrence White*.

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Federal Water Pollution Control Act (FWPCA or Act), 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. IV), requires a district court to enjoin immediately all discharges of pollut-

ants that do not comply with the Act's permit requirements or whether the district court retains discretion to order other relief to achieve compliance. The Court of Appeals for the First Circuit held that the Act withdrew the courts' equitable discretion. *Romero-Barcelo* v. *Brown*, 643 F. 2d 835 (1981). We reverse.

I

For many years, the Navy has used Vieques Island, a small island off the Puerto Rico coast, for weapons training. Currently all Atlantic Fleet vessels assigned to the Mediterranean and the Indian Ocean are required to complete their training at Vieques because it permits a full range of exercises under conditions similar to combat. During air-to-ground training, however, pilots sometimes miss land-based targets, and ordnance falls into the sea. That is, accidental bombings of the navigable waters and, occasionally, intentional bombings of water targets occur. The District Court found that these discharges have not harmed the quality of the water.

In 1978, respondents, who include the Governor of Puerto Rico and residents of the island, sued to enjoin the Navy's operations on the island. Their complaint alleged violations of numerous federal environmental statutes and various other Acts.[1] After an extensive hearing, the District Court found

[1] The complaint charged the Navy with violations of the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.* (1976 ed. and Supp. IV); the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. IV); the Clean Air Act Amendments of 1977, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. IV); the Noise Control Act of 1972, 42 U. S. C. § 4901 *et seq.*; the Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6901 *et seq.*; the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.*; the National Historic Preservation Act of 1966, 16 U. S. C. § 470 *et seq.*; the Coastal Zone Management Act of 1972, 16 U. S. C. § 1451 *et seq.*; the Marine Mammal Protection Act of 1972, 16 U. S. C. § 1361 *et seq.* (1976 ed. and Supp. IV); the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 401 *et seq.*; various amendments

that under the explicit terms of the Act, the Navy had violated the Act by discharging ordnance into the waters surrounding the island without first obtaining a permit from the Environmental Protection Agency (EPA).[2] *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646 (PR 1979).

Under the FWPCA, the "discharge of any pollutant" requires a National Pollutant Discharge Elimination System (NPDES) permit. 33 U. S. C. §§ 1311(a), 1323(a) (1976 ed. and Supp. IV). The term "discharge of any pollutant" is defined as

> "any addition of any *pollutant* to the waters of the contiguous zone or the ocean from any *point source* other than a vessel or other floating craft." 33 U. S. C. § 1362(12) (emphasis added).

Pollutant, in turn, means

> "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, *munitions*, chemical wastes, biological materials, radioactive materials, heat, wrecked

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to the United States Constitution, congressional and Presidential directives concerning cessation of Navy operations on the neighboring island of Culebra, and violations of Puerto Rico law.

[2] The District Court also found that the Navy had violated the National Environmental Policy Act (NEPA) by failing to file an Environmental Impact Statement (EIS) or a reviewable environmental record to support a decision not to file such a statement, *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 705 (PR 1979), and had failed to nominate historic sites to the National Register as required under the National Historic Preservation Act. *Ibid.* It ordered the Navy to nominate such sites and to file an EIS. *Id.*, at 708. The Court of Appeals remanded issues under the Endangered Species Act and the National Historic Preservation Act to the District Court for further consideration. *Romero-Barcelo* v. *Brown*, 643 F. 2d 835, 858, 860, 862 (1981). It vacated the order involving NEPA and remanded with orders to dismiss because the Navy had filed an EIS in the interim. *Id.*, at 862. Only the issue involving the FWPCA is before this Court.

> or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." 33 U. S. C. § 1362(6) (emphasis added).

And, under the Act, a "point source" is

> "any discernible, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or *vessel* or other *floating craft from which pollutants are or may be discharged*. . . ." 33 U. S. C. § 1362(14) (1976 ed., Supp. IV) (emphasis added).

Under the FWPCA, the EPA may not issue an NPDES permit without state certification that the permit conforms to state water quality standards. A State has the authority to deny certification of the permit application or attach conditions to the final permit. 33 U. S. C. § 1341.

As the District Court construed the FWPCA, the release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants, even though the EPA, which administers the Act, had not promulgated any regulations setting effluent levels or providing for the issuance of a NPDES permit for this category of pollutants.[3] Recognizing that violations of the Act "must be cured," 478 F. Supp., at 707, the District Court ordered the Navy to apply for a NPDES permit. It refused, however, to enjoin Navy operations pend-

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[3] The EPA issues effluent limitations for categories and classes of point sources. See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977); 40 CFR part 400 *et seq.* (1981). In a situation somewhat similar to that before us, the Secretary of the Interior has, under the Migratory Bird Treaty Act, 16 U. S. C. § 703 *et seq.* (1976 ed. and Supp. IV), regulated deposit of shot into water by duck hunters who miss their targets. *National Rifle Assn.* v. *Kleppe*, 425 F. Supp. 1101 (DC 1976), affirmance order, 178 U. S. App. D. C. 240, 571 F. 2d 674 (1978).

ing consideration of the permit application. It explained that the Navy's "technical violations" were not causing any "appreciable harm" to the environment.[4] *Id.*, at 706. Moreover, because of the importance of the island as a training center, "the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation."[5] *Id.*, at 707. The District Court concluded that an injunction was not necessary to ensure suitably prompt compliance by the Navy. To support this conclusion, it emphasized an equity court's traditionally broad discretion in deciding appropriate relief and quoted from the classic description of injunctive relief in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944): "The historic injunctive process was designed to deter, not to punish."

The Court of Appeals for the First Circuit vacated the District Court's order and remanded with instructions that the court order the Navy to cease the violation until it obtained a permit. 643 F. 2d 835 (1981). Relying on *TVA* v. *Hill*, 437 U. S. 153 (1978), in which this Court held that an imminent violation of the Endangered Species Act required injunctive relief, the Court of Appeals concluded that the District Court

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[4] The District Court wrote:

"In fact, if anything, these waters are as aesthetically acceptable as any to be found anywhere, and Plaintiff's witnesses unanimously testified as to their being the best fishing grounds in Vieques." 478 F. Supp., at 667. "[I]f the truth be said, the control of large areas of Vieques [by the Navy] probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practically non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of *res ipsa loquitur*." *Id.*, at 682 (footnote omitted).

[5] The District Court also took into consideration the delay by plaintiffs in asserting their claims. It concluded that although laches should not totally bar the claims, it did strongly militate against the granting of injunctive relief. *Id.*, at 707.

erred in undertaking a traditional balancing of the parties' competing interests. "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." 643 F. 2d, at 861. The court suggested that if the order would interfere significantly with military preparedness, the Navy should request that the President grant it an exemption from the requirements in the interest of national security."[6]

Because this case posed an important question regarding the power of the federal courts to grant or withhold equitable relief for violations of the FWPCA, we granted certiorari, 454 U. S. 813 (1981). We now reverse.

II

It goes without saying that an injunction is an equitable remedy. It "is not a remedy which issues as of course," *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 337–338 (1933), or "to restrain an act the injurious consequences of which are merely trifling." *Consolidated Canal*

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[6] Title 33 U. S. C. § 1323(a) (1976 ed., Supp. IV) provides, in relevant part:

"The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . . No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

Co. v. *Mesa Canal Co.*, 177 U. S. 296, 302 (1900). An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh* v. *Looney*, 248 U. S. 453, 456 (1919). The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 61 (1975); *Sampson* v. *Murray*, 415 U. S. 61, 88 (1974); *Beacon Theaters, Inc.* v. *Westover*, 359 U. S. 500, 506–507 (1959); *Hecht Co.* v. *Bowles*, *supra*, at 329.

Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a "nice adjustment and reconciliation" between the competing claims, *Hecht Co.* v. *Bowles*, *supra*, at 329. In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus* v. *United States*, 321 U. S. 414, 440 (1944). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co.* v. *Bowles*, *supra*, at 329.

In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 500 (1941). Thus, the Court has noted that "[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," and that "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the

plaintiff." *Yakus* v. *United States*, *supra*, at 440 (footnote omitted). The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. *TVA* v. *Hill*, 437 U. S., at 193; *Hecht Co.* v. *Bowles*, *supra*, at 329.

These commonplace considerations applicable to cases in which injunctions are sought in the federal courts reflect a "practice with a background of several hundred years of history," *Hecht Co.* v. *Bowles*, *supra*, at 329, a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. *Hecht Co.* v. *Bowles*, *supra*, at 329. As the Court said in *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946):

> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann*, 10 Pet. 497, 503 . . . ."

In *TVA* v. *Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than that before us. 437 U. S., at 173. The statute involved, the Endangered Species Act, 87 Stat. 884, 16 U. S. C. § 1531 *et seq.*, required the District Court to enjoin completion of the Tellico Dam in order to preserve the snail

darter, a species of perch. The purpose and language of the statute under consideration in *Hill*, not the bare fact of a statutory violation, compelled that conclusion. Section 7 of the Act, 16 U. S. C. § 1536, requires federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [any] endangered species . . . or result in the destruction or modification of habitat of such species which is determined . . . to be critical." The statute thus contains a flat ban on the destruction of critical habitats.

It was conceded in *Hill* that completion of the dam would eliminate an endangered species by destroying its critical habitat. Refusal to enjoin the action would have ignored the "explicit provisions of the Endangered Species Act." 437 U. S., at 173. Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

That is not the case here. An injunction is not the only means of ensuring compliance. The FWPCA itself, for example, provides for fines and criminal penalties. 33 U. S. C. §§ 1319(c) and (d). Respondents suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA.[7] As Congress explained, the objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a).

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[7] The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies. *E. g., Spur Industries, Inc.* v. *Del E. Webb Development Co.*, 108 Ariz. 178, 494 P. 2d 700 (1972); *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 257 N. E. 2d 870 (1970).

This purpose is to be achieved by compliance with the Act, including compliance with the permit requirements.[8] Here, however, the discharge of ordnance had not polluted the waters, and, although the District Court declined to enjoin the discharges, it neither ignored the statutory violation nor undercut the purpose and function of the permit system. The court ordered the Navy to apply for a permit.[9] It temporarily, not permanently, allowed the Navy to continue its activities without a permit.

In *Hill*, we also noted that none of the limited "hardship exemptions" of the Endangered Species Act would "even remotely apply to the Tellico Project." 437 U. S., at 188. The prohibition of the FWPCA against discharge of pollutants, in contrast, can be overcome by the very permit the Navy was ordered to seek.[10] The Senate Report to the 1972

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[8] Federal agencies must comply with the water pollution abatement requirements "in the same manner, and to the same extent as any nongovernmental entity . . . ." 33 U. S. C. § 1323(a) (1976 ed., Supp. IV). S. Rep. No. 92–414, p. 80 (1971), pointed to "[f]ederal agencies such as the Department of Defense" for failing to abate pollution.

[9] The Navy applied for an NPDES permit in December 1979. In May 1981, the EPA issued a draft NPDES permit and a notice of intent to issue that permit. The FWPCA requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. 33 U. S. C. § 1341(a). The Environmental Quality Board of the Commonwealth of Puerto Rico denied the Navy a water quality certificate in connection with this application for an NPDES in June 1981. In February 1982, the Environmental Quality Board denied the Navy's reconsideration request and announced it was adhering to its original ruling. In a letter dated April 9, 1982, the Solicitor General informed the Clerk of the Court that the Navy has filed an action challenging the denial of the water quality certificate. *United States* v. *Commonwealth of Puerto Rico*, Civ. Action No. 82–0726 (Dist. Ct. PR).

[10] As we have explained, the 1972 Amendments to the FWPCA established the NPDES as

"a means of achieving and enforcing the effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves

Amendments explains that it was enacting the permit program because "the Committee recognizes the impracticality of any effort to halt all pollution immediately." S. Rep. No. 92–414, p. 43 (1971). That the scheme as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute.

Other aspects of the statutory scheme also suggest that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction. Although the ultimate objective of the FWPCA is to eliminate all discharges of pollutants into the navigable waters by 1985, the statute sets forth a scheme of phased compliance. As enacted, it called for the achievement of the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. 33 U. S. C. § 1311(b). This scheme of phased compliance further suggests that this is a statute in which Congress envisioned, rather than curtailed, the exercise of discretion.[11]

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to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. . . . With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205 (1976) (footnote omitted).

[11] We have, however, held some standards related to phased compliance to be absolute. See *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64 (1980). In *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981), we concluded that the federal common law of nuisance was pre-empted by the FWPCA and other similar

The FWPCA directs the Administrator of the EPA to seek an injunction to restrain immediately discharges of pollutants he finds to be presenting "an imminent and substantial endangerment to the health of persons or to the welfare of persons." 33 U. S. C. § 1364(a) (1976 ed., Supp. IV). This rule of immediate cessation, however, is limited to the indicated class of violations. For other kinds of violations, the FWPCA authorizes the Administrator of the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order . . . ." 33 U. S. C. § 1319(b).[12] The provision makes clear that Congress did not

Acts: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.*, at 15; see *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981). But, as we have also observed in construing this Act: "The question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . ." *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S., at 138. Here we do not read the FWPCA as intending to abolish the courts' equitable discretion in ordering remedies.

[12] The statute at issue in *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), contained language very similar to that in § 1319(b). It directed the Administrator to seek "a permanent or temporary injunction, restraining order, or other order" to halt violations. *Id.*, at 322. The Court determined that such statutory language did not require the court to issue an injunction even when the Administrator had sued for injunctive relief. In *Hecht Co.*, the court's equitable discretion overrode that of the Administrator. If a court can properly refuse an injunction in the circumstances of *Hecht Co.*, the exercise of its discretion seems clearly appropriate in a case such as this, where the EPA Administrator was not a party and had not yet expressed his judgment. The action of the District Court permitted it to obtain the benefit of the EPA's recommendation before deciding to enjoin the discharge.

In *Hecht Co.*, unlike here, the violations had ceased by the time the injunction was sought. The Court, however, explained that "the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction." *Id.*, at 327. Thus, contrary to the dissent's characterization, *post*, at 327–328, the Court did not base its decision on the fact that violations had ceased.

anticipate that all discharges would be immediately enjoined. Consistent with this view, the administrative practice has not been to request immediate cessation orders. "Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act." Brief for Petitioners 17. See *Milwaukee* v. *Illinois*, 451 U. S. 304, 320–322 (1981). Here, again, the statutory scheme contemplates equitable consideration.

Both the Court of Appeals and respondents attach particular weight to the provision of the FWPCA permitting the President to exempt federal facilities from compliance with the permit requirements. 33 U. S. C. § 1323(a) (1976 ed., Supp. IV).[13] They suggest that this provision indicates congressional intent to limit the court's discretion. According to respondents, the exemption provision evidences Congress' determination that only paramount national interests justify failure to comply and that only the President should make this judgment.

We do not construe the provision so broadly. We read the FWPCA as permitting the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve *compliance* with the Act. The exemption serves a different and complementary purpose, that of permitting *noncompliance* by federal agencies in extraordinary circumstances. Executive Order No. 12088, 3 CFR 243 (1979), which implements the exemption authority, requires the federal agency requesting such an exemption to certify that it cannot meet the applicable pollution standards. "Exemptions are granted by the President only if the conflict between pollution control standards and crucial federal activities cannot be resolved through the development of a practicable remedial program." Brief for Petitioners 26, n. 30.

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[13] See n. 6, *supra*.

Should the Navy receive a permit here, there would be no need to invoke the machinery of the Presidential exemption. If not, this course remains open. The exemption provision would enable the President, believing paramount national interests so require, to authorize discharges which the District Court has enjoined. Reading the statute to permit the exercise of a court's equitable discretion in no way eliminates the role of the exemption provision in the statutory scheme.

Like the language and structure of the Act, the legislative history does not suggest that Congress intended to deny courts their traditional equitable discretion. Congress passed the 1972 Amendments because it recognized that "the national effort to abate and control water pollution has been inadequate in every vital aspect." S. Rep. No. 92–414, p. 7 (1971). The past failings included enforcement efforts under the Rivers and Harbors Appropriation Act of 1899 (Refuse Act), 33 U. S. C. § 401 *et seq.* The "major purpose" of the 1972 Amendments was "to establish a comprehensive long-range policy for the elimination of water pollution." S. Rep. No. 92–414, *supra*, at 95. The permit system was the key to that policy. "The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Milwaukee* v. *Illinois*, *supra*, at 310–311; see generally *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200 (1976). Nonetheless, "[i]n writing the enforcement procedures involving the Federal Government the Committee drew extensively . . . upon the existing enforcement provisions of the Refuse Act of 1899." S. Rep. No. 92–414, *supra*, at 63. Violations of the Refuse Act have not automatically led courts to issue injunctions. See *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492, 535–538 (CA8 1975); *United States* v. *Rohm & Haas Co.*, 500 F. 2d 167, 175 (CA5 1974), cert. denied, 420 U. S. 962 (1975); *United States* v. *Kennebec Log Driving Co.*, 491 F. 2d 562, 571 (CA1 1973), on remand, 399 F. Supp. 754, 759–760 (Me. 1975).

III

This Court explained in *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), that a major departure from the long tradition of equity practice should not be lightly implied. As we did there, we construe the statute at issue "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." *Id.*, at 330. We do not read the FWPCA as foreclosing completely the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.

The exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue at this stage in the proceedings. The District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. Should it become clear that no permit will be issued and that compliance with the FWPCA will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.

Because Congress, in enacting the FWPCA, has not foreclosed the exercise of equitable discretion, the proper standard for appellate review is whether the District Court abused its discretion in denying an immediate cessation order while the Navy applied for a permit. We reverse and remand to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

I join the opinion of the Court. In my view, however, the record clearly establishes that the District Court in this case did not abuse its discretion by refusing to enjoin the immediate cessation of all discharges. Finding that the District Court acted well within the equitable discretion left to it under the Federal Water Pollution Control Act (FWPCA), I would remand the case to the Court of Appeals with instructions that the decision of the District Court should be affirmed.*

The propriety of this disposition is emphasized by the dissenting opinion of JUSTICE STEVENS, *post*, p. 322. I agree with his view that Congress may limit a court's equitable discretion in granting remedies under a particular statute, and that some statutes may constrain discretion more narrowly than others. I stand with the Court, however, in finding no indication that Congress intended to limit the court's equitable discretion under the FWPCA in the manner suggested by JUSTICE STEVENS. As the Court's remand order might be thought to leave open whether the District Court in this case acted within its range of permissible discretion under the

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*The District Court's thorough opinion demonstrates the reasonableness of its decision in light of all pertinent factors, including of course the evident purpose of the statute. The District Court concluded as matters of fact that the Navy's violations have caused no "appreciable harm," *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 706 (PR 1979), and indeed that the Navy's control of the area "probably constitutes a positive factor in its over all ecology," *id.*, at 682. Moreover, the District Court found it "abundantly clear from the evidence in the record . . . that the training that takes place in Vieques is vital to the defense of the interests of the United States." *Id.*, at 707. Balancing the equities as they then stood, the District Court declined to order an *immediate* cessation of all violations but nonetheless issued affirmative orders aimed at securing compliance with the law. See *id.*, at 708. As I read its opinion, the District Court did not foreclose the possibility of ordering further relief that might become appropriate under changed circumstances at a later date.

379-671 O—83——7

FWPCA, it would promote both clarity and economy for us to hold now that the District Court did not abuse its discretion and that its decision should be reinstated.

JUSTICE STEVENS, dissenting.

The appropriate remedy for the violation of a federal statute depends primarily on the terms of the statute and the character of the violation. Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion.[1] Because the Federal Water Pollution Control Act does not specifically command the federal courts to issue an injunction every time an unpermitted discharge of a pollutant occurs, the Court today is obviously correct in asserting that such injunctions should not issue "automatically" or "mechanically" in every case. It is nevertheless equally clear that by enacting the 1972 Amendments to the FWPCA Congress channeled the discretion of the federal judiciary much more narrowly than the Court's rather glib opinion suggests. Indeed, although there may well be situations in which the failure to obtain an NPDES permit would not require immediate cessation of all discharges, I am convinced that Congress has circumscribed the district courts' discretion on the question of remedy so narrowly that a general rule of immediate cessation must be applied in all but a narrow category of cases. The Court of Appeals was quite correct in holding that this case does not present the kind of exceptional situation that justifies a departure from the general rule.

The Court's mischaracterization of the Court of Appeals' holding is the premise for its essay on equitable discretion. This essay is analytically flawed because it overlooks the limitations on equitable discretion that apply in cases in which public interests are implicated and the defendant's violation

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[1] Cf. *Steelworkers* v. *United States*, 361 U. S. 39, 54–59 (Frankfurter and Harlan, JJ., concurring).

of the law is ongoing. Of greater importance, the Court's opinion grants an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme designed by Congress to protect a precious natural resource from the consequences of ad hoc judgments about specific discharges of pollutants.

I

Contrary to the impression created by the Court's opinion, the Court of Appeals did not hold that the District Court was under an absolute duty to require compliance with the FWPCA "under any and all circumstances," *ante*, at 313, or that it was "mechanically obligated to grant an injunction for every violation of law," *ibid.* The only "absolute duty" that the Court of Appeals mentioned was the Navy's duty to obtain a permit before discharging pollutants into the waters off Vieques Island.[2] In light of the Court's opinion the point is worth repeating—the Navy, like anyone else,[3] must obey the law.

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[2] "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." *Romero-Barcelo* v. *Brown*, 643 F. 2d 835, 861 (CA1 1981).

This statement by the Court of Appeals is entirely consistent with the comments in the Senate Report on the legislation that "[e]nforcement of violations . . . should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay," and that "the issue before the courts would be a factual one of whether there had been compliance." S. Rep. No. 92-414, pp. 64, 80 (1971).

[3] The statute expressly subjects federal agencies to all laws "respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U. S. C. § 1323(a) (1976 ed., Supp. IV). Indeed, Congress required federal agencies "to provide national leadership in the control of water pollution," S. Rep. No. 92-414, *supra*, at 67, and to "be a model for the Nation," H. R. Rep. No. 92-911, p. 118 (1972).

The Court of Appeals did not hold that the District Court had no discretion in formulating remedies for statutory violations. It merely "conclude[d] that the district court erred in undertaking a traditional balancing of the parties' competing interests." *Romero-Barcelo* v. *Brown*, 643 F. 2d 835, 861 (CA1 1981). The District Court was not free to disregard the "congressional ordering of priorities" and "the judiciary's 'responsibility to protect the integrity of the . . . process mandated by Congress.'" *Ibid.* (quoting *Jones* v. *Lynn*, 477 F. 2d 885, 892 (CA1 1973)). The Court of Appeals distinguished a statutory violation that could be deemed merely "technical" from the Navy's "[utter disregard of] the statutory mandate." 643 F. 2d, at 861–862. It then pointed out that an order prohibiting any discharge of ordnance into the coastal waters off Vieques until an NPDES permit was obtained would not significantly affect the Navy's training operations because most, if not all, of the Navy's targets were land-based. *Id.*, at 862, n. 55. Finally, it noted that the statute authorized the Navy to obtain an exemption from the President if an injunction would have a significant effect on national security. *Id.*, at 862; see 33 U. S. C. § 1323(a) (1976 ed., Supp. IV).

Under these circumstances—the statutory violation is blatant and not merely technical, and the Navy's predicament was foreseen and accommodated by Congress—the Court of Appeals essentially held that the District Court retained no discretion to deny an injunction. The discretion exercised by the District Court in this case was wholly at odds with the intent of Congress in enacting the FWPCA. In essence, the District Court's remedy was a judicial permit exempting the Navy's operations in Vieques from the statute until such time as it could obtain a permit from the Environmental Protection Agency or a statutory exemption from the President. The two principal bases for the temporary judicial permit were matters that Congress did not commit to judicial discretion. First, the District Court was persuaded that the pollu-

tion was not harming the quality of the coastal waters, see *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 706–707 (PR 1979); and second, the court was concerned that compliance with the Act might adversely affect national security, see *id.*, at 707–708. The Court of Appeals correctly noted that the first consideration is the business of the EPA [4] and the second is the business of the President.[5]

The Court unfairly uses the Court of Appeals' opinion in this case as a springboard for a lecture on the principles of equitable remedies. The Court of Appeals' reasoning was correct in all respects. It recognized that the statute categorically prohibits discharges of pollutants without a permit. Unlike the Court, see *ante*, at 314–315, it recognized that the requested injunction was the only remedy that would bring the Navy into compliance with the statute on Congress' timetable.[6] It then demonstrated that none of the reasons of-

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[4] "Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,' S. Rep. No. 92–414, p. 95 (1971), 2 Leg. Hist. 1511, apt characterizations of any judicial approach applying federal common law, see *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 319 (1955)." *Milwaukee* v. *Illinois*, 451 U. S. 304, 325

[5] In my opinion the national security considerations that were persuasive to the District Court are not matters that are suitable for judicial evaluation. Congress has wisely given the President virtually unlimited authority to exempt the military from the statute on national defense grounds. If those grounds justify an exemption in this case, the Navy clearly should have obtained it from its Commander in Chief, not from a judge unlearned in such matters. This Court, however, makes the curious argument that the Presidential exemption was intended to permit *noncompliance* with the statute and therefore merely complements the equitable discretion of a district court also to authorize noncompliance. *Ante*, at 318–319.

[6] The District Court ordered the Navy to file for an NPDES permit "'with all deliberate speed.'" *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 708 (PR 1979) (quoting *Brown* v. *Board of Education*, 349 U. S. 294, 301).

fered by the District Court for refusing injunctive relief was consistent with the statute or was compelling under the circumstances. The position of the Court of Appeals in effect was that the federal courts' equitable discretion is constrained by a strong presumption in favor of enforcing the law as Congress has written it. By reversing, the Court casts doubt on the validity of that position. This doubt is especially dangerous in the environmental area, where the temptations to delay compliance are already substantial.[7]

II

Our cases concerning equitable remedies have repeatedly identified two critical distinctions that the Court simply ignores today. The first is the distinction between cases in which only private interests are involved and those in which a requested injunction will implicate a public interest. Second, within the category of public interest cases, those cases in which there is no danger that a past violation of law will recur have always been treated differently from those in which an existing violation is certain to continue.

Yakus v. *United States*, 321 U. S. 414, illustrates the first distinction. The Court there held that Congress constitutionally could preclude a private party from obtaining an injunction against enforcement of federal price control regulations pending an adjudication of their validity. In any balancing process, the Court explained, special deference must be given to the public interest:

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[7] It is ironic that the Court comes to the aid of the Navy even though Congress authorized an executive exemption for federal (particularly military) operations but no analogous exemption for important private activities, and even though Congress intended federal agencies to assume a leadership role in the water pollution control effort. To paraphrase the Senate Report, the Federal Government cannot expect private industry to obey the law by ceasing discharges of pollutants until a permit is obtained if the Federal Government is not willing to obey the same law or at least invoke a statutory exemption. See S. Rep. No. 92–414, p. 67 (1971).

> "Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. . . .
>
> "But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Id.*, at 440 (footnote omitted).

In that case, the public interest, reflected in an Act of Congress, was in opposition to the availability of injunctive relief. The Court stated, however, that the public interest factor would have the same special weight if it favored the granting of an injunction:

> "This is but another application of the principle, declared in *Virginia Ry. Co.* v. *System Federation*, 300 U. S. 515, 552, that 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Id.*, at 441.

Hecht Co. v. *Bowles*, 321 U. S. 321, which the Court repeatedly cites, did involve an attempt to obtain an injunction against future violations of a federal statute. That case fell into the category of cases in which a past violation of law had been found and the question was whether an injunction should issue to prevent future violations. Cf. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633–636; *United States* v. *Oregon Medical Society*, 343 U. S. 326, 332–334. Because the record established that the past violations were inadvert-

ent, that they had been promptly terminated, and that the defendant had taken vigorous and adequate steps to prevent any recurrence, the Court held that the District Court had discretion to deny injunctive relief. But in reaching that conclusion, the Court made it clear that judicial discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." 321 U. S., at 331. Indeed, the Court emphasized that any exercise of discretion "should reflect an acute awareness of the Congressional admonition" in the statute at issue. *Ibid.*

In contrast to the decision in *Hecht*, today the Court pays mere lipservice to the statutory mandate and attaches no weight to the fact that the Navy's violation of law has not been corrected.[8] The Court cites no precedent for its holding that an ongoing deliberate violation of a federal statute should be treated like any garden-variety private nuisance action in which the chancellor has the widest discretion in fashioning relief.[9]

Our prior cases involving the appropriate remedy for an ongoing violation of federal law establish a much more stringent test than the Court applies today. Thus, in *United States* v. *City and County of San Francisco*, 310 U. S. 16, a case in which the Government claimed that the city's disposition of electric power was prohibited by an Act of Congress, the Court held that "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued." *Id.*, at 30. "The equitable doctrines relied on do not militate against the capacity of a court of equity as a

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[8] The Navy has been in continuous violation of the statute during the entire decade since its enactment.

[9] Indeed, I am unaware of any case in which the Court has permitted a statutory violation to continue.

proper forum in which to make a declared policy of Congress effective." *Id.*, at 31. An injunction to prohibit continued violation of that policy "is both appropriate and necessary." *Ibid.*[10]

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, the Court plainly stated that an equitable remedy for the violation of a federal statute was neither automatic on the one hand, nor simply a matter of balancing the equities on the other.[11] *Albemarle* holds that the district court's remedial

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[10] In the steel seizure case, Justice Frankfurter rejected "the Government's argument that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure":

"'Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising 'equitable discretion.'" *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 609–610 (concurring opinion).

[11] "The petitoners contend that the statutory scheme provides no guidance, beyond indicating that backpay awards are within the District Court's discretion. We disagree. It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power 'in light of the large objectives of the Act,' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331 (1944). That the court's discretion is equitable in nature, see *Curtis* v. *Loether*, 415 U. S. 189, 197 (1974), hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288, 292 (1960), this Court held, in the face of a silent statute, that

decision must be measured against the purposes that inform the Act of Congress that has been violated. *Id.*, at 417.

III

The Court's discussion of the FWPCA creates the impression that Congress did not intend any significant change in the enforcement provisions of the Rivers and Harbors Appropriation Act of 1899. See *ante*, at 319. The Court goes so far as to suggest that the FWPCA is little more than a codification of the common law of nuisance.[12] The contrast between this casual attitude toward the FWPCA and the Court's writing in *Milwaukee* v. *Illinois*, 451 U. S. 304, is stark. In that case the Court refused to allow federal judges to supplement the statutory enforcement scheme by enjoining a nuisance, whereas in this case the question is whether a federal judge may create a loophole in the scheme by refusing

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district courts enjoyed the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against under § 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 217 (1958 ed.). The Court simultaneously noted that 'the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement.' 361 U. S., at 296.

"It is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.' *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 (1970)." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415–417 (footnotes omitted).

[12] "The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies. *E. g.*, *Spur Industries, Inc.* v. *Del E. Webb Development Co.*, 108 Ariz. 178, 494 P. 2d 700 (1972); *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 257 N. E. 2d 870 (1970)." *Ante*, at 314, n. 7.

to enjoin a violation. Why a different standard should be used to define the scope of judicial discretion in these two situations is not explained.

In *Milwaukee* v. *Illinois* the Court described the FWPCA in these terms:

> "The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." *Id.*, at 326.

Ironically, today the Court holds that federal district courts may in effect "write their own ticket" under the guise of federal common law *before* permits have been issued.

The Court distinguishes *TVA* v. *Hill*, 437 U. S. 153, on the ground that the Endangered Species Act contained a "flat ban" on the destruction of critical habitats. *Ante*, at 314. But the statute involved in this case also contains a flat ban against discharges of pollutants into coastal waters without a permit.[13] Surely the congressional directive to protect the

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[13] Indeed, this proposition has been consistently, repeatedly, and unequivocally reaffirmed by this Court:

"The discharge of 'pollutants' into water is unlawful without a permit issued by the Administrator of the EPA or, if a State has developed a program that complies with the FWPCA, by the State." *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 7.

"Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205.

"We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the

Nation's waters from gradual but possibly irreversible contamination is no less clear than the command to protect the snail darter.[14] To assume that Congress has placed a greater value on the protection of vanishing forms of animal life than on the protection of our water resources is to ignore the text, the legislative history,[15] and the previously consistent interpretation of this statute.[16]

It is true that in *TVA* v. *Hill* there was no room for compromise between the federal project and the statutory objective to preserve an endangered species; either the snail

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field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee* v. *Illinois*, 451 U. S., at 317.

In *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, the Court read the "plain language of the statute," *id.*, at 73, to require private firms "either to conform to BPT standards or to cease production." *Id.*, at 76.

[14] "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee* v. *Illinois*, *supra*, at 318 (emphasis in original; footnote omitted).

[15] The Senate Report emphasized that "if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct." S. Rep. No. 92–414, p. 65 (1971).

[16] "The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois* v. *Milwaukee*[, 406 U. S. 91,] was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee* v. *Illinois*, *supra*, at 319.

Today's holding that a federal court has inherent power to grant exemptions from the statutory permit requirement presents a dramatic contrast with the holding in *Milwaukee* v. *Illinois:*

"Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." 451 U. S., at 320.

darter or the completion of the Tellico Dam had to be sacrificed. In the FWPCA, the Court tells us, the congressional objective is to protect the integrity of the Nation's waters, not to protect the integrity of the permit process. *Ante*, at 314. Therefore, the Court continues, *ante*, at 315, a federal court may compromise the process chosen by Congress to protect our waters as long as the court is content that the waters are not actually being harmed by the particular discharge of pollutants.

On analysis, however, this reasoning does not distinguish the two cases. Courts are in no better position to decide whether the permit process is necessary to achieve the objectives of the FWPCA than they are to decide whether the destruction of the snail darter is an acceptable cost of completing the Tellico Dam. Congress has made both decisions, and there is nothing in the respective statutes or legislative histories to suggest that Congress invited the federal courts to second-guess the former decision any more than the latter.

A disregard of the respective roles of the three branches of government also tarnishes the Court's other principal argument in favor of expansive equitable discretion in this area.[17] The Court points out that Congress intended to halt water pollution gradually, not immediately, and that "the scheme as a whole contemplates the exercise of discretion and balancing of equities." *Ante*, at 316. In the Court's words, Congress enacted a "scheme of phased compliance." *Ibid.* Equitable discretion in enforcing the statute, the Court states, is therefore consistent with the statutory scheme.

The Court's sophistry is premised on a gross misunderstanding of the statutory scheme. Naturally, in 1972 Congress did not expect dischargers to end pollution immediately.[18] Rather, it entrusted to expert administrative

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[17] See also n. 5, *supra*.

[18] "The Committee believes that the no-discharge declaration in Section 13 of the 1899 Refuse Act is useful as an enforcement tool. Therefore, this

agencies the task of establishing timetables by which dischargers could reach that ultimate goal. These timetables are determined by the agencies and included in the NPDES permits; the conditions in the permits constitute the terms by which compliance with the statute is measured.[19] Quite obviously, then, the requirement that each discharger subject itself to the permit process is crucial to the operation of the "scheme of phased compliance." By requiring each discharger to obtain a permit *before* continuing its discharges of pollutants, Congress demonstrated an intolerance for delay in compliance with the statute. It is also obvious that the "exercise of discretion and balancing of equities" were tasks delegated by Congress to expert agencies, not to federal courts, yet the Court simply ignores the difference.

IV

The decision in *TVA* v. *Hill* did not depend on any peculiar or unique statutory language. Nor did it rest on any special interest in snail darters. The decision reflected a profound

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section [§ 301] declares the discharge of pollutants unlawful. The Committee believes it is important to clarify this point: No one has the right to pollute.

"But the Committee recognizes the impracticality of any effort to halt all pollution immediately. Therefore, this section provides an exception if the discharge meets the requirements of this section, Section 402, and others listed in the bill." S. Rep. No. 92–414, *supra*, at 43.

[19] "An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S., at 205 (citations omitted).

respect for the law and the proper allocation of lawmaking responsibilities in our Government.[5] There we refused to sit as a committee of review. Today the Court authorizes freethinking federal judges to do just that. Instead of requiring adherence to carefully integrated statutory procedures that assign to nonjudicial decisionmakers the responsibilities for evaluating potential harm to our water supply as well as potential harm to our national security, the Court unnecessarily and casually substitutes the chancellor's clumsy foot for the rule of law.

I respectfully dissent.

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[5] "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:

"'The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.' R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967).

"We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *TVA* v. *Hill*, 437 U. S. 153, 194–195.

SOUTHERN PACIFIC TRANSPORTATION CO. *v.* COMMERCIAL METALS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-622. Argued March 31, 1982—Decided April 27, 1982

Respondent, as consignor, shipped goods by rail to a third party under uniform straight bills of lading prescribed by the Interstate Commerce Commission (ICC). Each bill provided that the consignor was liable for freight charges unless it signed a statement in the bill that "[t]he carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." Respondent failed to execute this "nonrecourse" clause in the bills of lading. Petitioner, a common carrier by rail, delivered the first shipment to the consignee without collecting the freight charges in advance and without investigating the consignee's credit standing. Petitioner delivered the other shipments only after receiving checks from the consignee, but the checks were dishonored by the consignee's bank for insufficient funds. After unsuccessfully attempting to collect the unpaid freight charges from the consignee, petitioner requested that respondent pay the charges and, when payment was not made, filed suit against respondent in Federal District Court. The court ruled that although petitioner had established a prima facie case for the recovery of the freight charges, respondent had established a valid equitable defense by showing that petitioner had failed to comply with the ICC's credit regulations. These regulations, promulgated pursuant to § 3(2) of the Interstate Commerce Act, did not allow for delivery of freight on credit for more than five days. The Court of Appeals affirmed.

Held: Petitioner's violation of the credit regulations does not bar its collection of lawful freight charges from respondent. Pp. 342–352.

(a) Petitioner established a prima facie case of respondent's liability for the freight charges by proving that respondent failed to sign the nonrecourse clause in the bills of lading. The bill of lading is the basic transportation contract between the shipper-consignor and the carrier, and, unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. Thus, by failing to execute the nonrecourse provision, respondent continued to be primarily liable. Pp. 342–344.

(b) Petitioner's violation of the credit regulations did not provide respondent with an equitable affirmative defense to petitioner's prima facie

case. Neither § 3(2) of the Act nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge. Nor does either contain any words of affirmative defense to a freight charge action. The history of the regulations further indicates that this silence was not inadvertent—the intent of the rules was to protect carriers, not to penalize them. And public policy concerns disfavor judicial implication of affirmative defenses based on carrier violations of the credit regulations. The ICC has ample authority to police the credit practices of carriers, and thereby to deter improper practices, without the judicially created remedy of forfeiture of freight charges. Pp. 344–352.

641 F. 2d 235, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

James H. Pipkin, Jr., argued the cause for petitioner. With him on the briefs were *Charles G. Cole*, *Michael R. Johnson*, and *Harold S. Lentz*.

David M. Sudbury argued the cause for respondent. With him on the brief were *Richard Gary Thomas* and *Robert L. Feldman*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a common carrier's violation of credit regulations issued by the Interstate Commerce Commission (ICC) bars the carrier's collection of a lawful freight charge from a shipper-consignor who, under the terms of the shipment's bill of lading, is primarily liable for the charge.

I

Petitioner Southern Pacific Transportation Company (SP) is a common carrier by rail. Respondent Commercial Metals Company (Metals), a Delaware corporation with principal

*Briefs of *amici curiae* urging reversal were filed by *Nelson J. Cooney*, *Robert A. Hirsch*, *Alan J. Thiemann*, and *Kenneth E. Siegel* for the American Trucking Associations, Inc.; and by *Patricia A. Smith* for the Association of American Railroads.

Frederic L. Wood filed a brief for the National Industrial Traffic League as *amicus curiae* urging affirmance.

379-671 O—83——8

place of business in Dallas, Tex., is in the business of buying and selling steel goods. Petitioner instituted this action against respondent in the United States District Court for the Northern District of Texas to recover freight charges for three cars of steel cobble shipped by rail in 1974 from Detroit, Mich., to Alhambra, Cal.

Each of the three shipments was consigned by Metals to Penn Central Transportation Company, as initial carrier,[1] under the uniform straight bill of lading prescribed by the ICC. Each bill of lading included a "nonrecourse" clause that the consignor might sign. That clause reads: "Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."[2] In each instance, respondent Metals, as consignor, failed to execute this nonrecourse clause. Metals, however, already had received payment for the goods prior to shipment. Tr. of Oral Arg. 5, 6, 24–25; Brief for Respondent 21.

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[1] The shipments moved over the respective lines of the Penn Central, the St. Louis Southwestern Railway Company (an SP subsidiary), and the SP. Pursuant to an interline agreement, SP has paid the other two carriers their proportionate shares of the freight charges earned on the shipments.

[2] Section 7 of the Conditions of the Bill of Lading reads in pertinent part:

"The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. *The consignor shall be liable for the freight and all other lawful charges, except that* if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. . . . The term 'delivering carrier' means the line-haul carrier making ultimate delivery." (Emphasis added.)

The first of the three cars was tendered to Penn Central at Detroit on April 11, 1974, for transportation to Carco Steel Corporation (Carco), as consignee, in Alhambra. SP released the car to Carco on April 25 without collecting the freight charge in advance of delivery. On the same day, however, SP mailed to Carco a bill for $4,634.11, the correct amount of the charge. Carco was not a credit patron of SP and had never applied to SP for credit. SP never before had made a delivery to Carco. Nevertheless, the carrier made no investigation of Carco's credit standing.

The second and third shipments took place on May 2, 1974, when Metals consigned two other cars of cobble to Penn Central for transportation to Carco. SP delivered the cars to Carco on May 16. This time, SP released the cars only after receiving checks from Carco in the respective amounts of $5,761.79 and $2,383.67 for the freight charges. The larger amount was correct, but the smaller check should have been for $3,283.66 and thus was $900 short.[3] On May 20, SP issued freight bills in the correct amounts to Carco. The two checks were dishonored by Carco's bank for insufficient funds.

In August 1974, after efforts to collect the unpaid freight charges from Carco had proved fruitless, SP filed suit against Carco in a California state court. Attempts to serve the summons and complaint were unsuccessful.

On December 17, 1976, more than 30 months after the shipments, SP notified Metals of Carco's failure to pay the freight charges. SP requested that Metals, as the consignor who had failed to execute the nonrecourse provision in the bills of lading, pay the $13,679.56 total charges in satisfaction of its primary liability for the three shipments. This was the first notice to Metals that the freight charges had not been col-

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[3] SP suggests that the $900 difference was occasioned by a transposition of the initial digits. Brief for Petitioner 31, n. 21. No explanation of the one-cent variance is offered.

lected from Carco. When payment was not forthcoming, SP instituted the present action against Metals in federal court.

On this record, stipulated by the parties, the District Court ruled that SP had established a prima facie case for the recovery of the freight charges from Metals. It found the charges correct and in accord with applicable tariffs and that no part of those charges had been paid. App. 22. "Absent a showing of valid and affirmative defenses," then, Metals was liable to the carrier. *Id.*, at 23. The court rejected Metals' claim that the passage of time barred SP's recovery; although Metals lacked notice until December 1976 that the charges for the 1974 shipments had not been paid, the court noted that the applicable period of limitation was three years and that the carrier had been making efforts to locate Carco and to receive payment.

The District Court, however, went on to hold that Metals had established a valid equitable defense to SP's collection of the charges by showing that SP had failed to comply with the ICC's credit regulations promulgated pursuant to § 3(2) of the Interstate Commerce Act, 49 U. S. C. § 3(2).[4] App. 23. See 49 CFR pt. 1320 (1981). The court was not persuaded by SP's suggestion that Metals had failed to avail itself of its contractual opportunity for exoneration afforded by the non-recourse provision in the bills of lading. The court concluded: "The loss sustained by [SP] was due entirely to its own fault and negligence by failing to take the proper credit precautions when it delivered the goods to Carco. . . . I think that it is fundamentally unfair and inequitable for the defendant in this case to pay for the gross negligence of the plaintiff." App. 24. Accordingly, judgment was entered for Metals. *Id.*, at 26.

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[4] In 1978, the Interstate Commerce Act was revised and recodified by Pub. L. 95–473, 92 Stat. 1337, as 49 U. S. C. § 10101 *et seq.* (1976 ed., Supp. III). Because the transactions at issue in this case took place prior to 1978, we refer to the Act in its prior form unless otherwise specified.

The United States Court of Appeals for the Fifth Circuit affirmed that judgment. 641 F. 2d 235 (1981). Like the District Court, the Court of Appeals acknowledged that in the absence of a valid defense, Metals must be held liable to SP for the freight charges. *Id.*, at 236. The court felt, however, that § 3(2) of the Act, the payment-before-delivery provision, provided a barrier to the carrier's collection of the charges from the consignor.[5] The implementing regulation,[6] which modified the statutory mandate by allowing for delivery of freight on credit for up to five days, nevertheless was "quite strict." *Ibid.* Thus, Metals could assert as a defense the carrier's extension of credit to Carco without adequate precautions for a period in excess of that provided by the regulation. The court concluded: "Under these circumstances, we are compelled to hold that the carrier's failure to comply with the applicable ICC regulations is a defense, available to [Metals], in an action by [SP] for unpaid freight charges." *Id.*, at 239.

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[5] Section 3(2) reads:

"No carrier by railroad . . . shall deliver or relinquish possession at destination of any freight . . . shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . ."

[6] The applicable regulation reads in pertinent part:

"The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part*, may relinquish possession of the freight in advance of the payment of the tariff charges thereon *and may extend credit* in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, *for a period of 4 days* (*or 5 days* where retention or possession of freight by the carrier until tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part." 49 CFR § 1320.1 (1981) (emphasis added).

Because of a conflict in the decided cases,[7] we granted certiorari. 454 U. S. 1052 (1981).

II

Since 1919, the ICC has prescribed a uniform bill of lading for use on all interstate domestic shipments of freight by rail. See *In re Bills of Lading*, 52 I. C. C. 671 (1919), modified, 64 I. C. C. 357 (1921), further modified, 66 I. C. C. 63 (1922).[8] The bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers. *Texas & Pacific R. Co.* v. *Leatherwood*, 250 U. S. 478, 481 (1919).

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[7] In agreement with the decision of the Fifth Circuit in the present case is *Brown Transportation Corp.* v. *Atcon, Inc.*, 144 Ga. App. 301, 241 S. E. 2d 15 (1977), cert. denied *sub nom. Brown Transport Corp.* v. *Atcon, Inc.*, 439 U. S. 1014 (1978) (with two Justices dissenting). The contrary result has been reached in other cases. See, *e. g.*, *Consolidated Freightways Corp.* v. *Pacheco Int'l Corp.*, 488 F. Supp. 68 (CD Cal. 1979), and *Pennsylvania R. Co.* v. *Marcelletti*, 256 Mich. 411, 240 N. W. 4 (1932).

There is disagreement, too, as to whether equitable defenses may be asserted in various other situations where regulated carriers seek to recover lawful tariff charges. Compare, *e. g.*, *Aero Mayflower Transit Co.* v. *Hofberger*, 259 Ark. 322, 532 S. W. 2d 759 (1976), and *Westover* v. *United Van Lines, Inc.*, 154 Ga. App. 865, 270 S. E. 2d 74 (1980) (defenses upheld), with *Bartlett-Collins Co.* v. *Surinam Nav. Co.*, 381 F. 2d 546 (CA10 1967); *American Red Ball Transit Co.* v. *McCarthy*, 114 N. H. 514, 323 A. 2d 897 (1974), cert. denied, 420 U. S. 930 (1975); *Western Maryland R. Co.* v. *Cross*, 96 W. Va. 666, 123 S. E. 572 (1924); and *Arizona Feeds* v. *Southern Pacific Transp. Co.*, 21 Ariz. App. 346, 519 P. 2d 199 (1974) (defenses not recognized).

This division prompted one commentator some years ago to refer to the "striking lack of uniformity in decisions concerning the liability of consignors and consignees despite the obvious need for uniformity in interstate commercial transactions." Note, Carriers: Federal Bills of Lading: Liability of Parties to a Prepaid Shipment, 38 Cornell L. Q. 596, 603 (1953).

[8] The form of the bill of lading has been modified several times since 1922, see, *e. g.*, *In re Bills of Lading*, 245 I. C. C. 527 (1941), but only the 1921 and 1922 modifications affected the provisions of the bill of lading relevant to this case.

"Each [term] has in effect the force of a statute, of which all affected must take notice." *Ibid.* Unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. When the ICC first promulgated the uniform bill of lading, it stated:

> "The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges." *In re Bills of Lading*, 52 I. C. C., at 721.

This rule has not changed over time. Recently, the ICC again observed that the consignor's liability "is governed by the bill of lading contract between the parties and must be decided by interpreting that contract." *C–G–F Grain Co.* v. *Atchison, T. & S. F. R. Co.*, 351 I. C. C. 710, 712 (1976).

Clearly, then, under the contract between Metals as consignor and SP as the carrier, the consignor was primarily liable for the freight charges in question. Just as clearly, however, Metals was in a position to effectuate its release from liability by executing the nonrecourse clause in the bill of lading. Signing that clause would have operated to excuse Metals from liability. By failing to execute the nonrecourse provision, Metals continued to be primarily liable for those charges. *Illinois Steel Co.* v. *Baltimore & O. R. Co.*, 320 U. S. 508, 513 (1944); *New York, N. H. & H. R. Co.* v. *California Fruit Growers Exchange*, 125 Conn. 241, 254–255, 5 A. 2d 353, 359, cert. denied, 308 U. S. 567 (1939). See also *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65–67 (1924).

It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed. *Id.*, at 65–66, and n. 3. See *Pitts-*

burgh, C., C. & St. L. R. Co. v. *Fink*, 250 U. S. 577, 581–583 (1919). This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act—to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late 19th century. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 361 (1943); *New York, N. H. & H. R. Co.* v. *ICC*, 200 U. S. 361, 391 (1906).

Both the District Court and the Court of Appeals correctly found that SP had established a prima facie case of Metals' liability for the freight charges in question by proving that Metals had failed to sign the nonrecourse clause. This much, indeed, is conceded by Metals. Brief for Respondent 11; Tr. of Oral Arg. 31.

III

SP concedes that its failure to collect all freight charges from Carco before releasing the shipments violated the ICC regulation with regard to at least the first of the three shipments. *Id.*, at 4, 17. See 49 CFR § 1320.1 (1981), quoted in n. 6, *supra*. The question, then, is whether the Court of Appeals properly found that SP's violation of the regulation provided Metals with an equitable affirmative defense to SP's prima facie case.[9]

A. The ICC has comprehensively regulated the extension of credit to shippers by rail carriers. See 49 CFR pt. 1320 (1981). Yet neither the statute under which the regulations

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[9] Metals now asserts, as well, that SP's actions violated § 7 of the Conditions of the Bill of Lading, see n. 2, *supra*, and thus constituted a complete abrogation of SP's contractual obligations under the bill of lading. See Brief for Respondent 11. SP answers that this argument was presented to neither the District Court nor the Court of Appeals. See Reply Brief for Petitioner 4. Because the Court of Appeals did not rely on this theory to grant respondent relief, and because we did not grant certiorari to consider this breach-of-contract claim, we decline to address it.

were promulgated, 49 U. S. C. § 3(2), nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge. Nor does either contain any words of affirmative defense to a freight charge action. Indeed, to the extent the ICC has spoken to this question, it has stated: "[A] violation of section 3(2) by [a carrier], in itself, would have had no effect on [a consignor's] responsibility for payment of undercharges." *C-G-F Grain Co.* v. *Atchison, T. & S. F. R. Co.*, 351 I. C. C., at 712. Although § 3(2) "prohibits a rail carrier from delivering freight without collecting all charges thereon[,] . . . it contains no provision shielding a consignor from liability for lawful charges." *Ibid.* Thus, at least in dictum, the ICC has suggested that "[t]he question of [a consignor's] liability [under a bill of lading] does not turn on whether any provision of the act has been violated." *Ibid.*

We view the absence of any provision for an affirmative defense in the ICC's credit regulations as an administrative construction of the statute that aids our determination of congressional intent. "[L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. . . . Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 565 (1980). We so regard the administrative silence here. When an administrative agency historically has engaged in comprehensive regulation of an industry's credit practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant.

B. The legislative and administrative history of the credit regulations further indicates that this silence was not inadvertent—the intent of the rules was to protect carriers, not to penalize them. Prior to 1918, the Federal Government did not regulate the extension of credit by rail carriers.

Wartime regulation revealed, however, that a general requirement of payment before delivery would protect the working capital of carriers and avoid discrimination among credit recipients. Cf. *Ex Parte No. MC-1*, 2 M. C. C. 365, 374 (1937). After the first World War, when Congress returned the railroads to private control, § 405 of the Transportation Act, 1920, 41 Stat. 479, added paragraph (2) to § 3 of the Interstate Commerce Act. See n. 5, *supra*. The regulations adopted by the ICC in 1920 under the statute as so amended permitted railroads to extend limited credit to shippers on a nondiscriminatory basis. The regulations have remained largely unchanged to the present time. Until 1971, no court seriously suggested that a violation of the credit regulations precluded a carrier from collecting a freight charge from the party with primary liability. Instead, a defense of estoppel based on a violation of the credit regulations was held to be inconsistent with the purpose of the regulations themselves. Courts were concerned that a rule permitting selective estoppels would defeat the antidiscriminatory purpose of the Act and would weaken the capital structure of common carriers. See, *e. g.*, *Western Maryland R. Co.* v. *Cross*, 96 W. Va. 666, 673, 123 S. E. 572, 575 (1924); *Chicago Junction R. Co.* v. *Duluth Log Co.*, 161 Minn. 466, 469, 202 N. W. 24, 25 (1925); *East Texas Motor Freight Lines* v. *Franklin County Distilling Co.*, 184 S. W. 2d 505, 507 (Tex. Civ. App. 1944).

Despite the absence of any textual or historical support for an affirmative defense in either the statute or the regulations, the Court of Appeals concluded that Metals could raise SP's failure to comply fully with the regulations as an absolute equitable defense to SP's freight charge action. The Court of Appeals relied primarily on what it regarded as "a closely analogous situation," 641 F. 2d, at 237, presented in *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d 56 (CA7 1971). On examination, however, that Seventh Circuit case plainly is distinguishable from the present one.

The defendant there was a *consignee* to whom goods had been delivered under bills of lading marked "prepaid." Relying upon the carrier's explicit representation of prepayment, the consignee paid the amount of the freight charges to the shipper-consignor. In fact, however, the carrier had extended credit to the consignor and had failed to collect the charges within the period allowed by the regulations. When the consignor went out of business, the carrier turned to the consignee for payment. The Court of Appeals, by a divided vote, held the carrier estopped.

Admiral differs from this case in four crucial respects. First, in *Admiral*, the carrier not only violated ICC credit regulations but also made to the defendant a material misrepresentation regarding prepayment. The carrier here, in contrast, was charged solely with failure to observe the applicable ICC credit regulations. Second, in the Seventh Circuit case, the consignee-defendant had paid full freight charges to the consignor. Had the Seventh Circuit also awarded relief to the carrier, it would have "require[d] an innocent consignee to defray freight charges exactly double the amount contemplated by the applicable tariffs." 442 F. 2d, at 65 (Stevens, J., concurring). Here, the defendant paid no freight charges; thus, an award of relief to the carrier creates no possibility of enforcing a double payment.

Third, in *Admiral*, the grounds for equitable estoppel were created by the consignee's payment of freight charges in detrimental reliance on the carrier's misrepresentation. The carrier's violation of the credit regulations offered only "additional grounds for the intervention of the principles of equity." *Id.*, at 60 (majority opinion). In this case, there is no suggestion that the consignor knew of, or changed its position detrimentally in reliance on, the carrier's credit violation. Fourth, and most significant, the defendant-consignee in the Seventh Circuit case had no means by which to protect itself from freight charge liability. In this case, of course, the defendant-consignor could have protected itself com-

pletely simply by signing the nonrecourse clause in the bills of lading.

C. Finally, public policy concerns disfavor judicial implication of affirmative defenses based on carrier violations of the Commission's credit regulations. We recognize that the regulations are technical. Thousands of railcars are delivered every day by the country's railroads. See Association of American Railroads, Yearbook of Railroad Facts 25 (1981) (approximately 62,000 deliveries per day). Almost inevitably, some cars will be delivered to noncredit patrons, some freight bills will be sent out late, and some accounts will not be collected within the specified time. A 1966 study by the ICC's Bureau of Enforcement found that almost a third of 15,751 bills examined were overdue and that over half of those overdue were delinquent more than 10 days. See *In re Regulations for Payment of Rates and Charges*, 326 I. C. C. 483, 485 (1966).[10] After appraising this data, the ICC agreed that "the evidence establishes many and continued violations of the credit regulations. However, we are unable to conclude on this record that rigid rules . . . would provide a practical or desirable solution. [T]here are many reasons for credit violations which are beyond correction by rules, e. g., where shippers have unexpected peak workloads, where there are controversies over amounts due, where additional information is needed such as weights or evaluations, where standard office procedures are in the process of change, where temporary cash flow problems occur, and where it becomes necessary to check the validity of charges with third persons. Stringent credit rules . . . would destroy the flexibility needed to meet problems of this nature." *Id.*, at 489–490. Indeed, in 1980, the ICC proposed repealing the credit regulations altogether, noting that "apparent, wide-

[10] The methodology of this study was questioned by the railroads. The roads' own figures, however, showed that of 445,984 collectible items accrued during the period of the investigation, more than 10,000 resulted in credit violations. 326 I. C. C., at 486.

spread noncompliance with the regulations indicates that the payment periods and other time limits prescribed are simply not realistic for many of the situations in which they apply." *Ex parte Nos. MC-1, 73, 143, and 170*, 45 Fed. Reg. 31766.

It thus appears that the Court of Appeals in the present case implied an affirmative defense that would penalize railroads for violations of the credit regulations just as the agency responsible for administering those regulations was pronouncing them unrealistic. The prospect raised for the carrier is that it will be barred from recovering lawful freight charges, even from a consignor who fails to execute the nonrecourse clause, for possibly unavoidable violations of the credit rules. "The obvious consequence would be to discourage [carriers] from extending credit where the operation of this rather difficult statute is in doubt." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 753 (1947). Ironically, those shippers who pay their bills currently in a responsible manner would suffer as a result.

Metals argues that a ruling for SP places SP "in the unrealistic position of being incapable of doing any wrong" and therefore creates "no incentive [for carriers] to improve inefficient and careless credit practices." Brief for Respondent 12. Metals further claims that the loss at issue here would not have occurred if SP only had complied with its obligations under the regulations. *Id.*, at 24. The answer to this is that the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease-and-desist order, see *Shaw Warehouse Co.* v. *Southern R. Co.*, 308 I. C. C. 609, 633–634, 637 (1959), appeal dism'd *sub nom. Southern R. Co.* v. *United States*, 186 F. Supp. 29 (ND Ala. 1960); the power to seek a federal-court injunction requiring a carrier to comply with the regulations, see *ICC* v. *All-American, Inc.*, 505 F. 2d 1360 (CA7 1974); and the power to bring suit for the $5,000 civil forfeiture, provided by 49 U. S. C. § 16(8) and 49 U. S. C. § 11901(a) (1976 ed., Supp.

III), for each knowing violation of an order of the Commission, see, *e. g.*, *United States* v. *Western Pacific R. Co.*, 385 F. 2d 161 (CA10 1967), cert. denied *sub nom. Denver & R. G. W. R. Co.* v. *United States*, 391 U. S. 919 (1968); *United States* v. *Pennsylvania R. Co.*, 308 F. Supp. 293 (ED Pa. 1969).

Thus, the ICC may regulate the credit practices of carriers even without the judicially created remedy of forfeiture of freight charges. Furthermore, a reading of the cited cases reveals that the question whether a credit violation has occurred often will require the ICC or the courts to conduct a facteal inquiry as to the carrier's intent to violate the regulations. The "credit violation defense" adopted by the Court of Appeals requires a carrier to forfeit freight charges without regard to the nature of its violation.[11] This inflexible ap-

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[11] The facts of this case illustrate the problems that may arise when a court ventures to create law in this highly technical field. The rulings of the District Court and the Court of Appeals denied SP recovery not only for the first car, which was delivered without any payment upon the freight charge, but also for the two cars for which it did demand payment before delivery and received checks for the charges.

Yet acceptance of a proper check as payment for a freight charge is an acknowledged commercial practice in the railroad industry. See *Fullerton Lumber Co.* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 520, 522 (1931); see also 49 CFR § 1320.13 (1981). It therefore is at least possible that SP's insistence on payment by check before releasing the second and third cars constituted compliance with the regulations, which require only that the railroad take "precautions deemed by it to be sufficient to assure payment of the tariff charges." 49 CFR § 1320.1 (1981). It is true, of course, that the check for one car was understated by $900, but, as has been noted, SP mailed a freight bill for the correct amount to Carco within four days of the delivery. See 49 CFR § 1320.5 (1981) (carrier may extend credit for up to 30 days on balance due in the event of undercharges).

Furthermore, it is by no means clear that SP could safely have deferred delivery of the second and third cars until after Carco had paid the charges on the first car. The carrier's lien for unpaid charges covers only the goods in the immediate shipment. 49 U. S. C. § 105. See *Atlas S.S. Co.* v. *Colombian Land Co.*, 102 F. 358, 361 (CA2 1900). Once Carco offered to pay the charges on the second and third cars, even serious suspicion

proach disenables courts from considering the carrier's intent, the degree of the shipper's fault, the effect of enforcement on the carrier's existing permissible credit practices, and other subjective factors in deciding whether or not to enforce a shipper's primary liability for freight charges.

Metals also advances a number of "double payment" cases in support of its claim for an affirmative defense. See, *e. g.*, *Southern Pacific Transp. Co.* v. *Campbell Soup Co.*, 455 F. 2d 1219 (CA8 1972); *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d 56 (CA7 1971); *Farrell Lines, Inc.* v. *Titan Industrial Corp.*, 306 F. Supp. 1348 (SDNY), aff'd, 419 F. 2d 835 (CA2 1969), cert. denied, 397 U. S. 1042 (1970); *Southern Pacific Co.* v. *Valley Frosted Foods Co.*, 178 Pa. Super. 217, 116 A. 2d 70 (1955). To be sure, these cases speak in equity terms. But none of these cases turned solely on a carrier's violation of credit regulations. Each and all of them involved a carrier's misrepresentation, such as a false assertion of prepayment on the bill of lading, upon which a consignee detrimentally relied only to find itself later sued by the carrier for the same freight charges. We find that these double payment cases constitute their own category and stand against the placement of duplication of liability upon an innocent party. See *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d, at 65 (Stevens, J., concurring).

As we have noted above, no similar double payment liability is in prospect here. Metals, not the carrier, selected the consignee. Furthermore, Metals has been paid for its goods while the carrier has not been paid for its services. The carrier unsuccessfully has pursued its remedies against the consignee before turning to the shipper-consignor for payment. Nor had the statute of limitation run when SP finally sued Metals for payment.

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about Carco's financial health might not have allowed SP to withhold delivery without risking liability to Carco for conversion of its goods. See 49 U. S. C. § 88 (carrier's duty to deliver goods on demand).

We, of course, are in no position to condone slipshod collection practices and a carrier's violation of the governing regulations. But the terms of the bill of lading are specific and clear. Metals' failure to execute the nonrecourse provision in the bill of lading specifically placed upon it primary liability for the freight charges. To permit SP's violation of the credit regulations to be raised as an affirmative defense to its prima facie case would serve to nullify the enforceability of the nonrecourse clause. Nor do we believe that judicial implication of such a defense is necessary to encourage carrier compliance with credit rules. Railroads have real economic incentives to collect their freight charges from consignees insofar as they are able. The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper.

We therefore hold that the Court of Appeals erred by permitting Metals to assert an affirmative defense against SP based on its violation of the ICC credit regulations. Such "equities" as may exist by virtue of the carrier's delay and its violation of the credit regulations are insufficient in magnitude to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S., at 65.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. v. CURRAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-203. Argued November 2, 1981—Decided May 3, 1982*

The Commodity Exchange Act (CEA), which regulates commodity futures trading, was substantially amended by the Commodity Futures Trading Commission Act of 1974. Among other things, the Commodity Futures Exchange Commission was created to assume the regulatory and enforcement powers previously exercised by the Secretary of Agriculture and certain additional powers, and that Commission was authorized to grant reparations to any person complaining of a violation of the CEA or its implementing regulations committed by any futures commission merchant, floor broker, commodity trading adviser, or commodity pool operator. But the 1974 Act, like the original legislation and other amendatory enactments, was silent on the subject of private judicial remedies for persons injured by a violation of the CEA. These cases involve an action by an investor in commodity futures contracts against his futures commission merchant or broker for violation of an antifraud provision of the CEA, and three actions by speculators in futures contracts against the New York Mercantile Exchange and its officials and against futures commission merchants, claiming damages resulting from unlawful price manipulation that allegedly could have been prevented by the Exchange's enforcement of its own rules. In each action, after the respective District Courts had ruled adversely to the plaintiffs, the respective Courts of Appeals held that the plaintiffs had implied rights of action under the CEA.

Held: A private party may maintain an action for damages caused by a violation of the CEA. Pp. 374–395.

(a) Where it is clear that an implied cause of action under the CEA was a part of the "contemporary legal context" in which Congress undertook a comprehensive reexamination and amendment of the CEA in 1974, the fact that the amendments left intact the provisions under which

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*Together with No. 80-757, *New York Mercantile Exchange et al.* v. *Leist et al.*; No. 80-895, *Clayton Brokerage Co. of St. Louis, Inc.* v. *Leist et al.*; and No. 80-936, *Heinold Commodities, Inc., et al.* v. *Leist et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

379-671 O—83——9

the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy. Pp. 374–382.

(b) Moreover, a review of the legislative history of the 1974 enactment indicates that preservation of the remedy was indeed what Congress intended. Pp. 382–388.

(c) Purchasers and sellers of futures contracts have standing to assert both types of claims involved here—violation of the statutory prohibition against fraudulent and deceptive conduct and of the provisions designed to prevent price manipulation. The legislative history clearly indicates that Congress intended to protect all futures traders from price manipulation and other fraudulent conduct violative of the statute. Since actions by investors against exchanges were part of the contemporary legal context that Congress intended to preserve, exchanges can be held accountable for breaching their statutory duties to enforce their own rules prohibiting price manipulation. It follows that those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit by futures traders who can prove injury from such violations. Pp. 388–395.

622 F. 2d 216 and 638 F. 2d 283, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 395.

Richard P. Saslow argued the cause for petitioner in No. 80–203. With him on the briefs was *Douglas G. Graham*. *William E. Hegarty* argued the cause for petitioners in No. 80–757. With him on the briefs were *Maurice Mound*, *Charles Platto*, *Joseph W. Muccia*, and *Ruth D. MacNaughton*. *Gerard K. Sandweg, Jr.*, argued the cause for petitioners in Nos. 80–895 and 80–936. With him on the briefs for petitioner in No. 80–895 was *W. Stanley Walch*. *Lawrence H. Hunt, Jr.*, *Stuart S. Ball*, *Michael W. Davis*, *Donald G. McCabe*, *Edward J. Boyle*, and *Barbara A. Mentz* filed briefs for petitioners in No. 80–936.

Robert A. Hudson argued the cause and filed a brief for respondents in No. 80–203. *Leonard Toboroff* argued the cause and filed a brief for Leist et al., respondents in Nos.

80–757, 80–895, and 80–936. *Leonard M. Mendelson* filed a brief for National Super Spuds, Inc., et al., respondents in No. 80–936.

Barry Sullivan argued the cause for the Commodity Futures Trading Commission as *amicus curiae* urging affirmance in No. 80–203. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Geller, Pat G. Nicolette, Gregory C. Glynn*, and *Mark D. Young*.†

JUSTICE STEVENS delivered the opinion of the Court.

The Commodity Exchange Act (CEA), 7 U. S. C. §1 *et seq*. (1976 ed. and Supp. IV),[1] has been aptly characterized

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†Briefs of *amici curiae* urging reversal in Nos. 80–757, 80–895, and 80–936 were filed by *John H. Stassen, Terry L. Claassen, James L. Fox, Maurice Mound, James H. O'Hagan, Jerrold E. Salzman, Edmund R. Schroeder, Walter N. Vernon III*, and *Frederick L. White* for the Board of Trade of the City of Chicago et al.; by *Stephen F. Selig* and *Barry J. Mandel* for the Futures Industry Association, Inc.; and by *Russell E. Brooks* and *Richard C. Tufaro* for the New York Stock Exchange, Inc.

Leonard Toboroff filed a brief for Samuel Friedman as *amicus curiae* urging affirmance in No. 80–203.

Solicitor General McCree, Deputy Solicitor General Geller, Barry Sullivan, Pat G. Nicolette, Gregory C. Glynn, and *Mark D. Young* filed a brief for the Commodity Futures Trading Commission as *amicus curiae* urging affirmance in Nos. 80–757, 80–895, and 80–936.

Michael A. Doyle filed a brief for Sunnyside Eggs, Inc., et al., as *amici curiae* in Nos. 80–757, 80–895, and 80–936.

[1] The history of the CEA includes six major legislative enactments. The Future Trading Act, 42 Stat. 187 (1921), was declared unconstitutional in *Hill* v. *Wallace*, 259 U. S. 44 (1922), and was superseded by the Grain Futures Act, 42 Stat. 998 (1922). Major amendments to the operative statute followed in the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936), the Act of Feb. 19, 1968, 82 Stat. 26, the Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389, and the Futures Trading Act of 1978, 92 Stat. 865. The 1936 amendments changed the name of the operative statute to the CEA; citations to the Grain Futures Act, the original legislation, accordingly will refer to the CEA and not to the original name of the legislation. Citations to amending legislation will refer to the date of the amendments, in order not to confuse the operative statute and the

as "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex."[2] The central question presented by these cases is whether a private party may maintain an action for damages caused by a violation of the CEA. The United States Court of Appeals for the Sixth Circuit answered that question affirmatively, holding that an investor may maintain an action against his broker for violation of an antifraud provision of the CEA.[3] The Court of Appeals for the Second Circuit gave the same answer to the question in actions brought by investors claiming damages resulting from unlawful price manipulation that allegedly could have been prevented by the New York Mercantile Exchange's enforcement of its own rules.[4]

We granted certiorari to resolve a conflict between these decisions and a subsequent decision of the Court of Appeals for the Fifth Circuit,[5] and we now affirm. Prefatorily, we describe some aspects of the futures trading business, summarize the statutory scheme, and outline the essential facts of the separate cases.[6]

1936 amendments, both of which are entitled the Commodity Exchange Act. For a discussion of this history of federal regulation, see *infra*, at 360–367.

[2] H. R. Rep. No. 93–975, p. 1 (1974) (hereinafter House Report).

[3] 622 F. 2d 216 (1980), cert. granted, 451 U. S. 906 (1981). Accord, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F. 2d 129, 133, n. 7 (CA8) (dictum), cert. denied, 444 U. S. 838 (1979); *Hirk* v. *Agri-Research Council, Inc.*, 561 F. 2d 96, 103, n. 8 (CA7 1977). See also *Master Commodities, Inc.* v. *Texas Cattle Management Co.*, 586 F. 2d 1352, 1355 (CA10 1978) (assuming that a private right of action exists).

[4] *Leist* v. *Simplot*, 638 F. 2d 283 (1980), cert. granted, 450 U. S. 910 (1981).

[5] *Rivers* v. *Rosenthal & Co.*, 634 F. 2d 774 (1980), cert. pending, No. 80–1542.

[6] Our understanding of the futures trading business and of the facts is gleaned primarily from the congressional Reports relating to the 1974 amendments to the CEA, the opinions of the Courts of Appeals, and the pleadings.

I

Prior to the advent of futures trading, agricultural products generally were sold at central markets. When an entire crop was harvested and marketed within a short timespan, dramatic price fluctuations sometimes created severe hardship for farmers or for processors. Some of these risks were alleviated by the adoption of quality standards, improvements in storage and transportation facilities, and the practice of "forward contracting"—the use of executory contracts fixing the terms of sale in advance of the time of delivery.[7]

When buyers and sellers entered into contracts for the future delivery of an agricultural product, they arrived at an agreed price on the basis of their judgment about expected market conditions at the time of delivery. Because the weather and other imponderables affected supply and demand, normally the market price would fluctuate before the contract was performed. A declining market meant that the executory agreement was more valuable to the seller than the commodity covered by the contract; conversely, in a rising market the executory contract had a special value for the buyer, who not only was assured of delivery of the commodity but also could derive a profit from the price increase.

The opportunity to make a profit as a result of fluctuations in the market price of commodities covered by contracts for future delivery motivated speculators to engage in the practice of buying and selling "futures contracts." A speculator who owned no present interest in a commodity but anticipated a price decline might agree to a future sale at the current market price, intending to purchase the commodity at a reduced price on or before the delivery date. A "short" sale of that kind would result in a loss if the price went up instead of down. On the other hand, a price increase would produce a gain for a "long" speculator who had acquired a contract to

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[7] See House Report, at 33–34.

purchase the same commodity with no intent to take delivery but merely for the purpose of reselling the futures contract at an enhanced price.

In the 19th century the practice of trading in futures contracts led to the development of recognized exchanges or boards of trade. At such exchanges standardized agreements covering specific quantities of graded agricultural commodities to be delivered during specified months in the future were bought and sold pursuant to rules developed by the traders themselves. Necessarily the commodities subject to such contracts were fungible. For an active market in the contracts to develop, it also was essential that the contracts themselves be fungible. The exchanges therefore developed standard terms describing the quantity and quality of the commodity, the time and place of delivery, and the method of payment; the only variable was price. The purchase or sale of a futures contract on an exchange is therefore motivated by a single factor—the opportunity to make a profit (or to minimize the risk of loss) from a change in the market price.

The advent of speculation in futures markets produced well-recognized benefits for producers and processors of agricultural commodities. A farmer who takes a "short" position in the futures market is protected against a price decline; a processor who takes a "long" position is protected against a price increase. Such "hedging" is facilitated by the availability of speculators willing to assume the market risk that the hedging farmer or processor wants to avoid. The speculators' participation in the market substantially enlarges the number of potential buyers and sellers of executory contracts and therefore makes it easier for farmers and processors to make firm commitments for future delivery at a fixed price. The liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place.*

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*See n. 11, *infra*. The ability of producers and processors to hedge against risks of price changes is only one of the advantages of futures trad-

Persons who actually produce or use the commodities that are covered by futures contracts are not the only beneficiaries of futures trading. The speculators, of course, have opportunities to profit from this trading. Moreover, futures trading must be regulated by an organized exchange. In addition to its regulatory responsibilities, the exchange must maintain detailed records and perform a clearing function to discharge the offsetting contracts that the short or long speculators have no desire to perform.[9] The operation of the exchange creates employment opportunities for futures commission merchants, who solicit orders from individual traders, and for floor brokers, who make the actual trades on the floor of the exchange on behalf of futures commission merchants and their customers. The earnings of the persons who operate the futures market—the exchange itself, the clearinghouse, the floor brokers, and the futures commission merchants—are financed by commissions on the purchase and sale of futures contracts made over the exchange.

Thus, in a broad sense, futures trading has a direct financial impact on three classes of persons. Those who actually are interested in selling or buying the commodity are described as "hedgers";[10] their primary financial interest is in the profit to be earned from the production or processing of the commodity. Those who seek financial gain by taking positions in the futures market generally are called "speculators" or "investors"; without their participation, futures markets "simply would not exist."[11] Finally, there are the

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ing. Other advantages are described at some length in the House Report, at 132–134.

[9] The House Report, at 149, states that only about "3% of all futures contracts traded are normally settled by an actual delivery."

[10] Of course, when a hedger takes a long or a short position that is greater than its interest in the commodity itself, it is to that extent no longer a hedger, but a speculator.

[11] "Broadly speaking, futures traders fall into two general classifications, i. e. 'trade' hedging customers, and speculators. All orders which reach

futures commission merchants, the floor brokers, and the persons who manage the market; they also are essential participants, and they have an interest in maximizing the activity on the exchange. The petitioners in these cases are members of this third class whereas their adversaries, the respondents, are speculators or investors.

II

Because Congress has recognized the potential hazards as well as the benefits of futures trading, it has authorized the regulation of commodity futures exchanges for over 60 years. In 1921 it enacted the Future Trading Act, 42 Stat. 187, which imposed a prohibitive tax on grain[12] futures transactions that were not consummated on an exchange designated

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the trading floor originate with one or the other group of traders. The 'trade' customer is the hedger who seeks, at low cost, to protect himself or his company against possible loss due to adverse price fluctuations in the market place. Speculators, on the other hand, embrace all representatives of the general public, including some institutions, plus floor scalpers and position traders, who seek financial gain by taking positions in volatile markets. The principal role of the speculator in the markets is to take the risks that the hedger is unwilling to accept. The opportunity for profit makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market in that the composite bids and offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match." *Id.*, at 138.

[12] Grain was defined to include "wheat, corn, oats, barley, rye, flax, and sorghum." § 2(a) of the CEA, 42 Stat. 998, codified as amended, 7 U. S. C. § 2 (1976 ed., Supp. IV).

as a "contract market" by the Secretary of Agriculture.[13] The 1921 statute was held unconstitutional as an improper exercise of the taxing power in *Hill* v. *Wallace*, 259 U. S. 44 (1922), but its regulatory provisions were promptly re-enacted in the Grain Futures Act, 42 Stat. 998, and upheld under the commerce power in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (1923).[14] Under the original legislation, the principal function of the Secretary was to require the governors of a privately organized exchange to supervise the operation of the market. Two of the conditions for designation were that the governing board of the contract market prevent its members from disseminating misleading market information[15] and prevent the "manipulation of prices or the cornering of any grain by the dealers or operators upon such board."[16] The requirement that designated contract mar-

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[13] "It was an effort by Congress, through taxing at a prohibitive rate sales of grain for future delivery, to regulate such sales on boards of trade by exempting them from the tax if they would comply with the congressional regulations." *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 31 (1923).

[14] "The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held . . . prevented our sustaining the Future Trading Act. [T]he act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce." *Id.*, at 32.

Congress replaced the prohibitive tax on futures trading not conducted on a designated contract market with a direct prohibition of such trading. See § 4 of the CEA, 42 Stat. 999–1000, codified as amended, 7 U. S. C. § 6.

[15] § 5(c) of the CEA, 42 Stat. 1000, codified as amended, 7 U. S. C. § 7(c).

[16] § 5(d) of the CEA, 42 Stat. 1000. Section 5(d), codified as amended, 7 U. S. C. § 7(d), requires as a condition of designation that the governing board of the board of trade "provid[e] for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board."

The Secretary of Agriculture also was authorized to proceed directly against a violator of these and other provisions of the CEA by suspending a

kets police themselves and the prohibitions against disseminating misleading information and manipulating prices have been part of our law ever since.

In 1936 Congress changed the name of the statute to the Commodity Exchange Act, enlarged its coverage to include other agricultural commodities,[17] and added detailed provisions regulating trading in futures contracts. Commodity Exchange Act, ch. 545, 49 Stat. 1491. Among the significant new provisions was § 4b, prohibiting any member of a contract market from defrauding any person in connection with the making of a futures contract,[18] and § 4a, authorizing a

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violator's trading privileges. § 6(b) of the CEA, 42 Stat. 1002, codified as amended, 7 U. S. C. § 9. Moreover, misdemeanor penalties were authorized for violations of certain provisions of the CEA. § 9 of the CEA, 42 Stat. 1003, codified as amended, 7 U. S. C. § 13 (1976 ed., Supp. IV). The penalties subsequently have been increased. Today, § 9(b) of the CEA, 7 U. S. C. § 13(b) (1976 ed., Supp. IV), provides in pertinent part:

"It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity . . . . Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution."

[17] The 1936 amendments extended coverage to cotton, rice, butter, eggs, and Irish potatoes. § 3(a) of the 1936 amendments, 49 Stat. 1491 (amending § 2(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 2 (1976 ed., Supp. IV)).

[18] § 5 of the 1936 amendments, 49 Stat. 1493 (adding § 4b of the CEA). Section 4b, codified as amended, 7 U. S. C. § 6b, provides in pertinent part:

"It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made,

commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General to fix limits on the amount of permissible speculative trading in a futures contract.[19] The legislation also required registration of futures commission merchants and floor brokers.[20]

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on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

"(A) to cheat or defraud or attempt to cheat or defraud such other person;

"(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

"(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

"(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person."

[19] § 5 of the 1936 amendments, 49 Stat. 1492 (adding § 4a of the CEA). Section 4a, codified as amended, 7 U. S. C. § 6a, provides in pertinent part:

"(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden."

[20] § 5 of the 1936 amendments, 49 Stat. 1494–1495 (adding §§ 4d(1) and 4e of the CEA, codified as amended, 7 U. S. C. §§ 6d(1) and 6e (1976 ed. and

In 1968 the CEA again was amended to enlarge its coverage[21] and to give the Secretary additional enforcement authority. Act of Feb. 19, 1968, 82 Stat. 26. The Secretary was authorized to disapprove exchange rules that were inconsistent with the statute,[22] and the contract markets were required to enforce their rules;[23] the Secretary was authorized to suspend a contract market[24] or to issue a cease-and-desist order[25] upon a showing that the contract market's rules were not being enforced. In addition, the criminal sanctions for price manipulation were increased significantly,[26] and any

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Supp. IV)). The 1936 amendments also authorized the commission to order an exchange to cease and desist from violating the CEA or any rules promulgated thereunder in lieu of revoking its designation as a contract market. § 9 of the 1936 amendments, 49 Stat. 1500 (adding § 6b of the CEA, codified as amended, 7 U. S. C. § 13a (1976 ed., Supp. IV)).

[21] Livestock and livestock products were included in the definition of commodity. § 1(a) of the 1968 amendments, 82 Stat. 26 (amending § 2(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 2 (1976 ed., Supp. IV)).

[22] § 23 of the 1968 amendments, 82 Stat. 33 (adding § 8a(7) of the CEA, codified as amended, 7 U. S. C. § 12a(7)).

[23] § 12(c) of the 1968 amendments, 82 Stat. 29 (adding §§ 5a(8), (9) of the CEA, codified as amended, 7 U. S. C. §§ 7a(8), (9)). Today, § 5a(8) of the CEA, 7 U. S. C. § 7a(8), requires each contract market to

"[e]nforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or by any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission."

[24] § 15 of the 1968 amendments, 82 Stat. 30 (amending § 6(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 8(a) (1976 ed., Supp. IV)).

[25] § 18 of the 1968 amendments, 82 Stat. 31–32 (amending § 6b of the CEA, codified as subsequently amended, 7 U. S. C. § 13a (1976 ed., Supp. IV)).

[26] § 25 of the 1968 amendments, 82 Stat. 33–34 (amending § 9 of the CEA, codified as subsequently amended, 7 U. S. C. § 13 (1976 ed., Supp. IV)).

person engaged in price manipulation was subjected to the Secretary's authority to issue cease-and-desist orders for violations of the CEA and implementing regulations.[27]

In 1974, after extensive hearings and deliberation, Congress enacted the Commodity Futures Trading Commission Act of 1974. 88 Stat. 1389. Like the 1936 and the 1968 legislation, the 1974 enactment was an amendment to the existing statute[28] that broadened its coverage[29] and increased the penalties for violation of its provisions.[30] The Commission was authorized to seek injunctive relief,[31] to alter or supplement a contract market's rules,[32] and to direct a contract market to take whatever action deemed necessary by the Commission in an emergency.[33] The 1974 legislation retained the basic statutory prohibitions against fraudulent practices and price manipulation,[34] as well as the authority to prescribe

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[27] § 17 of the 1968 amendments, 82 Stat. 31 (adding § 6(c) of the CEA, codified as amended, 7 U. S. C. § 13b).

[28] Title I, 88 Stat. 1389, Title II, 88 Stat. 1395, and Title IV, 88 Stat. 1412, each amended separate sections of the CEA; Title III, 88 Stat. 1406, added an entirely new section authorizing the creation of national futures associations.

[29] Section 201(b) of the 1974 amendments, 88 Stat. 1395 (amending § 2(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 2 (1976 ed., Supp. IV)), extended the coverage of the statute to "all . . . goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."

[30] § 212 of the 1974 amendments, 88 Stat. 1403–1404 (amending §§ 6, 6b, 6(c), and 9 of the CEA, codified as subsequently amended, 7 U. S. C. §§ 9, 13, 13a, 13b (1976 ed. and Supp. IV)).

[31] § 211 of the 1974 amendments, 88 Stat. 1402 (adding § 6c of the CEA, 7 U. S. C. § 13a–1).

[32] § 213 of the 1974 amendments, 88 Stat. 1404 (replacing § 8a(7) of the CEA, 7 U. S. C. § 12a(7)).

[33] § 215 of the 1974 amendments, 88 Stat. 1404–1405 (adding § 8(9) of the CEA, 7 U. S. C. § 12a(9)).

[34] Congress extended the registration requirement and the corresponding antifraud and criminal penalty provisions to commodity trading advisers and commodity pool operators. §§ 205 and 409 of the 1974 amend-

trading limits. The 1974 amendments, however, did make substantial changes in the statutory scheme; Congress authorized a newly created Commodities Futures Trading Commission to assume the powers previously exercised by the Secretary of Agriculture, as well as certain additional powers. The enactment also added two new remedial provisions for the protection of individual traders. The newly enacted § 5a(11) required every contract market to provide an arbitration procedure for the settlement of traders' claims of no more than $15,000.[35] And the newly enacted § 14 authorized the Commission to grant reparations to any person complaining of any violation of the CEA, or its implementing regulations, committed by any futures commission merchant or any associate thereof, floor broker, commodity trading adviser, or commodity pool operator.[36] This section authorized the Commission to investigate complaints and, "if in its opinion the facts warrant such action," to afford a hearing before an administrative law judge. Reparations orders entered by the Commission are subject to judicial review.

The latest amendments to the CEA, the Futures Trading Act of 1978, 92 Stat. 865, again increased the penalties for violations of the statute.[37] The enactment also authorized the States to bring *parens patriae* actions, seeking injunctive or

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ments, 88 Stat. 1398–1400, 1414 (adding §§ 4n, 4o, and amending § 9(c) of the CEA, codified as subsequently amended, 7 U. S. C. §§ 6n, 6o, 13 (1976 ed. and Supp. IV)).

[35] § 209 of the 1974 amendments, 88 Stat. 1401 (adding § 5a(11) of the CEA, codified as subsequently amended, 7 U. S. C. § 7a(11) (1976 ed., Supp. IV)).

[36] § 106 of the 1974 amendments, 88 Stat. 1393–1395 (adding § 14 of the CEA, codified as subsequently amended, 7 U. S. C. § 18 (1976 ed. and Supp. IV)).

[37] § 19 of the 1978 amendments, 92 Stat. 875 (amending § 9 of the CEA, 7 U. S. C. § 13 (1976 ed., Supp. IV)).

monetary relief for certain violations of the CEA, implementing regulations, or Commission orders.[38]

Like the previous enactments, as well as the 1978 amendments, the Commodity Futures Trading Commission Act of 1974 is silent on the subject of private judicial remedies for persons injured by a violation of the CEA.

III

In the four cases before us, the allegations in the complaints filed by respondents are assumed to be true. The first involves a complaint by customers against their broker. The other three arise out of a malfunction of the contract market for futures contracts covering the delivery of Maine potatoes in May 1976, "'when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country.'"[39]

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[38] "Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, or floor broker) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this Act, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate." § 15 of the 1978 amendments, 92 Stat. 872 (adding § 6d(1) of the CEA, 7 U. S. C. § 13a-2(1) (1976 ed., Supp. IV)).

[39] 638 F. 2d, at 285 (quoting *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1256, 1258 (SDNY 1979)). "The default was virtually unprecedented and, in the words of CFTC officials and members of the industry, shocked the commodity markets and the participants more than any other single event in recent years." H. R. Rep. No. 95-1181, p. 99 (1978).

No. 80-203

Respondents in No. 80-203 were customers of petitioner, a futures commission merchant registered with the Commission. In 1973, they authorized petitioner to trade in commodity futures on their behalf and deposited $100,000 with petitioner to finance such trading. The trading initially was profitable, but substantial losses subsequently were suffered and the account ultimately was closed.

In 1976, the respondents commenced this action in the United States District Court for the Eastern District of Michigan. They alleged that petitioner had mismanaged the account, had made material misrepresentations in connection with the opening and the management of the account, had made a large number of trades for the sole purpose of generating commissions, and had refused to follow their instructions. Respondents claimed that petitioner had violated the CEA, the federal securities laws, and state statutory and common law.

The District Court dismissed the claims under the federal securities laws and stayed other proceedings pending arbitration. App. to Pet. for Cert. in No. 80-203, pp. A-39 to A-49. On appeal, a divided panel of the Court of Appeals for the Sixth Circuit affirmed the dismissal of the federal securities laws claims,[40] but held that the contractual provision requiring respondents to submit the dispute to arbitration was unenforceable.[41] Judge Engel, writing for the majority, then *sua sponte* noticed and decided the question whether re-

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[40] 622 F. 2d, at 221-224. The court held that a discretionary commodity account was not a security subject to the federal securities laws, relying primarily on *Milnarik* v. *M-S Commodities, Inc.*, 457 F. 2d 274 (CA7), cert. denied, 409 U. S. 887 (1972).

[41] The Court of Appeals also decided that the plaintiffs need not invoke the jurisdiction of the Commission prior to maintaining their CEA action. 622 F. 2d, at 235-236. Petitioner does not challenge that decision.

spondents could maintain a private damages action under the CEA:[42]

> "Although the CEA does not expressly provide for a private right of action to recover damages, an implied right of action was generally thought to exist prior to the 1974 amendment of the Act. Consistent with this view, no issue concerning the continuing validity of the implied right of action was raised in the court below, nor in this appeal. Nevertheless, to provide direction to the district court upon remand and to avoid further delay in this already protracted litigation, we review this issue and specifically agree that an implied private right of action survived the 1974 amendments to the Act." 622 F. 2d 216, 230 (1980) (footnotes omitted).

Judge Phillips dissented from this conclusion. *Id.*, at 237. We granted certiorari limited to this question: "Does the Commodity Exchange Act create an implied private right of action for fraud in favor of a customer against his broker?" 451 U. S. 906 (1981).

Nos. 80–757, 80–895, and 80–936

One of the futures contracts traded on the New York Mercantile Exchange provided for the delivery of a railroad car lot of 50,000 pounds of Maine potatoes at a designated place on the Bangor and Aroostok Railroad during the period between May 7, 1976, and May 25, 1976. Trading in this contract commenced early in 1975 and terminated on May 7, 1976. On two occasions during this trading period the Department of Agriculture issued reports containing estimates that total potato stocks, and particularly Maine potato stocks, were substantially down from the previous year. This in-

[42] Although the complaint alleged a violation of § 6 of the CEA, the parties agree that the section under which recovery is sought is § 4b, 7 U. S. C. § 6b (quoted in n. 18, *supra*).

formation had the understandable consequences of inducing investors to purchase May Maine potato futures contracts (on the expectation that they would profit from a shortage of potatoes in May) and farmers to demand a higher price for their potatoes on the cash market.[43]

To counteract the anticipated price increases, a group of entrepreneurs described in the complaints as the "short sellers" formed a conspiracy to depress the price of the May Maine potato futures contract. The principal participants in this "short conspiracy" were large processors of potatoes who then were negotiating with a large potato growers association on the cash market. The conspirators agreed to accumulate an abnormally large short position in the May contract, to make no offsetting purchases of long contracts at a price in excess of a fixed maximum, and to default, if necessary, on their short commitments. They also agreed to flood the Maine cash markets with unsold potatoes. This multifaceted strategy was designed to give the growers association the impression that the supply of Maine potatoes would be plentiful. On the final trading day the short sellers had accumulated a net short position of almost 1,900 contracts, notwithstanding a Commission regulation[44] limiting their lawful net position to 150 contracts. They did, in fact, default.

The trading limit also was violated by a separate group described as the "long conspirators." Aware of the short conspiracy, they determined that they not only could counteract its effects but also could enhance the price the short conspirators would have to pay to liquidate their short positions by accumulating an abnormally large long position—at the close of trading they controlled 911 long contracts—and by creat-

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[43] As a result of the first report issued in August 1975, "the price of the Contract rose from $9.75 per cwt ($.0975 per pound) to a record price of $19.15 per cwt ($.1915 per pound) by October 3, 1975." Complaint, App. in Nos. 80-757, 80-895, 80-936, p. 48.

[44] See 17 CFR § 150.10(a)(1)(iii) (1981).

ing an artificial shortage of railroad cars during the contract delivery period. Because the long conspirators were successful in tying up railroad cars, they prevented the owners of warehoused potatoes from making deliveries to persons desiring to perform short contracts.[45]

Respondents are speculators who invested long in Maine futures contracts.[46] Allegedly, if there had been no price manipulation, they would have earned a significant profit by reason of the price increase that free market forces would have produced.

Petitioners in No. 80–757 are the New York Mercantile Exchange and its officials. Respondents' complaints alleged that the Exchange knew, or should have known, of both the short and the long conspiracies but failed to perform its statutory duties to report these violations to the Commission and to prevent manipulation of the contract market. The Exchange allegedly had the authority under its rules to declare an emergency, to require the shorts and the longs to participate in an orderly liquidation, and to authorize truck deliveries and other measures that would have prevented or mitigated the consequences of the massive defaults.

Petitioners in No. 80–895 and No. 80–936 are the firms of futures commission merchants that the short conspirators used to accumulate their net short position. The complaint alleged that petitioners knowingly participated in the conspiracy to accumulate the net short position, and in doing so violated position and trading limits imposed by the Commission and Exchange rules requiring liquidation of contracts

[45] "Because the long conspirators had successfully tied up all the freight cars of the Bangor & Aroostook, Incomco was unable to deliver its warehoused potatoes to persons seeking delivery to fulfill short contracts. As the warm weather set in, the 1,500,000 pounds of potatoes became rotten, and Incomco's total investment was lost." 638 F. 2d, at 291.

[46] One respondent, Incomco, had taken delivery on March 1976 Maine potato futures contracts and planned to sell these potatoes to short traders in the May contract.

that obviously could not be performed.[47] Moreover, the complaint alleged that petitioners violated their statutory duty to report violations of the CEA to the Commission.

In late 1976, three separate actions were filed in the United States District Court for the Southern District of New York.[48] After extensive discovery, the District Court ruled on various motions, all of which challenged the plaintiffs' right to recover damages under the CEA.[49] The District Court considered it beyond question that the plaintiffs were within the class for whose special benefit the statute had been enacted,[50] but it concluded that Congress did not in-

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[47] Exchange Rule 44.02, governing the final day of trading, provides in part:

"(a) On the final day of trading in the delivery month, it shall be the responsibility of each clearinghouse member who is not in a position to fulfill his contractual obligation on any maturing contract by prescribed notice and tender, to have a liquidating order entered on the Exchange floor not later than five minutes before the time established as the official close for such delivery month. All such orders shall be market orders to be executed prior to the expiration of trading."

[48] The Commission had previously commenced its own investigation, which led to administrative proceedings against various parties involved in the default on the May Maine potatoes futures contract. See Brief for Petitioners in No. 80-936, p. 3. Substantial penalties were imposed. See 638 F. 2d, at 330, n. 3 (Mansfield, J., dissenting).

[49] Although the complaints are not so specific, apparently respondents sought to recover damages from all defendants under §§ 4b and 9(b) of the CEA, 7 U. S. C. §§ 6b and 13(b) (1976 ed. and Supp. IV), from the conspirator traders and their brokers under § 4a, 7 U. S. C. § 6a, and from the exchange under §§ 5(d) and 5a(8), 7 U. S. C. §§ 7(d) and 7a(8). Sections 5(d), 9(b), 4b, 4a, and 5a(8) are quoted in nn. 16, 18, 19, and 23, *supra*.

[50] "There can be no question that plaintiffs, investors in the commodities market and a dealer in potatoes, are within the class 'for whose especial benefit the statute was enacted.' As Senator Dole stated, the primary purposes of the 1974 amendments to the Act were '[to protect] against manipulation of markets and to protect any individual who desires to participate in futures market trading.' Additionally, the Act itself states that price manipulation and unreasonable fluctuations in price 'are detrimental

tend a private right of action to exist under the CEA. The court granted summary judgment on all claims seeking recovery under that statute. *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1257, 1259–1263 (1979).

A divided panel of the Court of Appeals for the Second Circuit reversed. The majority opinion, written by Judge Friendly, adopted essentially the same reasoning as the Sixth Circuit majority in No. 80–203, but placed greater emphasis on "the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and [its] desire to preserve them," *Leist* v. *Simplot*, 638 F. 2d 283, 307 (1980), and on the similarity between the implied private remedies under the CEA and the remedies implied under other federal statutes, particularly those regulating trading in securities, *id.*, at 296–299. Judge Mansfield, in dissent, reasoned that the pre–1974 cases recognizing a private right of action under the CEA were incorrectly decided and that a fair application of the criteria identified in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975),[51] required rejection of plaintiffs' damages claims. 638 F. 2d, at 323.

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to . . . persons handling commodit[ies].'" 470 F. Supp., at 1259–1260 (footnotes omitted).

[51] "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be

We granted certiorari. 450 U. S. 910 (1981). For the purpose of considering the question whether respondents may assert an implied cause of action for damages, it is assumed that each of the petitioners has violated the statute and thereby caused respondents' alleged injuries.

IV

> "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." *Cannon* v. *University of Chicago*, 441 U. S. 677, 717 (1979).

Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change. When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916).[52] Under this approach, federal courts,

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inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)."

[52] In that case the Court stated:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default

following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.[53]

Because the *Rigsby* approach prevailed throughout most of our history,[54] there is no merit to the argument advanced by

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is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (*Per* Holt, C. J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium.* See 3 Black. Com. 51, 123; *Couch* v. *Steel*, 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125." 241 U. S., at 39–40.

[53] T. Cooley, Law of Torts 790 (2d ed. 1888) described the common-law remedy for breach of a statutory duty in this way:

"[W]hen the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none."

A few years earlier an opinion by Judge Cooley was quoted with approval by this Court in support of its holding that a railroad's breach of a statutory duty to fence its right-of-way gave an injured party an implied damages remedy. See *Hayes* v. *Michigan Central R. Co.*, 111 U. S. 228, 240 (1884).

[54] See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) ("'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded'") (quoting 3 W. Blackstone, Commentaries *23); *Kendall* v. *United States*, 12 Pet. 524, 624 (1838) ("It cannot be denied but that congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Pollard* v. *Bailey*, 20 Wall. 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action"); *Hayes* v. *Michigan Central R. Co.*, *supra*, at 240 ("[E]ach person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery"); *De Lima* v. *Bidwell*, 182 U. S. 1, 176–177 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy").

petitioners that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine. As Justice Frankfurter explained:

> "Courts . . . are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515; *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 351. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R. Co.* v. *Rigsby*, 241 U. S. 33; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; cf. *De Lima* v. *Bidwell*, 182 U. S. 1." *Montana-Dakota Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 261–262 (1951) (dissenting opinion).

During the years prior to 1975, the Court occasionally refused to recognize an implied remedy, either because the statute in question was a general regulatory prohibition enacted for the benefit of the public at large, or because there was evidence that Congress intended an express remedy to provide the exclusive method of enforcement.[55] While the

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[55] See, *e. g.*, *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974).

Rigsby approach prevailed, however, congressional silence or ambiguity was an insufficient reason for the denial of a remedy for a member of the class a statute was enacted to protect.[56]

In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action.[57] In *Cort* v. *Ash*, 422 U. S. 66 (1975), the Court confronted a claim that a private litigant could recover damages for violation of a criminal statute that had never before been thought to include a private remedy. In rejecting that claim the Court outlined criteria that primarily focused on the intent of Congress in enacting the statute under review.[58] The increased complexity of federal legislation[59] and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required. Our cases subsequent to *Cort* v. *Ash* have plainly stated that our focus must be on "the intent of Congress." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981).[60] "The

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[56] See, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191 (1967); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971).

[57] See *California* v. *Sierra Club*, 451 U. S. 287, 292–293 (1981).

[58] See n. 51, *supra*.

[59] Statistics compiled in J. Bibby, T. Mann, & N. Ornstein, Vital Statistics on Congress, 1980, p. 91 (1980), indicate that, compared to 30 years ago, Congress today passes fewer, but much longer, public bills.

[60] "There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication. Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress. *E. g.*, *California* v. *Sierra Club*, [451 U. S.] 287; *Universities Research Assn.* v. *Coutu*, 450 U. S. 754 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979); *Touche Ross & Co.*

key to the inquiry is the intent of the Legislature." *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981). The key to these cases is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading.

V

In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping.[61] When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question

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v. *Redington*, 442 U. S. 560 (1979). Congressional intent may be discerned by looking to the legislative history and other factors: *e. g.*, the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief. See *California* v. *Sierra Club*, *supra*; *Cort* v. *Ash*, 422 U. S. 66 (1975)."

[61] "The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U. S. 820, 828 (1976) (footnote omitted).

is whether Congress intended to preserve the pre-existing remedy.

In *Cannon* v. *University of Chicago*, we observed that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." 441 U. S., at 696–697. In considering whether Title IX of the Education Amendments of 1972 included an implied private cause of action for damages, we assumed that the legislators were familiar with the judicial decisions construing comparable language in Title VI of the Civil Rights Act of 1964 as implicitly authorizing a judicial remedy, notwithstanding the fact that the statute expressly included a quite different remedy. We held that even under the "strict approach" dictated by *Cort* v. *Ash*, "our evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U. S., at 698–699. See *California* v. *Sierra Club*, 451 U. S. 287, 296, n. 7 (1981).

Prior to the comprehensive amendments to the CEA enacted in 1974, the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute.[62] The routine recognition of a private remedy under the CEA prior to our decision in *Cort* v. *Ash* was comparable to the routine acceptance of an analogous remedy under the Securities Exchange Act of 1934.[63] The Court described that remedy in *Blue Chip*

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[62] There is no dispute concerning the state of the law in 1974, even by those who have argued that a private cause of action under the CEA did not survive the 1974 amendments. See, *e. g.*, *Rivers* v. *Rosenthal & Co.*, 634 F. 2d, at 779; Davis, The Commodity Exchange Act: Statutory Silence is Not Authorization for Judicial Legislation of an Implied Private Right of Action, 46 Mo. L. Rev. 316, 321 (1981).

[63] The recognition of a private cause of action under the CEA was also fully consistent with the implication doctrine followed by this Court prior to *Cort* v. *Ash*. See *supra*, at 374–377.

Stamps v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975) (footnote omitted):

> "Despite the contrast between the provisions of Rule 10b–5 and the numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934, it was held in 1946 by the United States District Court for the Eastern District of Pennsylvania that there was an implied private right of action under the Rule. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512. This Court had no occasion to deal with the subject until 25 years later, and at that time we confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 150–154 (1972). Such a conclusion was, of course, entirely consistent with the Court's recognition in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964), that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'"

Although the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning Rule 10b–5, it was equally uniform and well understood. This Court, as did other federal courts and federal practitioners, simply assumed that the remedy was available. The point is well illustrated by this Court's opinion in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U. S. 113 (1973), which disposed of two separate actions in which private litigants alleged that an exchange had violated § 9(b) of the CEA by engaging in price manipulation and § 5a by failing both to enforce its own rules and to prevent market manipulation.[64] The Court held that

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[64] "In one, the *Phillips* suit, it was alleged that the Exchange had forced sales of futures contracts in March 1970 fresh eggs at artificially depressed

the judicial proceedings should not go forward without first making an effort to invoke the jurisdiction of the Commodity Exchange Commission, but it did not question the availability of a private remedy under the CEA.[65]

In view of the absence of any dispute about the proposition prior to the decision of *Cort* v. *Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the "contemporary legal context" in which Congress legislated in 1974. Cf. *Cannon* v. *University of Chicago*, 441 U. S., at 698–699. In that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that

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market prices and had thereby monopolized and restrained commerce in violation of §§ 1 and 2 of the Sherman Act, and had violated § 9(b) of the Commodity Exchange Act (CEA) by manipulating prices of a commodity for future delivery on a contract market. The Exchange was also accused of violating § 5a of the CEA for failure to enforce one of its own rules. In the second suit, the *Deaktor* case, the Exchange was charged with violating the CEA and its own rules as a designated contract market because it had failed to exercise due care to halt the manipulative conduct of certain of its members who allegedly had cornered the July 1970 market in frozen pork bellies futures contracts." 414 U. S., at 113–114 (statutory citations omitted).

[65] The Court of Appeals had expressly confirmed the availability of a private remedy, see *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529, 534 (CA7 1973), but the exchange did not question that ruling before this Court. Rather, the exchange's complaint concerned the Court of Appeals' refusal to invoke the doctrine of primary jurisdiction:

"The Chicago Mercantile Exchange has thus been put in an intolerable position. It must diligently seek to prevent, deter, and punish violations of its rules; but enforcement of its rules now exposes it to unrestricted attacks in federal courts by disgruntled traders. This situation will disrupt, if not immobilize, the self-regulatory machinery established by the Commodity Exchange Act. The doctrine of primary jurisdiction expressed in *Ricci* was designed to alleviate this dilemma." Pet. for Cert. in *Chicago Mercantile Exchange* v. *Deaktor*, No. 73-241, O. T. 1973, pp. 11–12.

Congress affirmatively intended to preserve that remedy.[66] A review of the legislative history of the statute persuasively indicates that preservation of the remedy was indeed what Congress actually intended.

VI

Congress was, of course, familiar not only with the implied private remedy but also with the long history of federal regulation of commodity futures trading.[67] From the enactment of the original federal legislation, Congress primarily has relied upon the exchanges to regulate the contract markets. The 1922 legislation required for designation as a contract market that an exchange "provide for" the making and filing of reports and records, the prevention of dissemination of false or misleading reports, the prevention of price manipulation and market cornering, and the enforcement of Commission orders.[68] To fulfill these conditions, the exchanges promulgated rules and regulations, but they did not always enforce them. In 1968, Congress attempted to correct this flaw in the self-regulation concept by enacting § 5a(8), 7 U. S. C. § 7a(8), which requires the exchanges to enforce their own rules.[69]

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[66] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414, n. 8 (1975); *NLRB* v. *Gullett Gin Co.*, 340 U. S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U. S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

[67] See generally *supra*, at 360–367.

[68] See 7 U. S. C. § 7.

[69] See S. Rep. No. 947, 90th Cong., 2d Sess., 2–3 (1968).

The enactment of § 5a(8), coupled with the recognition by the federal courts of an implied private remedy for violations of the CEA, gave rise to a new problem. As representatives of the exchanges complained during the hearings preceding the 1974 amendments,[70] the exchanges were being sued for not enforcing their rules. The complaint was taken seriously because it implicated the self-regulation premise of the CEA:

> "In the few years [§ 5a(8)] has been in the present Commodity Exchange Act, there is growing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." House Report, at 46 (emphasis in original).[71]

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[70] See, *e. g.*, Hearings on H. R. 11955 before the House Committee on Agriculture, 93d Cong., 2d Sess., 62 (1974); Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes before the House Committee on Agriculture, 93d Cong., 1st Sess., 121 (1973).

[71] In introducing the House bill, Representative Poage, the Chairman of the House Agriculture Committee, explained this development at some length. See 119 Cong. Rec. 41333 (1973). Representative Thone, a member of that Committee, later reiterated the problem. See 120 Cong. Rec. 10748 (1974) ("Some observers believe that the provision of the 1968 amendments requiring exchanges to enforce their own rules, thereby implicitly giving private parties the right to sue for nonenforcement, has had a perverse effect. To avoid risk of litigation, exchange authorities have been encouraged to reduce rather than strengthen rules designed to insure fair trading").

Congress could have removed this impediment to exchange rulemaking by eliminating the implied private remedy,[72] but it did not follow that course. Rather, it solved the problem by authorizing the new Commodity Futures Trading Commission to supplement exchange rules.[73] Congress thereby corrected the legal mechanism of self-regulation while preserving a significant incentive for the exchanges to obey the law. Only this course was consistent with the expressed purpose of the 1974 legislation, which was to "amend the Commodity Exchange Act to *strengthen* the regulation of futures trading."[74]

Congress in 1974 created new procedures through which traders might seek relief for violations of the CEA, but the legislative evidence indicates that these informal procedures were intended to supplement rather than supplant the implied judicial remedy. These procedures do not substitute for the private remedy either as a means of compensating injured traders or as a means of enforcing compliance with the statute. The reparations procedure established by § 14 is not available against the exchanges,[75] yet we may infer from the above analysis that Congress viewed private litigation against exchanges as a valuable component of the self-regula-

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[72] Indeed, Congress was urged to grant the exchanges immunity from private causes of action. See Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes, *supra*, at 121. The president of one exchange even proposed the addition of specific language to the statute that would have granted such immunity. See Hearings on H. R. 11955, *supra*, at 123; Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., 317 (1974).

[73] See § 8a(7) of the CEA, 7 U. S. C. § 12a(7).

[74] 88 Stat. 1389 (emphasis added).

[75] The reparations procedure is available against only futures commission merchants and their associates, floor brokers, commodity trading advisers, and commodity pool operators. In addition to exchanges, this list excludes traders who violate the CEA.

tion concept. Nor is that procedure suited for the adjudication of all other claims. The Commission may, but need not, investigate a complaint, and may, but need not, serve the respondent with the complaint. If the Commission permits the complaint to issue, it need not provide an administrative hearing if the claim does not exceed $5,000. The arbitration procedure mandated by § 5a(11) is even narrower in scope. Only members and employees of the contract market are subject to the procedure, and the use of the procedure by a trader is voluntary and is limited to claims of less than $15,000. There are other indications in the legislative history that the two sections were not intended to be exclusive of the implied judicial remedy. It was assumed by hearings witnesses that the informal procedures were supplementary.[76] Indeed, it was urged that complainants be put to the choice between informal and judicial actions.[77] A representative of one exchange urged Congress to place a dollar limit on claims arbitrable under § 5a(11) because there was an "economic impediment to Court litigation" only with small claims,[78] and such a limit was enacted. Chairman Poage described the newly enacted informal procedures as "new customer protection features,"[79] and Senator Talmadge, the Chairman of the Senate Committee on Agriculture and Forestry, stated that the reparations procedure was "not in-

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[76] See, *e. g.*, Hearings on H. R. 11955, *supra*, at 249 ("We point out that section 209 of the bill . . . requires contract markets to establish arbitration procedures for the settlement of customers' claims and grievances against members and employees of a contract market. In addition to these arbitration procedures, complainants of course have access to the courts. If the Commission is also given jurisdiction to pass upon civil disputes, there would then be a third forum for the same issues").

[77] See *id.*, at 321.

[78] See Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113, *supra*, at 415.

[79] 120 Cong. Rec. 10737 (1974).

379-671 O—83——11

tended to interfere with the courts in any way," although he hoped that the burden on the courts would be "somewhat lighten[ed]" by the availability of the informal actions.[80]

The late addition of a saving clause in § 2(a)(1) provides direct evidence of legislative intent to preserve the implied private remedy federal courts had recognized under the CEA. Along with an increase in powers, the Commission was given exclusive jurisdiction over commodity futures trading. The purpose of the exclusive-jurisdiction provision in the bill passed by the House[81] was to separate the functions of the Commission from those of the Securities and Exchange Commission and other regulatory agencies.[82] But the provision raised concerns that the jurisdiction of state and federal courts might be affected. Referring to the treble damages action provided in another bill that he and Senator McGovern had introduced, Senator Clark pointed out: "[T]he House bill not only does not authorize them, but section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate."[83] It was. The Senate added a saving clause to the exclusive-jurisdiction provision, providing that "[n]othing in this section shall

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[80] *Id.*, at 30459.

[81] The provision in the bill passed by the House provided as follows: "*Provided*, that the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery . . . : *And provided further*, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States . . . ." H. R. 13113, 93d Cong., 2d Sess., § 201 (1974).

[82] See House Report, at 3.

[83] Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113, *supra*, at 205. For other expressions of concern, see *id.*, at 259–260 (Chairman Rodino of the House Committee on the Judiciary); *id.*, at 664 (Chairman Talmadge).

supersede or limit the jurisdiction conferred on courts of the United States or any State."[84] The Conference accepted the Senate amendment.[85]

The inference that Congress intended to preserve the pre-existing remedy is compelling. As the Solicitor General argues on behalf of the Commission as *amicus curiae*, the private cause of action enhances the enforcement mechanism fostered by Congress over the course of 60 years. In an enactment purporting to strengthen the regulation of commodity futures trading, Congress evidenced an affirmative intent to preserve this enforcement tool.[86] It removed an impediment to exchange rulemaking caused in part by the implied private remedy not by disapproving that remedy but rather by giving the Commission the extraordinary power to supplement exchange rules. And when several Members of Congress expressed a concern that the exclusive-jurisdiction provision, which was intended only to consolidate federal regulation of commodity futures trading in the Commission, might be construed to affect the implied cause of action as well as other court actions, Congress acted swiftly to dispel any such notion. Congress could have made its intent clearer only by expressly providing for a private cause of action in the statute. In the legal context in which Congress acted, this was unnecessary.

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[84] See 7 U. S. C. § 2.

[85] Chairmen Talmadge and Poage reported that "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC." 120 Cong. Rec. 34737, 34997 (1974).

[86] In his opinion for the Second Circuit panel majority, Judge Friendly extensively analyzed the evidence of legislative intent with respect to the pre-existing private remedy. See 638 F. 2d, at 307–321. We need not restate that analysis in the same detail.

In view of our construction of the intent of the Legislature there is no need for us to "trudge through all four of the factors when the dispositive question of legislative intent has been resolved." See *California* v. *Sierra Club*, 451 U. S., at 302 (REHNQUIST, J., concurring in judgment). We hold that the private cause of action under the CEA that was previously available to investors survived the 1974 amendments.

VII

In addition to their principal argument that no private remedy is available under the CEA, petitioners also contend that respondents, as speculators, may not maintain such an action and that, in any event, they may not sue an exchange or futures commission merchants for their alleged complicity in the price manipulation effected by a group of short traders. To evaluate these contentions, we must assume the best possible case for the speculator in terms of proof of the statutory violations, the causal connection between the violations and the injury, and the amount of damages. It is argued that no matter how deliberate the defendants' conduct, no matter how flagrant the statutory violation, and no matter how direct and harmful its impact on the plaintiffs, the federal remedy that is available to some private parties does not encompass these actions.

The cause of action asserted in No. 80-203 is a claim that respondents' broker violated the prohibitions against fraudulent and deceptive conduct in § 4b. In the other three cases the respondents allege violations of several other sections of the CEA that are designed to prevent price manipulation.[87]

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[87] Section 4a instructs the Commission to fix trading and position limits to curb excessive speculation. 7 U. S. C. § 6a. Section 5(d) requires as a condition for designation as a contract market that an exchange prevent price manipulation by dealers, 7 U. S.C § 7(d), and § 5a(8) imposes a duty upon contract markets to enforce their rules, 7 U. S. C. § 7a(8). Section 9(b) fixes criminal penalties for price manipulation and other violations of the CEA. 7 U. S. C. § 13(b) (1976 ed., Supp. IV).

We are satisfied that purchasers and sellers of futures contracts have standing to assert both types of claims.

The characterization of persons who invest in futures contracts as "speculators" does not exclude them from the class of persons protected by the CEA. The statutory scheme could not effectively protect the producers and processors who engage in hedging transactions without also protecting the other participants in the market whose transactions over exchanges necessarily must conform to the same trading rules. This is evident from the text of the statute. The antifraud provision, § 4b, 7 U. S. C. § 6b, by its terms makes it unlawful for any person to deceive or defraud any other person in connection with any futures contract. This statutory language does not limit its protection to hedging transactions; rather, its protection encompasses every contract that "is or may be used for (a) hedging . . . or (b) determining the price basis of any transaction . . . in such commodity." See n. 18, *supra*. Since the limiting language defines the character of the contracts that are covered, and since futures contracts traded over a regulated exchange are fungible, it is manifest that all such contracts may be used for hedging or price basing, even if the parties to a particular futures trade may both be speculators. In other words, all purchasers or sellers of futures contracts—whether they be pure speculators or hedgers—necessarily are protected by § 4b.[88]

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[88] The language of § 4b is similar to that of § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and this Court has recognized an implied cause of action under the Securities and Exchange Commission's Rule 10b–5 on behalf of all securities traders. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S., at 13, n. 9; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975). We recognized in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), that the implication of a cause of action under Rule 10b–5 could be "explained historically"; "the Court explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b–5 cause of action." *Id.*, at 692, n. 13. In terms of the number of years and the number of decisions in which an implied cause of action was recognized, the CEA action does not compare favorably with the Rule

The legislative history quite clearly indicates that Congress intended to protect all futures traders from price manipulation and other fraudulent conduct violative of the statute. It is assumed, of course, that federal regulation of futures trading benefits the entire economy; a sound futures market tends to reduce retail prices of the underlying commodities. The immediate beneficiaries of a healthy futures market are the producers and processors of commodities who can minimize the risk of loss from volatile price changes on the cash market by hedging on the futures market.[89] As the House Report on the 1974 amendments explained at length,[90] their ability to engage in hedging depends on the availability of investors willing to assume or to share the hedger's risk in the hope of making a profit. The statutory proscriptions against price manipulation and other fraudulent practices were intended to ensure that hedgers would sell or purchase the underlying commodities at a fair price and that legitimate investors would view the assumption of the hedger's risk as a fair investment opportunity. Although the speculator has never been the favorite of Congress, Congress recognized his crucial role in an effective and orderly futures market and intended him to be protected by the statute as much as the hedger. Judge Friendly's discussion of the legislative history, see 638 F. 2d, at 304–307, amply supports his observation that "[i]t is almost self-evident that legislation regulating future trading was for the 'especial benefit' of futures traders," *id.*, at 306–307.

Although § 4b compels our holding that an investor defrauded by his broker may maintain a private cause of action

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10b–5 action. On the other hand, Congress comprehensively reexamined the CEA in 1974 and did not amend the sections under which the cause of action had been implied; no comparable legislative approval or acquiescence exists for the Rule 10b–5 remedy.

[89] See, *e. g.*, § 3 of the CEA, 42 Stat. 999, codified as amended, 7 U. S. C. § 5.

[90] See, *e. g.*, n. 11, *supra*.

for fraud, petitioners in the three manipulation cases correctly point out that the other sections of the CEA that they are accused of violating are framed in general terms and do not purport to confer special rights on any identifiable class of persons. Under *Cort* v. *Ash*, the statutory language would be insufficient to imply a private cause of action under these sections.[91] But we are not faced with the *Cort* v. *Ash* inquiry.[92] We have held that Congress intended to preserve the pre-existing remedy; to determine whether the pre-existing remedy encompasses respondents' actions, we must turn once again to the law as it existed in 1974.

Although the first case in which a federal court held that a futures trader could maintain a private action was a fraud claim based on § 4b,[93] subsequent decisions drew no distinction between an action against a broker and an action against

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[91] "The Court consistently has found that Congress intended to create a cause of action 'where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case.' *Cannon* v. *University of Chicago*, 441 U. S. 677, 690, n. 13 (1979). Conversely, it has noted that there 'would be far less reason to infer a private remedy in favor of individual persons' where Congress, rather than drafting the legislation 'with an unmistakable focus on the benefited class,' instead has framed the statute simply as a general prohibition or a command to a federal agency. *Id.*, at 690–692." *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 771–772 (1981).

[92] "The statutes originally enacted in 1933 and 1934 have been amended so often with full congressional awareness of the judicial interpretation of Rule 10b–5 as implicitly creating a private remedy that we must now assume that Congress intended to create rights for the specific beneficiaries of the legislation as well as duties to be policed by the SEC. This case therefore does not present the same kind of issue discussed in *Cort* v. *Ash*, 422 U. S. 66 [1975], namely, *whether* the statute created an implied private remedy. Rather, the question presented here is *who* may invoke that remedy." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 55, n. 4 (1977) (STEVENS, J., dissenting) (emphasis in original).

[93] The seminal decision was *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (ND Ill. 1967), in which the implication of a private remedy on behalf of

an exchange.[94] When Congress acted in 1974, courts were recognizing causes of action on behalf of investors against exchanges. The *Deaktor* case, which came before this Court, is an example.[95] Moreover, these actions against exchanges

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commodity futures traders against their broker was based on Restatement of Torts § 286 (1938).

"Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. Restatement, Torts, Section 286. Violation of the standard of conduct set out in Section 6b of the Commodity Exchange Act is a tort for which plaintiffs, as members of the class Congress sought to protect from the type of harm they allege here, have a federal civil remedy even in the absence of specific mention of a civil remedy in the Commodity Exchange Act. The Restatement rationale was the basis for the presently well accepted rule that a civil remedy cognizable in the federal courts will be implied for a defrauded investor under Section 78j of the Securities Act of 1934 and Securities and Exchange Commission regulation 10b–5 thereunder. Kardon v. National Gypsum Co., D. C., 69 F. Supp. 512 (1946)." 265 F. Supp., at 447.

[94] *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d, at 534; *Booth* v. *Peavey Co. Commodity Services*, 430 F. 2d 132, 133 (CA8 1970); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1083–1092 (SDNY 1974), aff'd, 550 F. 2d 762 (CA2), cert. denied *sub nom. Miller* v. *New York Produce Exchange*, 434 U. S. 823 (1977); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61, 65–66 (MD Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (ND Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (SDNY 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338, 1342–1343 (ED La. 1972); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375, 1383–1384 (SDNY 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 437 (ND Cal. 1968), modified, 430 F. 2d 1202 (CA9 1970).

[95] The facts alleged in the *Deaktor* case are quite similar to those alleged in the Second Circuit case:

"Darryl B. Deaktor, plaintiff in Nos. 71–1890 and 71–1893, brought a class action against the Chicago Mercantile Exchange and various members of the Exchange alleging that the defendant members manipulated

were well recognized. During the hearings on the 1974 amendments to the CEA, a complaint voiced by representatives of the exchanges was that the exchanges were being sued for not enforcing their rules. Congress responded to the complaint by authorizing the Commission to supplement exchange rules because, we have inferred,[96] Congress wished to preserve the private cause of action as a tool for enforcement of the self-regulation concept of the CEA.

To the extent that the *Cort* v. *Ash* inquiry[97] is relevant to the question now before us—whether respondents' claims can be pursued under the implied cause of action that Congress preserved—it is noteworthy that the third and fourth factors of that inquiry support an affirmative answer. As the Solicitor General has argued on behalf of the Commodities Futures Trading Commission, it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy."[98] Moreover, there is no basis for believing that state law will afford an adequate remedy against an exchange. On the contrary, throughout the long history of federal regulation of futures trading it has been federal law that has imposed a stringent duty upon exchanges to police the trading activities in the markets that they are authorized by statute to regu-

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and cornered the July, 1970 frozen pork bellies futures contracts market, forcing up the price of those contracts and injuring traders, such as the plaintiff, who sold short and had not liquidated their positions prior to the defendants' manipulation and thus were required to cover their positions by the purchase of contracts at inflated prices. This conduct was alleged to be in violation of 7 U. S. C. § 1 *et seq.* of the Commodity Exchange Act. The Exchange was sued on the ground of failing to exercise reasonable care in compliance with 7 U. S. C. § 7a(8), and thus failing to be aware of and to promptly halt the unlawful activities of the defendants." 479 F. 2d, at 530. See also *Seligson* v. *New York Produce Exchange*, *supra*, at 1083–1092.

[96] See *supra*, at 382–384.

[97] See n. 51, *supra*.

[98] *Cort* v. *Ash*, 422 U. S., at 78.

late.[99] Since the amendments to the original legislation regulating futures trading consistently have strengthened that regulatory scheme, the elimination of a significant enforcement tool would clash with this legislative pattern. We therefore may not simply assume that Congress silently withdrew the pre-existing private remedy against exchanges.[100]

Having concluded that exchanges can be held accountable for breaching their statutory duties to enforce their own rules prohibiting price manipulation, it necessarily follows that those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit by futures traders who can prove injury from these violations.[101] As we said regarding the analogous Rule 10b–5, "privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S., at 745. Because there is no indication of legislative intent that privity should be an element of the implied remedy under the CEA,[102] we are not prepared to fashion such a limitation. As has been the case with the Rule 10b–5

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[99] That duty has been the centerpiece of federal regulation in this area since 1921. See *supra*, at 361–362, 382–384.

[100] "It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." 638 F. 2d, at 313.

[101] Indeed, in the *Deaktor* case, members of the exchange alleged to have manipulated the futures contract price and cornered the market were sued by short traders. See n. 95, *supra*.

[102] Notably, the reparations provision enacted in 1974, 7 U. S. C. § 18, includes no express limitation on the types of aggrieved persons that can seek reparations from persons registered under certain provisions of the statute. Section 18(a) provides that "[a]ny person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j or 6m of this title may, at any time within two years after the cause of action accrues," file a complaint with the Commission.

action,[163] unless and until Congress acts, the federal courts must fill in the interstices of the implied cause of action under the CEA. The elements of liability, of causation, and of damages are likely to raise difficult issues of law and proof in litigation arising from the massive price manipulation that is alleged to have occurred in the May 1976 futures contract in Maine potatoes. We express no opinion about any such question. We hold only that a cause of action exists on behalf of respondents against petitioners.

The judgments of the Courts of Appeals are affirmed.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today holds that Congress intended the federal courts to recognize implied causes of action under five separate provisions of the Commodity Exchange Act (CEA), 7 U. S. C. §1 *et seq.* (1976 ed. and Supp IV). The decision rests on two theories. First, the Court relies on fewer than a dozen cases in which the lower federal courts *erroneously* upheld private rights of action in the years prior to the 1974 amendments to the CEA. Reasoning that these mistaken decisions constituted "the law" in 1974, the Court holds that Congress must be assumed to have endorsed this path of error when it *failed to amend* certain sections of the CEA in that year. This theory is incompatible with our constitutional separation of powers, and in my view it is without support in logic or in law. Additionally—whether alternatively or cumulatively is unclear—the Court finds that Congress in 1974 "affirmatively" manifested its intent to "preserve" pri-

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[163] See, *e. g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972).

vate rights of action by adopting particular amendments to the CEA. This finding is reached without even token deference to established tests for discerning congressional intent.

I

In determining whether an "implied" cause of action exists under a federal statute, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U. S. 11, 15–16 (1979). See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981) (*Sea Clammers*).[1] In these cases private rights of action are asserted under five separate provisions of the CEA—two of them passed initially in 1922, two in 1936, and one adopted for the first time in 1968.[2] The Court does

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[1] As the Court correctly observes, *ante*, at 377, reliance on congressional intent as dispositive of implication questions was at least implicit in the four-pronged inquiry mandated by *Cort* v. *Ash*, 422 U. S. 66 (1975). The *Cort* test explicitly called for inquiries into whether plaintiffs were seen by Congress as especial beneficiaries of a statutory scheme, whether an implied cause of action would be consistent with legislative purpose, and whether the asserted cause of action traditionally was relegated to state law. See *id.*, at 78. But these factors all are important primarily as indices of congressional intent. As we recently explained in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981), "Congressional intent may be discerned by looking to . . . , *e. g.*, the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief."

[2] The five sections are § 4a, 7 U. S. C. § 6a; § 4b, 7 U. S. C. § 6b; § 5a(8), 7 U. S. C. § 7a(8); § 5(d), 7 U. S. C. § 7(d); and § 9(b), 7 U. S. C. § 13(b).

Though subsequently amended, §§ 5(d) and 9(b) were both adopted as part of the Grain Futures Act of 1922. See 42 Stat. 1000, 1003. Section 5(d) authorizes the Commodity Futures Trading Commission (CFTC) to designate as a "contract market" (and thus permit trading upon) a commodities exchange only when the exchange's governing board "provides for the prevention of manipulation of prices and the cornering of any commodity

not argue that Congress in 1922, in 1936, or in 1968, intended to authorize private suits for damages in the federal courts. In 1936—the year in which the CEA was adopted as the successor statute to the Grain Futures Act[3]—Congress did not even provide for federal-court jurisdiction to enforce the CEA.[4] And the Court adduces no evidence that congressional views had changed by 1968.

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by the dealers or operators" upon the exchange. Its terms suggest no intent to confer a right of action on any class of aggrieved persons.

Section 9(b)—as are §§ 4a and 4b—is a criminal provision. It establishes that "[i]t shall be a felony" for "any person" to manipulate commodity prices, to corner commodities, to deliver false crop or market information, or to omit or misstate facts to the CFTC. Before today the Court had established that private rights of action generally would not be inferred from criminal prohibitions. See *California* v. *Sierra Club*, 451 U. S. 287, 294 (1981); *Cannon* v. *University of Chicago*, 441 U. S. 677, 690–693, n. 13 (1979).

Sections 4a and 4b were adopted as part of the Commodity Exchange Act of 1936. See 49 Stat. 1492, 1493. Section 4a provides that it is illegal for any person to buy, sell, or hold positions in excess of limitations established by the CFTC. Section 4b declares it unlawful for designated persons who make commodity futures contracts for other persons to cheat, defraud, deceive, or make false statements to such other persons. Sections 4a and 4b are similar to § 206 of the Investment Advisers Act of 1940. See 15 U. S. C. § 80b–6. We have held explicitly that the language of § 206 does not create an implied damages action. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U. S. 11, 16, n. 6, 24 (1979).

Section 5a(8), 7 U. S. C. § 7a(8), is traceable to the 1968 amendments. It directs that each "contract market" shall enforce its own approved rules relating to contract and trading requirements. Section 5a(8) resembles the language of 15 U. S. C. § 78q(a) (1970 ed.), that we found to create no implied private damages action under the Securities Exchange Act of 1934. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 562, n. 2, 579 (1979).

[3] The structural history of the CEA and its antecedents is ably summarized by the Court and requires no further recounting here. See *ante*, at 360–367.

[4] Congress had included jurisdictional provisions under several securities laws preceding enactment of the 1936 amendments to the CEA, thus evidencing that it knew quite well how to authorize private suits for civil damages when it wished to do so. *TAMA*, *supra*, at 20–21.

If the Court focused its implication inquiry on the intent of the several Congresses that enacted the statutory provisions involved in these cases, it thus is indisputable that the plaintiffs would have no claim. "The dispositive question" in implication cases is whether Congress intended to create the right to sue for damages in federal court. "Having answered that question in the negative, our inquiry [would be] at an end." *TAMA*, *supra*, at 24. See *Sea Clammers*, *supra*, at 13.

The Court today asserts its fidelity to these principles but shrinks from their application. It does so in the first instance by invoking a novel legal theory—one that relies on congressional inaction and on erroneous decisions by the lower federal courts. In 1967 a Federal District Court in the Northern District of Illinois upheld the existence of a private right of action under one section of the CEA. *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (1967). Relying on state common-law principles set forth in § 286 of the Restatement of Torts (1938), *Goodman* ruled that the "complete absence of provision for private civil actions in the Commodity Exchange Act," 265 F. Supp., at 447, was not decisive:

> "'Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. *On the contrary, they are implied unless the legislation evidences a contrary intention.* Brown v. Bullock, D.C., 194 F. Supp. 207, 224, aff'd on other grounds, 2 Cir., 294 F. 2d 415; cited in Wheeldin v. Wheeler, 373 U. S. 647 at 661, 662 . . . (Brennan, J., dissenting).'
>
> "There is no indication in the Commodity Exchange Act that Congress intended *not* to allow private persons injured by violations access to the federal courts." *Ibid.* (emphasis added).

The Court does not dispute that the *Goodman* court erred. The *Goodman* court placed primary emphasis on inquiring

whether Congress had created a regulatory system for the *benefit* of the plaintiffs' class. As the court's citation of the Restatement of Torts made apparent, this inquiry has been thought appropriate for common-law courts of general jurisdiction. But our cases establish that it is *not* appropriate for federal courts possessed only of limited jurisdiction. On the contrary, we have established that an "argument in favor of implication of a private right of action based on tort principles . . . is entirely misplaced." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). "The dispositive question [is] whether *Congress* intended to create any such [private damages] remedy." *TAMA*, 444 U. S., at 24 (emphasis added). The *Goodman* court did not even ask this question.[5]

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[5] The Court correctly observes that the effect of *Cort* v. *Ash* was to "*modify* [this Court's] approach to the question whether a federal statute includes a private right of action." *Ante*, at 377 (emphasis added). As exemplifying a previous approach the Court quotes *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916): "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." The Court does not appear to argue, however, that *Rigsby* mandated the *Goodman* decision. Nor does *Rigsby* somehow validate *Goodman* as a correct statement of the law as it was in 1967. As is clear from a reading of the opinion, *Rigsby* stated not so much a rule of substantive law as a maxim of statutory construction. *Rigsby* did not question that the *creation* of rights of action was a congressional function. On the contrary, in *Rigsby* the Court devoted most of its opinion, not to the question whether a remedy could be "implied" under the statute, but to the question whether it was within the constitutional power of Congress to impose tort liability of the kind asserted. See 241 U. S., at 40–43 (asserting that plaintiff will be entitled to recover "unless it be beyond the power of *Congress* under the commerce clause of the Constitution *to create* such a liability") (emphasis added).

Moreover, although the *Rigsby* approach made the denial of a damages action "the exception rather than the rule," *ante*, at 375, the Court even during the *Rigsby* period refused to recognize implied remedies where the evidence—even with the aid of the maxim—failed to indicate that Congress had intended to create them. See, *e. g.*, *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464, 474 (1959) ("The question is, of course, one of statutory in-

About 10 cases—none decided by this Court[6]—followed *Goodman*'s mistake. Seven of these found *Goodman* dispositive without further comment.[7] Three remaining cases[8] added to *Goodman*'s analysis only by quoting differing por-

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tent"); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 457–458 (1974) (*Amtrak*) ("It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent . . .").

[6] One of these cases, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529, 534 (CA7), rev'd on other grounds *sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U. S. 113 (1973), did come before this Court. But the petition for certiorari included no "implication" question, and our *per curiam* opinion decided the case on primary jurisdiction grounds. Reversing the decision of the Court of Appeals, which had upheld the jurisdiction of the District Court to entertain a private suit for damages under the CEA, we held that "the *Deaktor* plaintiffs, who . . . alleged violations of the CEA and the rules of the [Chicago Merchantile] Exchange, should be routed in the first instance to the [Commodity Exchange Commission] whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case." *Id.*, at 115.

The Court today notes that *Deaktor* "did not question the availability of a private remedy under the CEA." *Ante*, at 381. But neither does *Deaktor* exert any precedential force on an issue that the parties did not present and the Court did not decide. In any event, our disposition of the *Deaktor* case—referring the matters complained of to the Commodity Exchange Commission—at least is consistent with a view that plaintiffs enjoy no private rights of action in the courts, but that they are entitled to seek administrative relief through the procedures made available under the CEA.

[7] See *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 437 (ND Cal. 1968), modified on other grounds, 430 F. 2d 1202 (CA9 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (Minn. 1968); *Booth* v. *Peavey Co. Commodity Services*, 430 F. 2d 132, 133 (CA8 1970) (alternative holding); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (ED La. 1972); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (SDNY 1972); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (ND Tex. 1972) (by implication); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61, 65–66 (MD Pa. 1973).

[8] See *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375, 1384 (SDNY 1970); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (SDNY 1974), aff'd, 550 F. 2d 762 (CA2) (no explicit discussion of propriety of implying cause of action under the CEA), cert.

tions of one sentence discussing the CEA's purpose.[9] This single sentence "leaves no doubt that Congress intended to [benefit the named classes of persons by enacting the CEA] . . . . But whether Congress intended additionally that [the CEA] provisions would be enforced through private litigation is a different question." *TAMA*, *supra*, at 17–18. Because these cases ignore this "different question," they fail to rectify *Goodman*'s fundamental legal error—that of basing a finding of an implied cause of action under a federal statute on common-law principles. "There is, of course, 'no federal general common law.'" *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981), quoting *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938).

To the Court, however, this all is irrelevant. The *Goodman* line may have been wrong. The decisions all may have been rendered by lower federal courts. *Goodman* nevertheless was "the law" in 1974. Moreover, the Court reasons, Congress must be presumed to have known of *Goodman* and its progeny, see *ante*, at 378–382; and it could have changed the law if it did not like it, see *ante*, at 381–382. Yet Congress, the Court continues, "left intact the statutory provisions under which the federal courts had implied a cause of action." *Ante*, at 381. This legislative *inaction*, the Court concludes, signals a conscious intent to "preserve" the right of action that *Goodman* mistakenly had created. *Ante*, at 382. And this unexpressed "affirmative intent" of Congress now is binding on this Court, as well as all other federal courts.[10]

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denied *sub nom. Miller* v. *New York Produce Exchange*, 434 U. S. 823 (1977); *Deaktor* v. *L. D. Schreiber & Co.*, *supra*, at 534.

[9] "The fundamental purpose of the Commodity Exchange Act 'is to ensure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves.'" Campbell, Trading in Futures under the Commodity Exchange Act, 26 Geo. Wash. L. Rev. 215, 223 (1958), quoting H. R. Rep. No. 421, 74th Cong., 1st Sess., 1 (1935).

[10] If Congress must be presumed to have known of the lower court deci-

This line of reasoning is inconsistent with fundamental premises of our structure of government. Fewer than a dozen District Courts wrongly create a remedy in damages under the CEA; Congress fails to correct the error; and congressional silence binds this Court to follow the erroneous decisions of the District Courts and Courts of Appeals. The Court today does not say that *Goodman* was correctly decided. Congress itself surely would reject emphatically the *Goodman* view that federal courts are free to hold, as a general rule of statutory interpretation, that private rights of action are to be implied unless Congress "evidences a contrary intention." Yet today's decision is predicated in major part on this view.

It is not surprising that the Court—having propounded this novel theory that congressional intent can be inferred from its silence, and that legislative inaction should achieve the force of law—would wish to advance an additional basis for its decision.

II

In 1974 Congress rewrote much of the CEA. It did not, however, re-enact or even amend most of the provisions under which the Court today finds implied rights of action. But the Court does not pause over the question how Con-

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sions in the *Goodman* line, it would seem Congress also should be presumed to have known of this Court's 1974 decision in *Amtrak*, *supra*. *Amtrak* properly directed that the implication of rights of action must adhere to congressional intent. See 414 U. S., at 457–458. More importantly, *Amtrak* also would have alerted Congress that its provision of a comprehensive scheme of administrative remedies—and the 1974 amendments to the CEA admittedly provided such a scheme, see *ante*, at 384–385—would give rise to an inference of intent to preclude alternative modes of relief. See 414 U. S., at 458 ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies"). The Court does not explain the relationship of *Amtrak* to Congress' presumptive knowledge of "the 'contemporary legal context' in which [it] legislated in 1974." *Ante*, at 381.

gress might legislate a right of action merely by remaining silent after the lower federal courts have misstated the law.[11] Instead it argues that at least some of the 1974 amendments evidenced an affirmative congressional intent to "preserve" implied rights of action under the CEA. *Ante*, at 381–382. Fairly read, the evidence fails to sustain this argument.

A

In support of its argument the Court advances no evidence of the kinds generally recognized as most probative of congressional intent. It cites no statutory language stating an intent to preserve judicially created rights. It offers no legislative materials citing *Goodman* or any of its progeny in approving tones. In the hundreds of pages of Committee hearings and Reports that preceded the 1974 amendments, the Court is unable to discover even a single clear remark to the effect that the 1974 amendments would create or preserve private rights of action.

The Court relies instead on three unrelated additions to the CEA that were adopted by Congress in 1974. First, the Court places weight on the enactment of § 8a(7), 7 U. S. C. § 12a(7), which authorizes the Commodity Futures Trading Commission to supplement the trading regulations established by individual commodity exchanges. *Ante*, at 384. The accompanying House Report, H. R. Rep. No. 93–975,

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[11] The Court opinion, see *ante*, at 381–382, n. 66, and cites cases in which we previously have held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). Here, however, Congress did *not* re-enact the provisions in issue in 1974; the relevant 1974 amendments altered existing language, but without actively readopting the terms that were left unchanged. It also is significant that the statute involved in *Lorillard* expressly authorized private civil actions. *Id.*, at 579, n. 6. The Court cites no case in which a presumption of congressional awareness was based on erroneous lower court decisions.

p. 46 (1974), explained that the CFTC needed this power to ensure that the local exchanges would establish adequate safeguards. According to the Report, "attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations . . . , since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." From this observation the Court purports to infer that Congress must have approved of the *Goodman* line of cases.

This single quotation, however, is entirely neutral as to approval or disapproval. Moreover, there is persuasive evidence on the face of the statute that Congress did not contemplate a judicial remedy for damages against the exchanges. The 1974 amendments explicitly subjected the exchanges to fines and other sanctions for nonenforcement of their own rules. See § 6b, 7 U. S. C. § 13a. But the statute specifies that fines may not exceed $100,000 per violation, *ibid.*, and that the Commission must determine whether the amount of any fine will impair an exchange's ability to perform its functions. A private damages action would not be so limited and therefore would expose the exchanges to greater liability than Congress evidently intended.

The second statutory change cited by the Court actually undercuts rather than supports its case. The Court notes that the 1974 Congress enacted two sections creating procedures for reimbursing victims of CEA violations.[12] *Ante*, at

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[12] The added reimbursement procedures are of two types. First, the 1974 Congress added § 5a(11) to the Act. See 88 Stat. 1401. This provision requires commodity exchanges to "provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' *claims and grievances against any member or employee* [of the exchange]" (emphasis added). The procedure applies only to claims involving less than $15,000. This process evidently is designed to encourage the

384–385. In its view these sections evidence a further intent to enhance the availability of relief in damages. Yet the Court suggests no reason why the 1974 Congress would have enacted these duplicative channels for damages recovery if it intended at the same time to approve the implied private damages actions permitted by *Goodman*.[13] Rather, the Court flatly contravenes settled rules for the identification of congressional intent. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA*, 444 U. S., at 19.[14] "In the absence

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speedy and voluntary resolution of smaller customer disputes at the exchange level.

Second, the 1974 amendments included a new § 14 that expressly authorized damages actions. See 88 Stat. 1393–1394. This adjudicatory procedure apparently is designed to resolve larger disputes or smaller § 5a(11) disputes that are not settled. The actions are brought before the Commission rather than before an exchange. There is no limit on the amount of damages that may be awarded. The Commission's judgments are enforceable by actions in federal district court. 7 U. S. C. § 18.

[13] Instead of attempting to explain this overlap between the express and the implied CEA remedies, the Court points to the limitations Congress placed on its express remedies as compared to an implied *Goodman* action. See *ante*, at 384–385, and n. 75. The Court suggests that Congress' scheme is wanting as a tool for compensation and deterrence. The opposite inference would be more reasonable. One normally would assume that Congress took care to prescribe precisely those remedies compatible with its view of the costs and benefits of different modes of regulation. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U. S. 282, 289 (1929). See *Sea Clammers*, 453 U. S. 1, 14–15 (1981).

[14] "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Northwest Airlines, Inc.* v. *Transport Workers*, 451

of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Sea Clammers*, 453 U. S., at 15.

The Court finally relies upon congressional enactment of a so-called jurisdictional saving clause as part of the 1974 amendments:

> "Nothing in this section shall supersede or limit the *jurisdiction* conferred on courts of the United States or any State." § 201 (amending § 2 of the Act), 88 Stat. 1395, codified at 7 U. S. C. § 2 (emphasis added).

Ante, at 386–387.

By its terms the saving clause simply is irrelevant to the issue at hand: whether a cause of action should be implied under particular provisions of the CEA. Where judicially cognizable claims do exist, the saving clause makes clear that federal courts retain their jurisdiction. But it neither creates nor preserves any *substantive* right to sue for damages. And it is settled by our cases that "[t]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provision." *Touche Ross & Co.* v. *Redington*, 442 U. S., at 577. Cf. *Sea Clammers*, *supra*, at 15–17 (refusing to imply right of action even from a *substantive* "saving clause").[15]

U. S. 77, 97 (1981). See also *Sea Clammers*, *supra*, at 13–15; *Touche Ross & Co.* v. *Redington*, 442 U. S., at 574; *Amtrak*, 414 U. S., at 458.

In an effort to show that these reparation procedures were designed to *supplement* implied rights of action, the Court reviews comments made by hearing witnesses that allude to the existence of "court" actions. *Ante*, at 385–386, and nn. 76–80. These references, however, fairly must be characterized as ambiguous.

[15] In attaching substantive significance to the jurisdictional saving provision, the Court relies heavily on an isolated remark by Senator Clark. See *ante*, at 386. Senator Clark is not identified as a legislative draftsman,

B

Despite its imaginative use of other sources, the Court neglects the only unambiguous evidence of Congress' intent respecting private actions for civil damages under the CEA. That evidence is a chart that appears in the record of Senate Committee hearings.[16] This chart compares features of four proposed bills with the "Present Commodities Exchange Act." It evidently was prepared by the expert Committee staff advising the legislators who considered the 1974 amendments.

The chart is detailed. It occupies five pages of the hearing record. Comparing the feature of "civil money penalties" between the different proposed bills, however, the chart does not list "implied damages actions" under the existing Act. Rather, it says there are "none." Neither does the chart make any reference to implied private damages actions under any of the four proposed amending bills.

Under these circumstances, the most that the Court fairly can claim to have shown is that the 1974 Congress did not dis-

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floor manager, or committee chairman. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 204, n. 24 (1976) ("Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight"). Moreover, the Court advances no evidence that even Senator Clark was thinking of *Goodman* actions when he expressed his concern to preserve existing state and federal jurisdiction. It is equally plausible that he was thinking primarily of federal antitrust jurisdiction and state-court jurisdiction over contract claims. These were, in fact, precisely the grounds on which three other witnesses, appearing before the same Senate Committee as Senator Clark, criticized the language of an earlier draft of the saving clause. See Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., 259–260 (1974) (Chairman Rodino of the House Committee on the Judiciary); *id.*, at 663–664 (Deputy Assistant Attorney General Clearwaters); *id.*, at 667–668 (Director Halverson of the Bureau of Competition, Federal Trade Commission).

[16] The relevant portion of this chart is attached as an Appendix to this opinion.

approve *Goodman* and its progeny. There simply is no persuasive evidence of affirmative congressional intent to recognize rights through the enactment of statutory law, even under the Court's unprecedented theory of congressional ratification by silence of judicial error.

III

The Court's holding today may reflect its view of desirable policy. If so, this view is doubly mistaken.

First, modern federal regulatory statutes tend to be exceedingly complex. Especially in this context, courts should recognize that intricate policy calculations are necessary to decide when new enforcement measures are desirable additions to a particular regulatory structure. Judicial creation of private rights of action is as likely to disrupt as to assist the functioning of the regulatory schemes developed by Congress. See, *e. g.*, *University Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 782–784 (1981).

Today's decision also is disquieting because of its implicit view of the judicial role in the creation of federal law. The Court propounds a test that taxes the legislative branch with a duty to respond to opinions of the lower federal courts. The penalty for silence is the risk of having those erroneous judicial opinions imputed to Congress itself—on the basis of its presumptive knowledge of the "contemporary legal context." *Ante*, at 379. Despite the Court's allusion to the lawmaking powers of courts at common law, see *ante*, at 374–377, this view is inconsistent with the theory and structure of our constitutional government.

For reasons that I have expressed before, I remain convinced that "we should not condone the implication of any private right of action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." *Cannon* v. *University of Chicago*, 441 U. S. 677, 749 (1979) (POWELL, J., dissenting).[17] Here the

[17] There can be little doubt that failure to adhere to this standard will encourage the discovery of private causes of action of which Congress never

evidence falls far short of this constitutionally appropriate standard.

Accordingly, I respectfully dissent.

APPENDIX TO OPINION OF POWELL, J., DISSENTING

		HUMPHREY	McGOVERN	HART	Page 5
FEATURES	H. R. 13113	S. 2485	S. 2578	S. 2837, AS AMENDED	PRESENT COMMODITY EXCHANGE ACT
Civil money penalties	Permits civil money penalties up to $100,000 (Sec. 212)	Permits money penalties of $1,000 to $100,000 but only for failure to comply with a Commission order to cease and desist from violating the Act (Sec. 7)	Permits money penalties up $100,000 and provides criteria for assessment. Civil actions may be brought by individuals for treble damages (Sec. 10)	Civil actions may be brought by individuals for treble damages (Sec. 506) Provides for civil money penalties for violation of a final order (Sec. 504) Provides Commission with authority to directly impose a fine of up to $100,000, order a cease and desist order, require restitution, suspend registration, and grant other relief that a court of equity would have the right to grant (Sec. 406)	None

Commodity Futures Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., 194 (1974).

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dreamed. The escalating recourse to damages suits has placed a severe and growing burden on the lower federal courts. My research—accomplished mostly through a computer search of cases in the federal reporters—indicates that in the past decade there have been at least 243 reported Court of Appeals opinions and 515 District Court opinions dealing with the existence of implied causes of action under various federal statutes. It is time federal courts discontinued the speculative creation of damages liability where the legislative branch has chosen to remain silent.

ZANT, WARDEN *v.* STEPHENS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-89. Argued February 24, 1982—Decided May 3, 1982

After respondent was convicted of murder in a Georgia trial court, his sentencing jury found the existence of three aggravating circumstances specified in the Georgia death penalty statute and imposed the death penalty. Although the Georgia Supreme Court set aside one of the aggravating circumstances found by the jury, it upheld the death sentence, concluding that the evidence supported the jury's findings of the other aggravating circumstances and that therefore the sentence was not impaired. After exhausting state postconviction remedies, respondent filed for a writ of habeas corpus in Federal District Court, which denied relief. The Court of Appeals reversed and remanded insofar as the District Court had left standing respondent's death sentence. This Court granted the State's petition for certiorari to consider the question whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. The Georgia Supreme Court consistently has asserted that authority, but there is considerable uncertainty about the state-law premises of Georgia's rule.

Held: Such state-law premises are relevant to the constitutional issue at hand. Thus, pursuant to a Georgia statute providing that under certain circumstances the Georgia Supreme Court will decide questions of state law upon certification from this Court, the following question is certified: What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

631 F. 2d 397 and 648 F. 2d 446, question certified.

Daryl A. Robinson, Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the brief were *Michael J. Bowers*, Attorney General, *Robert S. Stubbs* II, Executive Assistant Attorney General, and *Marion O. Gordon* and *John C. Walden*, Senior Assistant Attorneys General.

John Charles Boger argued the cause for respondent. With him on the brief were *James C. Bonner, Jr.*, *Jack Greenberg*, *James M. Nabrit III*, *Joel Berger*, *Deborah Fins*, and *Anthony G. Amsterdam*.*

PER CURIAM.

The respondent was convicted of murder in a Georgia Superior Court. His sentencing jury found the following statutory aggravating circumstances:[1]

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*A brief for the State of Alabama et al. as *amici curiae* urging reversal was filed by *Charles A. Graddick*, Attorney General of Alabama, *George Deukmejian*, Attorney General of California, *Jim Smith*, Attorney General of Florida, *William J. Guste, Jr.*, Attorney General of Louisiana, *William A. Allain*, Attorney General of Mississippi, *John D. Ashcroft*, Attorney General of Missouri, and *John M. Morris III*, Assistant Attorney General, *Michael T. Greely*, Attorney General of Montana, *Paul L. Douglas*, Attorney General of Nebraska, *Richard H. Bryan*, Attorney General of Nevada, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, *Daniel R. McLeod*, Attorney General of South Carolina, and *David L. Wilkinson*, Attorney General of Utah.

Daniel J. Popeo, *Paul D. Kamenar*, and *Nicholas E. Calio* filed a brief for the Washington Legal Foundation as *amicus curiae*.

[1] The trial judge instructed the sentencing jury as follows:

"Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation [*sic*], mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a

"(1) that the offense of murder was committed by a person with a prior record of conviction of a capital felony, Code Ann. §27-2534.1(b)(1); (2) that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Code Ann. §27-2534.1(b)(1), supra; and, (3) that the offense of murder was committed by a person who had escaped from the lawful custody of a peace officer or a place of lawful

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Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case." App. 18-19.

> confinement, Code Ann. § 27-2534.1(b)(9)." *Stephens* v. *Hopper*, 241 Ga. 596, 597-598, 247 S. E. 2d 92, 94, cert. denied, 439 U. S. 991 (1978).

The jury imposed the death penalty. On direct appeal, the Georgia Supreme Court affirmed. *Stephens* v. *State*, 237 Ga. 259, 227 S. E. 2d 261, cert. denied, 429 U. S. 986 (1976). On the authority of *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976), it set aside the second statutory aggravating circumstance found by the jury. It upheld the death sentence, however, on the ground that in *Arnold* "that was the sole aggravating circumstance found by the jury," whereas in the case under review "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." 237 Ga., at 261-262, 227 S. E. 2d, at 263.

After exhausting his state postconviction remedies, *Stephens* v. *Hopper*, *supra*, the respondent applied for a writ of habeas corpus in Federal District Court. Relief was denied by that court, but the United States Court of Appeals for the Fifth Circuit "reverse[d] the district court's denial of habeas corpus relief insofar as it le[ft] standing the [respondent's] death sentence, and . . . remanded for further proceedings." 631 F. 2d 397, 407 (1980), modified, 648 F. 2d 446 (1981). We granted the State's petition for certiorari. 454 U. S. 814.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court's construing the statute and reviewing capital sentences consistently with this concern. See 428 U. S., at 198, 201-206 (opinion of Stewart, POWELL,

and STEVENS, JJ.); *id.*, at 211–212, 222–224 (WHITE, J., concurring in judgment). Our review of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in *Coker* v. *Georgia*, 433 U. S. 584 (1977), *Presnell* v. *Georgia*, 439 U. S. 14 (1978), *Green* v. *Georgia*, 442 U. S. 95 (1979), and *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

Today, we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. The Georgia Supreme Court consistently has asserted that authority.[2] Its construction of state law is clear: "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." *Gates* v. *State*, 244 Ga. 587, 599, 261 S. E. 2d 349, 358 (1979), cert. denied, 445 U. S. 938 (1980).

Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state-law prem-

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[2] See *Stevens* v. *State*, 247 Ga. 698, 709, 278 S. E. 2d 398, 407 (1981); *Green* v. *State*, 246 Ga. 598, 606, 272 S. E. 2d 475, 485 (1980), cert. denied, 450 U. S. 936 (1981); *Hamilton* v. *State*, 246 Ga. 264, n. 1, 271 S. E. 2d 173, 174, n. 1 (1980), cert. denied, 449 U. S. 1103 (1981); *Brooks* v. *State*, 246 Ga. 262, 263, 271 S. E. 2d 172 (1980), cert. denied, 451 U. S. 921 (1981); *Collins* v. *State*, 246 Ga. 261, 262, 271 S. E. 2d 352, 354 (1980), cert. denied, 449 U. S. 1103 (1981); *Dampier* v. *State*, 245 Ga. 882, 883, n. 1, 268 S. E. 2d 349, 350, n. 1, cert. denied, 449 U. S. 938 (1980); *Burger* v. *State*, 245 Ga. 458, 461–462, 265 S. E. 2d 796, 799–800, cert. denied, 446 U. S. 988 (1980); *Gates* v. *State*, 244 Ga. 587, 599, 261 S. E. 2d 349, 358 (1979), cert. denied, 445 U. S. 938 (1980); *Stephens* v. *State*, 237 Ga. 259, 261–262, 227 S. E. 2d 261, 263, cert. denied, 429 U. S. 986 (1976).

ises of that rule.[3] The Georgia Supreme Court has never explained the rationale for its position. It may be that implicit in the rule is a determination that multiple findings of statutory aggravating circumstances are superfluous, or a determination that the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions. In this Court, the Georgia Attorney General offered as his understanding the following construction of state law: The jury must first find whether one or more statutory aggravating circum-

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[3] Last Term, Members of this Court expressed different assumptions about the meaning—and the constitutionality—of the Georgia Supreme Court's position. In *Drake* v. *Zant*, 449 U. S. 999 (1980), the Court declined to grant certiorari and vacate the judgments in two Georgia cases in which the death sentences—premised in part on the (b)(7) aggravating circumstance—were imposed prior to our decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). JUSTICE STEVENS, concurring in the disposition, expressed the opinion that the Georgia Supreme Court's position was so clear that there was no need to remand the cases for reconsideration in light of *Godfrey*. 449 U. S., at 1000. Dissenting from the denial of certiorari, Justice Stewart stated that if one aggravating circumstance found by the jury "could not constitutionally justify the death sentence, Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance." *Id.*, at 1001. He believed that the Georgia Supreme Court's position on the issue was inconsistent with the Georgia capital punishment scheme because "only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death." *Ibid.* JUSTICE WHITE, also dissenting, would have remanded for reconsideration in light of *Godfrey*, a disposition that "would allow the Georgia Supreme Court in the first instance to determine whether the death penalty should be sustained without regard to the validity of the *Godfrey* circumstance." 449 U. S., at 1002. He did "not understand the Georgia cases . . . to hold either that the Georgia Supreme Court is without power to set aside a death penalty if it sustains only one of the aggravating circumstances found by the jury or that, although the court has that power, it invariably will not disturb the death penalty in such situations." *Ibid.*

stances have been established beyond a reasonable doubt. The existence of one or more aggravating circumstances is a threshold finding that authorizes the jury to consider imposing the death penalty; it serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature has determined warrant the death penalty. After making the finding that the death penalty is a possible punishment, the jury then makes a separate finding whether the death penalty should be imposed. It bases this finding "not upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which ha[s] been introduced at both phases of the trial." Brief for Petitioner 13.

In view of the foregoing uncertainty, it would be premature to decide whether such determinations, or any of the others we might conceive as a basis for the Georgia Supreme Court's position, might undermine the confidence we expressed in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Georgia capital-sentencing system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster. Suffice it to say that the state-law premises of the Georgia Supreme Court's conclusion of state law are relevant to the constitutional issue at hand.

The Georgia Supreme Court under certain circumstances will decide questions of state law upon certification from this Court. See Ga. Code §24–4536 (Supp. 1980).[4] We invoke that statute to certify the following question: What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of

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[4] "When it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such Federal appellate court may certify such questions or propositions of the laws of Georgia to this court for instructions concerning such questions or propositions."

one of the statutory aggravating circumstances found by the jury?

The Clerk of this Court is directed to transmit this certificate, signed by THE CHIEF JUSTICE and under the official seal of the Court, as well as the briefs and record filed with the Court, to the Supreme Court of Georgia, and simultaneously to transmit copies of the certificate to the attorneys for the respective parties.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Six years ago in *Gregg* v. *Georgia*, 428 U. S. 153, 193 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.), this Court declared:

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (Footnote omitted.)

In today's decision, a majority of this Court intimates that a *post hoc* construction of a death penalty statute by the State's highest court may remedy the fact that a jury was improperly instructed with respect to the very factors that save the Georgia statute from unconstitutionality. See *Gregg* v. *Georgia*, *supra*. Because I cannot see how the Georgia Supreme Court's response to this Court's certification could constitutionally justify the imposition of the death penalty in this case, I must dissent.

I

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

379-671 O—83——13

Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, *supra*, at 231. Even if I believed that the death penalty could constitutionally be imposed under certain circumstances, however, I believe that respondent Stephens' sentence must be vacated and his case remanded to the Georgia state courts for resentencing.

II

In my opinion, remanding this case for resentencing is compelled by this Court's decisions upholding the constitutionality of the Georgia death penalty statute, and by well-recognized principles of appellate review. Therefore, whether or not the Georgia Supreme Court's construction of the statute in response to this Court's certification might avoid the constitutional infirmity inherent in respondent's sentence in some future case, it can do nothing to alter the fact that respondent's death sentence may have been based in part on consideration of an unconstitutional aggravating circumstance.

Under Georgia law, certification is appropriate "[w]hen it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State *which are determinative of said cause* and there are no clear controlling precedents in the appellate court decisions of this State." Ga. Code § 24–4536(a) (Supp. 1980) (emphasis added). The majority attempts to bring this case within the ambit of this certification procedure by indicating that "[i]t may be that . . . multiple findings of statutory aggravating circumstances are superflous, or . . . the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions." *Ante*, at 415. The majority then requests the Georgia Supreme Court to clarify "the premises of state law that support the conclusion that the death sentence in this case is not impaired

by the invalidity of one of the statutory aggravating circumstances found by the jury." *Ante*, at 416–417.

I wholeheartedly agree that we do not know the answers to these questions. The majority recognizes that we do not possess this information because "[t]he Georgia Supreme Court has never explained the rationale for its position" that a death sentence may be reaffirmed when one of the aggravating circumstances relied on by the jury is declared invalid. *Ante*, at 415. I submit, however, that we are not alone in our ignorance. There is absolutely no indication that the jury sentencing respondent to death or the judge who instructed that jury was any more aware of the answers to these questions than we are today. Indeed, by certifying these questions to the Georgia Supreme Court, the majority concedes that it was impossible for *anyone* to know the answers to these questions at the time respondent was sentenced to death, because "there are no controlling precedents" in Georgia on these issues. Given this Court's prior treatment of cases in which a defendant received a sentence, particularly a death sentence, on the basis of erroneous jury instructions, I do not understand how the Georgia Supreme Court's answer to the certified question could possibly be "determinative" of this case.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down death penalties imposed pursuant to a Georgia statute. Shortly thereafter, the Georgia Legislature enacted the current death penalty statute. This statute provides for a separate sentencing proceeding after the defendant has been found guilty of a capital offense. During the sentencing phase, the trial judge shall instruct the jury[1] to consider "any of the [10] statutory aggravating circumstances which may be supported by the evidence." Ga. Code § 27–2534.1(b) (1978). The aggravating circumstances found

[1] In bench trials, the judge must consider these factors.

by the judge to be warranted by the evidence are submitted to the jury in writing to be used during its deliberations. § 27-2534.1(c). If the jury recommends a death sentence, it "shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt." *Ibid.* Even if it finds that one or more aggravating circumstances has been established beyond a reasonable doubt, the jury is not required to impose the death penalty. See *Bowen* v. *State*, 241 Ga. 492, 246 S. E. 2d 322 (1978). The jury's verdict to impose the death penalty must be unanimous. *Miller* v. *State*, 237 Ga. 557, 229 S. E. 2d 376 (1976). The trial judge is bound by the jury's recommendation of sentence, whether that recommendation be life or death. Ga. Code §§ 26-3102, 27-2514 (1978).

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), this Court held that this statutory scheme satisfied the constitutional guaranty against cruel and unusual punishment. In reaching this conclusion, the two principal opinions relied heavily on the fact that the aggravating circumstances served to guide the jury's discretion. The joint opinion announcing the judgment of the Court emphasized that because "the members of a jury will have had little, if any, previous experience in sentencing," *id.*, at 192 (opinion of Stewart, POWELL, and STEVENS, JJ.), they should be given specific standards to guide their sentencing deliberations, such as those provided in the Model Penal Code, which catalogs "'the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other*'" by the jury. *Id.*, at 193 (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (emphasis in original). That opinion found that the new Georgia statute satisfied this requirement because, through the statutory aggravating circumstances, "[t]he new Georgia sentencing procedures . . . *focus the jury's attention* on the particularized nature of the crime and the particularized characteristics of the individual defendant." 428 U. S., at 206 (emphasis added). JUSTICE WHITE,

joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, concurring in the judgment, placed an even stronger emphasis on the role of the statutory aggravating circumstances:

> "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute . . . . As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate *as they are in Georgia by reason of the aggravating-circumstance requirement*, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined." *Id.*, at 222 (first emphasis added).

In *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion of Stewart, J., joined by BLACKMUN, POWELL, and STEVENS, JJ.), this Court reaffirmed the role of aggravating circumstances in protecting against the arbitrary imposition of the death penalty. The *Godfrey* Court addressed the constitutionality of a death sentence imposed in reliance on aggravating circumstance § (b)(7), which allows a jury to impose the death sentence if it finds that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7) (1978).

The plurality opinion found: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U. S., at 428–429. Section (b)(7), if construed broadly enough to encompass every murder, would

be unconstitutional because it provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 433. The plurality found it significant that this interpretation of § (b)(7) "may . . . have been one to which the members of the jury in this case subscribed," and that, if the jury did hold this view "their preconceptions were not dispelled by the trial judge's sentencing instructions." *Id.*, at 429. Therefore, the jury was not given appropriate guidance, and the death sentence could not constitutionally be imposed.

In my view, this reasoning requires that respondent's death sentence be vacated and that this case be remanded so he can be resentenced by a properly instructed jury. It is conceded that the jury in this case was instructed on an aggravating circumstance that the Georgia Supreme Court has since declared unconstitutional. If this were the only aggravating circumstance found by the jury, it is also undisputed that the State would be unable to impose the death sentence, see *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976), even if the Georgia Supreme Court determined that the evidence supported a finding of other statutory aggravating circumstances. Cf. *Presnell* v. *Georgia*, 439 U. S. 14, 16 (1978). Petitioner argues, however, because the jury found two other statutory aggravating circumstances that the Georgia Supreme Court found to be supported by the evidence, that court could reaffirm the death sentence. This argument flies in the face of the reasoning of the *Godfrey* plurality which found it crucial that the *jury's* decision to impose the death sentence be guided by clear and appropriate instructions.

Moreover, this argument is patently contrary to the settled principle that "if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside." 631 F. 2d 397, 406 (CA5 1980) (case below); see *Stromberg* v.

California, 283 U. S. 359 (1931). Since 1931, this Court has consistently declined to speculate about whether a particular jury would have reached the same conclusion in the absence of an unconstitutional instruction. See, *e. g.*, *id.*, at 367–368. Accord, *Bachellar* v. *Maryland*, 397 U. S. 564, 570–571 (1970); *Street* v. *New York*, 394 U. S. 576, 585–588 (1969); *Yates* v. *United States*, 354 U. S. 298, 311–312 (1957). In light of this Court's consistent recognition that "the penalty of death is qualitatively different from a sentence of imprisonment," *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1980) (opinion of Stewart, POWELL, and STEVENS, JJ.); see, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 117–118 (1982) (O'CONNOR, J., concurring), there is certainly no reason to engage in such speculation here. Yet, the jury is not *required* to recommend death even if it finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Therefore, to adopt the bald pronouncement that "[w]here two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death thereon," *Gates* v. *State*, 244 Ga. 587, 599, 261 S. E. 2d 349, 358 (1979), we would have to speculate that the jury's decision to impose the death penalty was not influenced by the presence of the unconstitutional aggravating circumstance.[2]

Recognizing that settled law normally requires that sentences arguably imposed on the basis of unconstitutional instructions cannot stand, petitioner and several States in an

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[2] To date, the majority of state courts that have confronted this issue have declined to speculate whether the jury would still have returned a death sentence in the absence of the subsequently invalidated aggravating circumstance. See, *e. g.*, *Williams* v. *State*, 274 Ark. 9, 11–13, 621 S. W. 2d 686, 687–688 (1981); *State* v. *Irwin*, 304 N. C. 93, 106–108, 282 S. E. 2d 439, 448–449 (1981); *State* v. *Moore*, 614 S. W. 2d 348, 351–352 (Tenn. 1981); *Hopkinson* v. *State*, 632 P. 2d 79, 171–172 (Wyo. 1981). See also *Cook* v. *State*, 369 So. 2d 1251, 1255–1257 (Ala. App. 1979).

amicus curiae brief[3] attempt to distinguish the *Stromberg* line of cases by arguing that, as a matter of statutory construction, a jury's finding that 1 of the 10 aggravating circumstances has been established beyond a reasonable doubt is irrelevant to its ultimate conclusion that the death penalty should be imposed. Specifically, petitioner argues that the term "aggravating circumstance" actually has *two* entirely different meanings, with each meaning representing a separate task that a capital sentencing jury must perform. First, the jury must determine whether any of the 10 statutory "aggravating circumstances" has been established beyond a reasonable doubt. This, petitioner argues, is a threshold determination that only allows the jury to *consider* the death penalty, but has no impact on whether that penalty should be imposed. After reaching this threshold determination, the jury may consider any "evidence in aggravation" or mitigation in reaching its conclusion as to whether the dealth penalty *should* be imposed. According to petitioner, the jury performs this second task free of any influence from the very "legislative guidelines" that, by "focus[ing] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant," prevent the death penalty from being wantonly and freakishly imposed. *Gregg* v. *Georgia*, 428 U. S., at 206–207 (joint opinion of Stewart, POWELL, and STEVENS, JJ.).

Putting to one side both the plausibility and the constitutionality of petitioner's construction of the Georgia death penalty statute,[4] it is patently obvious that this *ex post facto* at-

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[3] The States of Alabama, California, Florida, Missouri, North Carolina, South Carolina, and Utah submitted an *amicus* brief on behalf of petitioner. It is interesting to note that the appellate courts of Alabama and North Carolina have already implicitly rejected the construction now urged by these States as *amici*. See n. 2, *supra*.

[4] In my view, if the Georgia Supreme Court adopted this interpretation of the death penalty statute, it would raise serious questions as to the constitutionality of this statute under *Gregg*.

tempt to avoid the clear mandate of *Stromberg* cannot possibly remedy the constitutional infirmity of respondent's sentence. This conclusion is compelled by this Court's decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). In *Sandstrom*, a defendant was convicted of "deliberate homicide," which, under Montana law, required the State to prove that he "purposefully or knowingly" caused the death of the victim. *Id.*, at 512. At the close of all the evidence, the judge instructed the jury that "'[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.'" *Id.*, at 513. The defendant objected to this instruction on the ground that it unconstitutionally shifted the burden of proof on the issue of intent. On direct appeal, the Montana Supreme Court conceded that shifting the burden of proof in a criminal case was unconstitutional. It nevertheless upheld the challenged instruction on the ground that under its interpretation, the instruction only shifted the burden of production rather than the burden of persuasion. *Id.*, at 513–514. In the proceedings before this Court, the State argued that the Montana Supreme Court's interpretation of the effect of the presumption was conclusive on this Court. *Id.*, at 516.

This Court unanimously[5] rejected the State's attempt to avoid the constitutional issue by the use of a *post hoc* narrowing construction by the State's highest court. While acknowledging that "[t]he Supreme Court of Montana is . . . the final authority on the legal weight to be given a presumption under Montana law, . . . *it is not the final authority on the interpretation which a jury could have given the [challenged] instruction.*" *Id.*, at 516–517 (emphasis added). Instead, this Court defined the relevant question as whether "a reasonable juror could well have been misled by the instruction." *Id.*, at 517. Even assuming the constitutionality of the Montana Supreme Court's interpretation of the pre-

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[5] JUSTICE REHNQUIST joined by THE CHIEF JUSTICE filed a separate opinion concurring in both the judgment and the opinion of the Court.

sumption, an interpretation that this Court conceded might have been in the minds of "some jurors," the fact that "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that *Sandstrom's jurors* actually did proceed upon one or the other of these latter interpretations." *Id.*, at 519 (emphasis added). "Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption . . . , or a conclusive presumption," *id.*, at 524, this Court held the instruction unconstitutional and remanded the case to the state courts for proceedings not inconsistent with the opinion.[6]

In my view, the case presently before the Court presents even a stronger case for rejecting the relevance of an *ex post facto* saving construction. By certifying this question to the Georgia Supreme Court, the majority concedes that this construction has never been explicitly adopted by the Georgia courts. It must also be acknowledged that petitioner's interpretation of the jury's role under the Georgia law is not the only, or even the most plausible, construction of the death penalty statute. A "reasonable juror" could fairly conclude

[6] The *Sandstrom* Court also rejected the State's argument that the jury need not have relied on the challenged instruction in finding Sandstrom guilty of intentional murder. The State reasoned that because the tainted instruction could arguably be viewed as only relating to the defendant's "purpose," the jury might have convicted Sandstrom solely on the ground that he "knowingly" caused the death of the victim. Because the statute only requires that the crime be committed "purposefully *or* knowingly," the State argued that there was an alternative basis on which the conviction could be sustained. 442 U. S., at 525. Relying on *Stromberg* v. *California*, 283 U. S. 359 (1931), this Court refused to engage in such speculation, since "even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." 442 U. S., at 526 (emphasis in original). There is similarly no way to tell whether respondent's jury adopted the Georgia Supreme Court's yet undisclosed interpretation of the Georgia death penalty statute.

that he or she was required to place special emphasis on the existence of statutory aggravating circumstances, and weigh them against each other and against any mitigating circumstances, when deciding whether or not to impose the death penalty. Cf. *Godfrey* v. *Georgia*, 446 U. S., at 428–429. Certainly several Members of this Court have operated under this assumption. See *Gregg* v. *Georgia*, 428 U. S., at 197–198, 221–222; *Godfrey* v. *Georgia*, *supra*, at 436–437 (MARSHALL, J., concurring in judgment); *Drake* v. *Zant*, 449 U. S. 999, 1001 (1980) (Stewart, J., dissenting from denial of certiorari).

If respondent's jury subscribed to this interpretation of their role, "their preconceptions were not dispelled by the trial judge's sentencing instructions." *Godfrey*, *supra*, at 429. Indeed, everything about the judge's charge highlighted the importance of the aggravating circumstances. Not only were the circumstances submitted to the jury in writing, but also the jury was in turn required to write down each and every aggravating circumstance that it found to be established beyond a reasonable doubt. See Ga. Code § 27–2534.1(c) (1978) discussed *supra*, at 420. The jury instructions provide absolutely no indication that, after carefully considering each of the statutory aggravating circumstances submitted by the trial judge, the jury should, or even could, discard this list of officially sanctioned grounds for imposing the death penalty in deciding whether to actually sentence respondent to death.

Absent even a shred of evidence that respondent's trial judge and jury were cognizant of petitioner's asserted construction of the Georgia death penalty statute, a construction never acknowledged by any Georgia appellate court, we can only speculate whether "the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." 631 F. 2d, at 406. It is precisely to guard against such speculation that this Court has uniformly re-

fused to uphold a conviction or sentence that might have been based even in part on an unconstitutional ground.[7] See *supra*, at 423. Furthermore, in *Gregg* v. *Georgia*, *supra*, at 189, this Court made clear that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." See also *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because nothing the Supreme Court of Georgia can say in response to this Court's certification will assure us that *respondent's jury* was "suitably directed,"[8] I must dissent.

JUSTICE POWELL, dissenting.

I am in essential agreement with the views expressed by JUSTICE MARSHALL in Part II of his dissenting opinion, and

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[7] It is irrelevant whether the jury's determination was only partially based on the presence of the unconstitutional aggravating circumstance. As this Court held in *Street* v. *New York*, 394 U. S. 576 (1969), "even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on [an unconstitutional ground], we are still bound to reverse if the conviction could have been based upon *both*" an unconstitutional and a constitutional ground. *Id.*, at 587 (emphasis in original).

[8] The majority's implication that certifying this case will give the Georgia Supreme Court an opportunity to clarify whether it has the power to "assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions," *ante*, at 415, does not alter my conclusion. In affirming respondent's death sentence, the Georgia Supreme Court did not purport to exercise such authority. Nor did the State argue that such action by the Georgia Supreme Court was permissible in the proceedings before this Court. Indeed, prior to this Court's action today, it has always been assumed that "only the trier of fact may impose a death sentence." *Willis* v. *Balkcom*, 451 U. S. 926, 928 (1981) (MARSHALL, J., joined by BRENNAN and Stewart, JJ., dissenting from denial of certiorari). In any event, a "reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law." *Godfrey* v. *Georgia*, 446 U. S. 420, 437 (1980) (MARSHALL, J., concurring in judgment).

with his conclusion that the death sentence was imposed under instructions that could have misled the jury. I would not hold, however, that the case must be remanded for resentencing *by a jury*.

The Court of Appeals for the Fifth Circuit simply reversed and remanded, thus leaving it to the Georgia Supreme Court to determine whether resentencing by a jury is required in this case. It may be that under Georgia law the State Supreme Court lacks authority to resentence. If that should be the case, I would leave open—also for the Supreme Court of Georgia to decide—whether it has authority to find that the instruction was harmless error beyond a reasonable doubt.

O'DELL ET AL. *v.* ESPINOZA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ESPINOZA AND AS GUARDIAN, ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 81-534. Argued April 26, 1982—Decided May 3, 1982

Certiorari dismissed for want of jurisdiction. Reported below: —— Colo. ——, 633 P. 2d 455.

Theodore S. Halaby argued the cause for petitioners. With him on the briefs were *Louis B. Bruno* and *David Neil.*

Scott H. Robinson argued the cause and filed a brief for respondents.*

PER CURIAM.

Under 28 U. S. C. § 1257, this Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Because the Colorado Supreme Court remanded this case for trial, its decision is not final "as an effective determination of the litigation." *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U. S. 548, 551 (1945). Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

It is so ordered.

**Charles S. Sims, Leon Friedman, Christopher A. Hansen,* and *Anthony F. Renzo* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

FINNEGAN ET AL. v. LEU ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-2150. Argued February 24, 1982—Decided May 17, 1982

Sections 101(a)(1) and (2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (Act) guarantee equal voting rights and rights of free speech and assembly to "[e]very member of a labor organization," and § 609 of Title VI makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled" under the Act. Section 102 provides that any person whose rights under Title I have been infringed by any violation thereof may bring an action in federal district court for appropriate relief. Petitioners were discharged from their appointed positions as business agents for respondent local union by respondent union president following his election over a candidate supported by petitioners. Petitioners were also members of the union, and their discharges did not render them ineligible to continue union membership. Petitioners filed suit against respondents in Federal District Court alleging that their discharges violated §§ 101(a)(1) and (2). The District Court granted summary judgment for respondents, holding that the Act does not protect a union employee from discharge by the union president if the employee's rights as a union member are not affected. The Court of Appeals affirmed.

Held: Petitioners have failed to establish a violation of the Act. Pp. 435–442.

(a) It is apparent both from the language of §§ 101(a)(1), (2), and 609, and from Title I's legislative history, that Congress sought to protect rank-and-file union members, not the job security or tenure of union officers or employees as such. Pp. 435–437.

(b) The term "discipline," as used in § 609, refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union. The disciplinary sanctions of fine, suspension, and expulsion enumerated in § 609 are all punitive actions taken against union members as members. In contrast, discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they also happen to be union employees. Moreover, Congress used essentially the same language elsewhere in the Act with the specific intent not to protect a member's status as a union employee or officer. Accordingly, removal from appointive union em-

ployment is not within the scope of the union sanctions explicitly prohibited by § 609. Pp. 437–439.

(c) Petitioners were not prevented from exercising their rights under §§ 101(a)(1) and (2) as union members to campaign for respondent union president's opponent and to vote in the union election, and they allege only an *indirect* interference with those rights. Whatever limits Title I places on a union's authority to utilize dismissal from union office as part of an attempt to suppress dissent within the union, it does not restrict the freedom of an elected union leader to choose staff members whose views are compatible with his own. Neither the language nor legislative history of the Act suggests that it was intended to address the issue of union patronage, its overriding objective being rather to ensure that unions would be democratically governed and responsive to the union membership's will as expressed in open elections. Pp. 439–442.

652 F. 2d 58, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 442.

Samuel G. Bolotin argued the cause and filed a brief for petitioners.

Ted Iorio argued the cause for respondents. With him on the brief was *Jack Gallon* and *Jeffrey Julius*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the discharge of a union's appointed business agents by the union president, following his election over the candidate supported by the business agents, violated the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C.

**Alan Hyde* and *Paul Alan Levy* filed a brief for the Association for Union Democracy et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll*, *Marsha Berzon*, and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Amy Gladstein* and *James Reif* for the National Labor Law Center of the National Lawyers Guild.

§ 401 *et seq.* The Court of Appeals held that the Act did not protect the business agents from discharge. We granted certiorari to resolve Circuit conflicts,[1] 454 U. S. 813 (1981), and we affirm.

I

In December 1977, respondent Harold Leu defeated Omar Brown in an election for the presidency of Local 20 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization representing workers in a 14-county area of northwestern Ohio.[2] During the vigorously contested campaign, petitioners, then business agents of Local 20, openly supported the incumbent president, Brown. Upon assuming office in January 1978, Leu discharged petitioners and the Local's other business agents, all of whom had been appointed by Brown

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[1] See, *e. g.*, *Lamb* v. *Miller*, —— U. S. App. D.C. ——, 660 F. 2d 792 (1981); *Maceira* v. *Pagan*, 649 F. 2d 8 (CA1 1981); *Newman* v. *Local 1101, Communications Workers*, 570 F. 2d 439 (CA2 1978); *Bradford* v. *Textile Workers Local 1093*, 563 F. 2d 1138 (CA4 1977); *Gabauer* v. *Woodcock*, 520 F. 2d 1084 (CA8 1975), cert. denied, 423 U. S. 1061 (1976); *Wambles* v. *International Brotherhood of Teamsters*, 488 F. 2d 888 (CA5 1974); *Wood* v. *Dennis*, 489 F. 2d 849 (CA7 1973) (en banc), cert. denied, 415 U. S. 960 (1974); *Grand Lodge of International Assn. of Machinists* v. *King*, 335 F. 2d 340 (CA9), cert. denied, 379 U. S. 920 (1964); *Sheridan* v. *Carpenters Local No. 626*, 306 F. 2d 152 (CA3 1962).

[2] Brown challenged the election results and, following an investigation, the Secretary of Labor determined that unlawful employer contributions had affected the outcome of the election. The Secretary filed suit in the United States District Court for the Northern District of Ohio, and that court ordered a rerun election under the Secretary's supervision; the Court of Appeals for the Sixth Circuit affirmed. *Marshall* v. *Local 20, Teamsters*, 611 F. 2d 645 (1979). In the second election, Leu again defeated Brown.

Brown and Leu had previously opposed each other in the 1974 election for the presidency. Although Leu defeated Brown by a slight margin, the election was set aside by the International Union because of irregularities at the polling places. Brown won the second election, which was held in 1975 under the supervision of a panel from the International Union.

379-671 O—83——14

following his election in 1975.[3] Leu explained that he felt the agents were loyal to Brown, not to him, and therefore would be unable to follow and implement his policies and programs.

Local 20's bylaws—which were adopted by, and may be amended by, a vote of the union membership—provide that the president shall have authority to appoint, direct, and discharge the Union's business agents. Bylaws of Teamsters, Chauffers, Warehousemen and Helpers Union Local No. 20, Art. IX, § 3 D, Joint Exhibit 1, p. 15 (1975). The duties of the business agents include participation in the negotiating of collective-bargaining agreements, organizing of union members, and processing of grievances. In addition, the business agents, along with the president, other elected officers, and shop stewards, sit as members of the Stewards Council, the legislative assembly of the Union. Petitioners had come up through the union ranks, and as business agents they were also members of Local 20. Discharge from their positions as business agents did not render petitioners ineligible to continue their union membership.

Petitioners filed suit in the United States District Court, alleging that they had been terminated from their appointed positions in violation of the Labor-Management Reporting and Disclosure Act, 29 U. S. C. §§ 411(a)(1), 411(a)(2), 412, and 529. The District Court granted summary judgment for respondents Leu and Local 20, holding that the Act does not protect a union employee from discharge by the president of the union if the employee's rights as a union member are not affected. *Navarro* v. *Leu*, 469 F. Supp. 832 (1979). The United States Court of Appeals for the Sixth Circuit affirmed, concluding "that a union president should be able to work with those who will cooperate with his program and carry out his directives, and that these business agents, who

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[3] When Brown was elected president in 1975, see n. 2, *supra*, the incumbent business agents resigned.

served at the pleasure of the union president, and actively supported the president's opponent could be removed from their employment as union business agents." App. to Pet. for Cert. A3.

II

The Labor-Management Reporting and Disclosure Act of 1959 was the product of congressional concern with widespread abuses of power by union leadership. The relevant provisions of the Act had a history tracing back more than two decades in the evolution of the statutes relating to labor unions. Tensions between union leaders and the rank-and-file members and allegations of union wrongdoing led to extended congressional inquiry. As originally introduced, the legislation focused on disclosure requirements and the regulation of union trusteeships and elections. However, various amendments were adopted, all aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution; not surprisingly, these amendments—ultimately enacted as Title I of the Act, 29 U. S. C. §§ 411–415—were introduced under the title of "Bill of Rights of Members of Labor Organizations."[4] The amendments placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in

[4] The original "Bill of Rights" amendment was introduced on the floor of the Senate by Senator McClellan and adopted by a vote of 47–46. 105 Cong. Rec. 6469–6493 (1959), 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1096–1119 (1959) (hereafter Leg. Hist.). However, a compromise version of the amendment introduced by Senator Kuchel was substituted shortly thereafter, 105 Cong. Rec. 6716–6727 (1959), 2 Leg. Hist. 1229–1239, and later approved by the House of Representatives as part of the Landrum-Griffin bill, H. R. 8400, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. 628–633. See 105 Cong. Rec. 15711, 15859–15860, 1692–1702 (1959), 2 Leg. Hist. 1645, 1691–1692, 1693–1702.

turn loss of livelihood. Such protection was necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of their memberships. See 105 Cong. Rec. 6471–6472, 6476 (1959), 2 Leg. Hist. 1098–1099, 1103; 105 Cong. Rec. 15530 (1959), 2 Leg. Hist. 1566.

Sections 101(a)(1) and (2) of the Act, 29 U. S. C. §§ 411(a)(1) and (2), on which petitioners rely, guarantee equal voting rights, and rights of speech and assembly, to "[e]very *member* of a labor organization" (emphasis added).[5] In addition, § 609 of the Act, 29 U. S. C. § 529, renders it unlawful for a union or its representatives "to fine, suspend, expel, or otherwise discipline any of its *members* for exercising any right to which he is entitled under the provisions of this Act." (Emphasis added.)[6] It is readily apparent, both from the

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[5] Section 101(a)(1) provides:

"Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Section 101(a)(2) provides:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

[6] Section 609 provides:

"It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its

language of these provisions and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect.[7]

Petitioners held a dual status as both employees and members of the Union. As *members* of Local 20, petitioners undoubtedly had a protected right to campaign for Brown and support his candidacy. At issue here is whether they were thereby immunized from discharge at the pleasure of the president from their positions as appointed union *employees*.

III

Petitioners contend that discharge from a position as a union employee constitutes "discipline" within the meaning of § 609; and that termination of union employment is therefore unlawful when predicated upon an employee's exercise of rights guaranteed to members under the Act. However, we conclude that the term "discipline," as used in § 609, refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union. Section 609 speaks in terms of disciplining "members"; and the three disciplinary sanctions specifically enumerated—fine, suspension, and expulsion—are all punitive actions taken against union mem-

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members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section."

[7] The provisions of Title I consistently refer to the rights of union "members." As originally passed by the Senate, § 101(a)(4)—which in its present form protects the right of "any member" to institute legal proceedings against the union, 29 U. S. C. § 411(a)(4)—applied to "any member *or officer*" of a labor organization (emphasis added). S. 1555, 86th Cong., 1st Sess., § 101(a)(4) (1959), 1 Leg. Hist. 520. However, the words "or officer" were deleted from the Landrum-Griffin bill, H. R. 8400, 86th Cong., 1st Sess., § 101(a)(4) (1959), 1 Leg. Hist. 630–631, and the House version was retained in Conference, see H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 31 (1959), 1 Leg. Hist. 935. See also *Sheridan* v. *Carpenters Local No. 626*, 306 F. 2d, at 156–157.

bers as members.[8] In contrast, discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they happen also to be union employees. See *Sheridan* v. *Carpenters Local No. 626*, 306 F. 2d 152, 156 (CA3 1962). We discern nothing in § 609, or its legislative history, to support petitioners' claim that Congress intended to establish a system of job security or tenure for appointed union employees.

Congress used essentially the same language elsewhere in the Act with the specific intent not to protect a member's status as a union employee or officer. Section 101(a)(5), 29 U. S. C. § 411(a)(5), states that "[n]o member of any labor organization may be fined, suspended, expelled, or otherwise disciplined" without enumerated procedural protections. The Conference Report accompanying S. 1555 as finally enacted, H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 31 (1959), 1 Leg. Hist. 935, explains that this "prohibition on suspension without observing certain safeguards applies only to suspension of membership in the union; *it does not refer to suspension of a member's status as an officer of the union*" (emphasis added). This too is a persuasive indication that the virtually identical language in § 609 was likewise meant to refer only to punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee.[9]

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[8] Compare § 201(a)(5)(H) of the Act, 29 U. S. C. § 431(a)(5)(H), which requires reporting on the procedures for "discipline *or removal* of *officers or agents* for breaches of their trust" (emphasis added).

[9] In *Grand Lodge of International Assn. of Machinists* v. *King*, 335 F. 2d, at 344, the court held that Congress had used the "identical words . . . with quite different meanings" in the two sections. The court found that the "legislative gloss" on the words "otherwise disciplined" in § 101(a)(5) stemmed primarily from congressional concern that "wrongdoing union officials"—and particularly those guilty of misappropriating union funds—might be permitted "to remain in control while the time-consuming 'due process' requirements of the section were met." *Id.*, at 341–342. See 105

We hold, therefore, that removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609.

IV

Our analysis is complicated, however, by the fact that § 102, 29 U. S. C. § 412, provides independent authority for a suit against a union based on an alleged violation of Title I of the Act. Section 102 states that

> "[a]ny person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

Although the intended relationship between §§ 102 and 609 is not entirely clear, it seems evident that a litigant may maintain an action under § 102—to redress an "infringement" of "rights secured" under Title I—without necessarily stating a violation of § 609.[10]

Cong. Rec. 17899 (1959) (remarks of Sen. Kennedy). However, viewing this concern as inapplicable with regard to § 609, the court concluded that "although Congress did not intend the words 'otherwise discipline' to include removal from union office in section 101(a)(5), it did intend the words to include such action in section 609." 335 F. 2d, at 345. See also *Maceira* v. *Pagan*, 649 F. 2d, at 14; *Wood* v. *Dennis*, 489 F. 2d, at 853–854.

We agree that the purposes of the two sections are different, and that the distinction drawn in *King* is one Congress plausibly could have chosen to make. However, we are hard pressed to discern any such distinction from either the language or legislative history of the Act. Certainly one would expect that if Congress had intended identical language to have substantially different meanings in different sections of the same enactment it would have manifested its intention in some concrete fashion. See *Wood* v. *Dennis*, *supra*, at 858 (Stevens, J., concurring in result).

[10] Section 609, of course, applies to disciplinary action taken in retaliation for the exercise of *any* right secured under the Act, whereas § 102 protects only rights secured by Title I. Although the two sections may be somewhat duplicative as regards union discipline imposed in retaliation for the exercise of Title I rights, this seems due in large part to the fact that the

The question still remains, however, whether petitioners' "rights secured" under Title I were "infringed" by the termination of their union employment. Petitioners, as union members, had a right under §§ 101(a)(1) and (2) to campaign for Brown and to vote in the union election, but they were not prevented from exercising those rights. Rather, petitioners allege only an *indirect* interference with their membership rights, maintaining that they were forced to "choos[e] between their rights of free expression . . . and their jobs." See *Retail Clerks Union Local 648* v. *Retail Clerks International Assn.*, 299 F. Supp. 1012, 1021 (DC 1969).

We need not decide whether the retaliatory discharge of a union member from union office—even though not "discipline" prohibited under § 609—might ever give rise to a cause

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provisions derived from different sources and were originally intended to serve quite different purposes. Section 102 was first included as part of the so-called Kuchel Amendment, see n. 4, *supra*, and was designed to enforce the provisions of Title I by creating an individual right of action for union members. 105 Cong. Rec. 6719 (1959), 2 Leg. Hist. 1232. In contrast, the precursor of § 609 created *criminal* penalties for retaliatory discipline, and was included in the Senate bill prior to the addition of the bill of rights, see S. 1555, 86th Cong., 1st Sess., § 506 (1959) (as reported), 2 Leg. Hist. 390; it apparently was thought to be primarily applicable to violations of the election provisions. See 105 Cong. Rec. 6534 (1959), 2 Leg. Hist. 1140; Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 199, 218 (1960). The Landrum-Griffin bill retained this provision, but "temper[ed] the remedy," 105 Cong. Rec. 15531 (1959), 2 Leg. Hist. 1567 (remarks of Rep. Griffin), providing for civil enforcement by the Secretary of Labor instead of criminal sanctions. H. R. 8400, 86th Cong., 1st Sess., § 609 (1959), 1 Leg. Hist. 676. Finally, one day before passage of the Landrum-Griffin bill, § 609 was amended to authorize private suits, by making "[t]he provisions of section 102 . . . applicable in the enforcement of this section." The amendment was promoted by Congressmen who thought that enforcement by the Secretary would lead to "unnecessary injection of the executive branch on the Federal level into law enforcement matters," 105 Cong. Rec. 15830 (1959), 2 Leg. Hist. 1662 (remarks of Rep. Cramer). See Rothman, *supra*, at 219.

of action under § 102. For whatever limits Title I places on a union's authority to utilize dismissal from union office as "part of a purposeful and deliberate attempt . . . to suppress dissent within the union," cf. *Schonfeld* v. *Penza*, 477 F. 2d 899, 904 (CA2 1973), it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own.[11] Indeed, neither the language nor the legislative history of the Act suggests that it was intended even to address the issue of union patronage.[12] To the contrary, the Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. See *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 497 (1968). Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.

Here, the presidential election was a vigorous exercise of the democratic processes Congress sought to protect. Petitioners—appointed by the defeated candidate—campaigned openly against respondent Leu, who was elected by a substantial margin. The Union's bylaws, adopted, and subject to amendment, by a vote of the union membership, grant the president plenary authority to appoint, suspend, discharge, and direct the Union's business agents, who have sig-

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[11] We leave open the question whether a different result might obtain in a case involving nonpolicymaking and nonconfidential employees.

[12] We think it virtually inconceivable that Congress would have prohibited the long-standing practice of union patronage without any discussion in the legislative history of the Act. See *Wood* v. *Dennis*, 489 F. 2d, at 858 (Stevens, J., concurring in result). Had such a result been contemplated, it undoubtedly would have encountered substantial resistance. Moreover, Congress likely would have made some express accommodation to the needs of union employers to appoint and remove policymaking officials. See *ibid.*

nificant responsibility for the day-to-day conduct of union affairs. Nothing in the Act evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies.

No doubt this poses a dilemma for some union employees; if they refuse to campaign for the incumbent they risk his displeasure, and by supporting him risk the displeasure of his successor. However, in enacting Title I of the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union *members* from arbitrary action by the union or its officers.

We therefore conclude that petitioners have failed to establish a violation of the Act. Accordingly, the decision of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

I am not prepared to hold that a newly elected president of a local union may discipline, without violating the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. § 401 *et seq.*, and as a matter of retaliation, *all* union member-employees who opposed his candidacy. As the Court notes, a union member possesses, under the Act, rights to freedom of expression and of speech and assembly, *ante*, at 436–437, and a right to support the candidate of his choice.

I must assume that what the Court holds today is that the newly elected president may discharge the union's appointed business agents and other appointed union member-employees who will be instrumental in evolving the president's ad-

ministrative policies. See *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Branti* v. *Finkel*, 445 U. S. 507 (1980). Indeed, the Court uses the terms "staff," *ante*, at 441, and "his own administrators," *ibid.* In addition, this particular union's bylaws expressly give the president plenary authority over the business agents. With that much, I have no difficulty.

On the understanding, but only on the understanding, that the Court by its opinion is not reaching out further to decide the same issue with respect to nonpolicymaking employees, that is, rank-and-file member-employees (a matter which, for me, presents another case for another day), I join the Court's opinion.

GREENE ET AL. *v.* LINDSEY ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-341. Argued February 23, 1982—Decided May 17, 1982

A Kentucky statute permits service of process in forcible entry and detainer actions to be made by posting a summons "in a conspicuous place on the premises," if the defendant or a member of the defendant's family over 16 years of age cannot be found on the premises. Service of process under this statute was made on appellee tenants in a public housing project by posting summonses on the doors of each of their apartments. Appellees claim that they never saw the summonses and did not know of the eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them and their opportunity for appeal had lapsed. They then filed a class action in Federal District Court against appellant public officials, seeking declaratory and injunctive relief under 42 U. S. C. § 1983 and alleging that the notice procedures employed violated the Due Process Clause of the Fourteenth Amendment. The District Court granted summary judgment for appellants, holding that such notice procedures did not deny due process. The Court of Appeals reversed.

Held: In failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State deprived them of property without due process of law required by the Fourteenth Amendment. Pp. 449–456.

(a) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314. Pp. 449–450.

(b) In light of the fact that appellees were deprived of a significant interest in property and, indeed, of the right to continued residence in their homes, it does not suffice to recite that because the action was *in rem*, it was only necessary to serve notice "upon the thing itself." The sufficiency of the notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. Pp. 450–451.

(c) Notices posted on the doors of tenants' apartments were "not infrequently" removed before they could be seen by the tenants. What-

ever the efficacy of posting notice on a door of a person's home in many cases, it is clear that, in the circumstances of this case, merely posting notice on the apartment door did not satisfy minimum standards of due process. Pp. 453–454.

(d) Neither the statute nor the practice of process servers provides for even a second attempt at personal service. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be constitutionally adequate. P. 454.

(e) Notice by mail in the circumstances of this case would go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense. Pp. 455–456.

649 F. 2d 425, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 456.

William L. Hoge III argued the cause and filed a brief for appellants.

Robert Frederick Smith argued the cause for appellees. With him on the brief was *Barry L. Master*.*

JUSTICE BRENNAN delivered the opinion of the Court.

A Kentucky statute provides that in forcible entry and detainer actions, service of process may be made under certain circumstances by posting a summons on the door of a tenant's apartment. The question presented is whether this statute, as applied to tenants in a public housing project, fails to afford those tenants the notice of proceedings initiated against them required by the Due Process Clause of the Fourteenth Amendment.

**Lynn E. Cunningham* filed a brief for the Antioch School of Law et al. as *amici curiae* urging affirmance.

David M. Madway filed a brief for the National Housing Law Project as *amicus curiae*.

I

Appellees Linnie Lindsey, Barbara Hodgens, and Pamela Ray are tenants in a Louisville, Ky., housing project. Appellants are the Sheriff of Jefferson County, Ky., and certain unnamed Deputy Sheriffs charged with responsibility for serving process in forcible entry and detainer actions. In 1975, the Housing Authority of Louisville initiated detainer actions against each of appellees, seeking repossession of their apartments. Service of process was made pursuant to Ky. Rev. Stat. § 454.030 (1975), which states:

> "If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court."

In each instance, notice took the form of posting a copy of the writ of forcible entry and detainer on the door of the tenant's apartment.[1] Appellees claim never to have seen these posted summonses; they state that they did not learn of the

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[1] "Posting" refers to the practice of placing the writ on the property by use of a thumbtack, adhesive tape, or other means. App. 74, 77 (deposition of process servers). Appellants describe the usual method of effecting service pursuant to § 454.030 in the following terms:

"The officer of the court who is charged with serving notice in a forcible entry and detainer action, usually a Jefferson County Deputy Sheriff, takes the following steps in notifying a tenant. First, the officer goes to the apartment in an effort to effectuate personal in-hand service. Second, if the named tenant is absent or will not appear at the door, personal in-hand service is made on any member of the tenant's family over sixteen years of age. Finally, if no one answers the door, a copy of the notice is posted on the premises, usually the door." Brief for Appellants 3.

eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them, and after their opportunity for appeal had lapsed.

Thus without recourse in the state courts, appellees filed this suit as a class action in the United States District Court for the Western District of Kentucky, seeking declaratory and injunctive relief under 42 U. S. C. § 1983. They claimed that the notice procedure employed as a predicate to these eviction proceedings did not satisfy the minimum standards of constitutionally adequate notice described in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and that the Commonwealth of Kentucky had thus failed to afford them the due process of law guaranteed by the Fourteenth Amendment. Named as defendants were the Housing Authority of Louisville, several public officials charged with responsibility over particular Louisville public housing projects, Joseph Greene, the Jefferson County Sheriff, and certain known and unknown Deputy Sheriffs.

On cross-motions for summary judgment, the District Court granted judgment for appellants. In an unreported opinion, the court noted that some 70 years earlier, in *Weber* v. *Grand Lodge of Kentucky, F. & A. M.*, 169 F. 522 (1909), the Court of Appeals for the Sixth Circuit had held that constructive notice by posting on the door of a building, pursuant to the predecessor statute to § 454.030, provided an adequate constitutional basis upon which to commence an eviction action, on the ground that it was reasonable for the State to presume that a notice posted on the door of the building in dispute would give the tenant actual notice in time to contest the action. Although the District Court recognized that "conditions have changed since the decision in *Weber* . . . and . . . that there is undisputed testimony in this case that notices posted on the apartment doors of tenants are often removed by other tenants," App. 41–42, the court nevertheless concluded that the procedures employed did not deny due

process in light of the fact "that posting only comes into play after the officer directed to serve notice cannot find the defendant on the premises," *id.*, at 42.

The Court of Appeals for the Sixth Circuit reversed the grant of summary judgment in favor of appellants and remanded the case for further proceedings. 649 F. 2d 425 (1981). Acknowledging that its decision in *Weber* directed a contrary result, the Court of Appeals examined the doctrinal basis of that decision, and concluded that it rested in part on distinctions between actions *in rem* and actions *in personam* that had been drawn in cases such as *Pennoyer* v. *Neff*, 95 U. S. 714 (1878); *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559 (1889); *Arndt* v. *Griggs*, 134 U. S. 316 (1890); *Ballard* v. *Hunter*, 204 U. S. 241 (1907); and *Longyear* v. *Toolan*, 209 U. S. 414 (1908), and that had been substantially undercut by intervening decisions of this Court. In overruling *Weber*, the Court of Appeals cited *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), *Mullane*, *supra*, and *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), as cases calling for a more realistic appraisal of the adequacy of process provided by the State. Turning to the circumstances of this case and the procedures contemplated by § 454.030, the Court of Appeals noted that while there may have been "a time when posting provided a surer means of giving notice than did mailing, [t]hat time has passed. The uncontradicted testimony by process servers themselves that posted summonses are not infrequently removed by persons other than those served constitutes effective confirmation of the conclusion that notice by posting 'is not reasonably calculated to reach those who could easily be informed by other means at hand,' " 649 F. 2d, at 428, quoting *Mullane*, *supra*, at 319.[2] The court held, therefore, that the notice provided

[2] The Court of Appeals concluded that "[r]equiring Kentucky to provide notice by mail when personal service proves infeasible will not be overly burdensome. The cost will be minimal, and the state's conceded interest

pursuant to § 454.030 was constitutionally deficient. We noted probable jurisdiction, 454 U. S. 938 (1981), and now affirm.

II

A

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane*, *supra*, at 314. Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled *in personam*. *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917). Nevertheless, certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance, we have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that the Due Process Clause does prescribe a constitutional minimum: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the*

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in providing a summary procedure for settlement of landlord-tenant disputes will not be seriously circumscribed." 649 F. 2d, at 428. The court then noted with approval the provisions of the New York counterpart of § 454.030, which provides that when notice is served by posting, a copy of the petition must be sent by registered or certified mail within a day of the posting. *Ibid.*, citing *Velazquez* v. *Thompson*, 451 F. 2d 202, 205 (CA2 1971).

379-671 O—83——15

pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U. S., at 314 (emphasis added). It is against this standard that we evaluate the procedures employed in this case.

B

Appellants argue that because a forcible entry and detainer action is an action *in rem*, notice by posting is *ipso facto* constitutionally adequate. Appellees concede that posting has traditionally been deemed appropriate for *in rem* proceedings, but argue that detainer actions can now encompass more than the simple issue of the tenant's continued right to possession, and that they therefore require the more exacting forms of notice customarily provided for proceedings *in personam*. Appellants counter by conceding that if the particular detainer proceeding was one in which the landlord sought to recover past due rent, personal service would be required by Kentucky law, but argue that such claims are unusual in such proceedings, and that in the case before us the landlord claimed only a right to recover possession. Tr. of Oral Arg. 19–21.

As in *Mullane*, we decline to resolve the constitutional question based upon the determination whether the particular action is more properly characterized as one *in rem* or *in personam*. 339 U. S., at 312. See *Shaffer* v. *Heitner*, *supra*, at 206. That is not to say that the nature of the action has no bearing on a constitutional assessment of the reasonableness of the procedures employed. The character of the action reflects the extent to which the court purports to extend its power, and thus may roughly describe the scope of potential adverse consequences to the person claiming a right to more effective notice. But "[a]ll proceedings, like all rights, are really against persons."[3] In this case, appellees

[3] *Shaffer* v. *Heitner*, 433 U. S. 186, 207, n. 22 (1977), quoting *Tyler* v. *Court of Registration*, 175 Mass. 71, 76, 55 N. E. 812, 814 (Holmes, C. J.), writ of error dism'd, 179 U. S. 405 (1900).

have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes.[4] In light of this deprivation, it will not suffice to recite that because the action is *in rem*, it is only necessary to serve notice "upon the thing itself."[5] The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925).

It is, of course, reasonable to assume that a property owner will maintain superintendence of his property, and to presume that actions physically disturbing his holdings will come to his attention. See *Mullane*, *supra*, at 316.[6] The

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[4] The dissent directs our attention to the "nature and purpose," of Kentucky's forcible entry and detainer action. *Post*, at 457. Such proceedings are designed to offer an expeditious means of determining who is entitled to retain possession of an apartment. But that hardly explains why we may dispense with the constitutional requirement of adequate notice. After all, detainer proceedings, while in some sense "summary," are *proceedings* in which issues of fact and law are to be resolved, and important interests in property determined. We can agree with the dissent's observation that the "means chosen for making service of process . . . must be prompt and certain." *Ibid.* But it is difficult to see how, from the perspective of the landlord, any of the likely supplements to the form of service currently provided under § 454.030 will render the procedure markedly less prompt or certain. More significantly, *from the perspective of the tenant*, it is difficult to see how a means of serving process that fails to afford actual notice in a "not insubstantial" number of cases can be deemed *either* prompt or certain.

[5] *The Mary*, 9 Cranch 126, 144 (1815).

[6] As we noted in *Mullane:*

"The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or propri-

frequent restatement of this rule impresses upon the property owner the fact that a failure to maintain watch over his property may have significant legal consequences for him, providing a spur to his attentiveness, and a consequent reinforcement to the empirical foundation of the principle. Upon this understanding, a State may in turn conclude that in most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests.

The empirical basis of the presumption that notice posted upon property is adequate to alert the owner or occupant of property of the pendency of legal proceedings would appear to make the presumption particularly well founded where notice is posted at a residence. With respect to claims affecting the continued possession of that residence, the application of this presumption seems particularly apt: If the tenant has a continuing interest in maintaining possession of the property for his use and occupancy, he might reasonably be expected to frequent the premises; if he no longer occupies the premises, then the injury that might result from his not having received actual notice as a consequence of the posted notice is reduced. Short of providing personal service, then, posting notice on the door of a person's home would, in many

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etary rights. Hence, . . . entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. . . . A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized." 339 U. S., at 316.

Of course, the *Mullane* discussion of the special notice rules with respect to proceedings affecting property ownership focused on the forms of notice that might be appropriate as a supplement to the direct disturbance of the property itself. But where the State has reason to believe the premises to be occupied or under the charge of a caretaker, notice posted on the premises, if sufficiently apparent, is itself a form of disturbance, likely to come to the attention of the occupants or the caretaker.

or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.

But whatever the efficacy of posting in many cases, it is clear that, in the circumstances of this case, merely posting notice on an apartment door does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting pursuant to the provisions of § 454.030 results in a failure to provide actual notice to the tenant concerned. Indeed, appellees claim to have suffered precisely such a failure of actual notice. As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were "not infrequently" removed by children or other tenants before they could have their intended effect.[7] Under these conditions, notice by

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[7] The depositions before the District Court included the following statements by the process servers:

"The children—we had problems with children. They would take [the writs] off.

"They never took them off when we were present, but we, you know, assume—the Housing Authority told us that they would take them off, so we always put them up high." App. 74.

"Q. Did you ever see kids pulling them off?

"A. Yes.

"Q. You did?

"A. Uh-huh.

"Q. Did you see many?

"A. No, not too many. I did see it in one place over there.

"Q. Where was that?

"A. Village West.

"Q. How many times did you see that happen?

"A. Well, probably a couple of times." *Id.*, at 80.

"Q. . . . Were you aware of there being any problem with children ripping the Writs off?

"A. Oh, we had plenty of trouble.

[*Footnote 7 is continued on p. 454*]

posting on the apartment door cannot be considered a "reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane*, 339 U.S., at 315.

Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen. *Ibid.* In this connnection, we reject appellants' characterization of the procedure contemplated by § 454.030 as one in which "'posting' is used as a method of service only as a last resort." Brief for Appellants 7. To be sure, the statute requires the officer serving notice to make a visit to the tenant's home and to attempt to serve the writ personally on the tenant or some member of his family. But if no one is at home at the time of that visit, as is apparently true in a "good percentage" of cases,[8] posting follows forthwith. Neither the statute, nor the practice of the process servers, makes provision for even a second attempt at personal service, perhaps at some time of day when the tenant is more likely to be at home. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be held constitutionally adequate. Cf. *Mullane*, 339 U. S., at 317–318.

"Q. You had trouble?

"A. With kids, yeah. Yeah.

"Q. Did you ever see kids ripping them off?

"A. Yeah. I have seen them take them off of the door and I would go back and tell them to put it back. They don't know. They didn't know. They just—

. . . . .

"Q. Were there any particular places where you saw kids ripping them off the doors?

"A. Well most of that was in Village West." *Id.*, at 82.

[8] *Id.*, at 76 (deposition of process server).

As noted by the Court of Appeals, and as we noted in *Mullane*, the mails provide an "efficient and inexpensive means of communication," *id.*, at 319, upon which prudent men will ordinarily rely in the conduct of important affairs, *id.*, at 319–320. Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy.[9] Particularly where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings. We need not go so far as to insist that in order to "dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required," *McDonald* v. *Mabee*, 243 U. S., at 92, in order to recognize that where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service is not notice "reasonably calculated to reach those who could

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[9] The dissent apparently wishes to dispute the District Court's finding that "notices posted on apartment doors are often removed," and further questions our reliance on the observation in *Mullane* that the mails are a reliable means of communication—in light of its own observation that "unattended mailboxes are subject to plunder." *Post*, at 460. The dissent misconstrues the constitutional standard. In light of the findings of the courts below, we hold only that posted notice pursuant to § 454.030 is constitutionally inadequate. It is not our responsibility to prescribe the form of service that the Commonwealth should adopt. But even conceding that process served by mail is far from the ideal means of providing the notice the Due Process Clause of the Fourteenth Amendment requires, we have no hesitation in concluding that posted service *accompanied by* mail service, is constitutionally preferable to posted service alone.

easily be informed by other means at hand." *Mullane*, *supra*, at 319.[10]

III

We conclude that in failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

Today, the Court holds that the Constitution prefers the use of the Postal Service to posted notice. The Court reaches this conclusion despite the total absence of any evidence in the record regarding the speed and reliability of the mails. The sole ground for the Court's result is the scant and conflicting testimony of a handful of process servers in Kentucky. On this flimsy basis, the Court confidently overturns the work of the Kentucky Legislature and, by implication, that of at least 10 other States. I must respectfully dissent.

At a minimum, the Fourteenth Amendment requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The question before the Court is whether the notice provided by Kentucky's statute meets this standard. In answering that question, the first "circumstances"

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[10] "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U. S., at 318. See *Schroeder* v. *City of New York*, 371 U. S. 208, 213 (1962).

to be considered are the nature and purpose of the action for which notice is required.

Kentucky's forcible entry and detainer action is a summary proceeding for quickly determining whether or not a landlord has the right to immediate possession of leased premises and, if so, for enabling the landlord speedily to obtain the property from the person in wrongful possession. Ky. Rev. Stat. §§ 383.200, 383.210 (1972). As this Court has recognized, such circumstances call for special procedures:

> "There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property." *Lindsey* v. *Normet*, 405 U. S. 56, 72–73 (1972).

The means chosen for making service of process, therefore, must be prompt and certain, for otherwise the principal purpose of a forcible entry and detainer action could be thwarted before the judicial proceedings even began.

The Kentucky statute meets this need. It directs the process server to attempt personal service on the tenant at his residence. Ky. Rev. Stat. § 454.030 (1975). If the process server cannot find the tenant on the premises, the statute directs the server to explain and leave a copy of the notice

with a family member over the age of 16. *Ibid.* If both of these attempts fail, Kentucky authorizes the server, as a last resort, to post a copy of the notice in a conspicuous place on the premises. *Ibid.*

As the Court recognizes, notice procedures like Kentucky's, though "less rigorous" than mandatory personal service, nonetheless "have enjoyed substantial acceptance throughout our legal history." *Ante*, at 449. The weight of historical precedent is reinforced by the collective wisdom of the legislatures of the at least 11 States authorizing notice in summary eviction proceedings solely by posting or by leaving the notice at the tenant's residence.[1] The Court itself acknowledges that "posting notice on the door of a person's home would, in many or perhaps most instances, constitute . . . a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him." *Ante*, at 452–453.

The Court nonetheless rejects these established procedures as unconstitutional, though it does not cite a single case, other than the decision below, supporting its position that notice by posting is constitutionally inadequate in summary eviction proceedings. Instead, the Court relies solely on the deposition testimony of a few Kentucky process servers.

The testimony is hardly compelling. For example, one process server, Mr. S. Carter Bacon, reported having seen children in the Village West housing development pull down posted writs "probably a couple of times." App. 80; App. in No. 79–3477 (CA6), p. 103. The Court neglects to mention,

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[1] See Ala. Code §§ 6–6–332, 35–9–82 (1975); Colo. Rev. Stat. § 13–40–112 (1973); Fla. Stat. § 48.183 (1979); Kan. Stat. Ann. § 61–1805 (1976); Ky. Rev. Stat. § 454.030 (1975); La. Code Civ. Proc. Ann., Art. 4703 (West 1961); Miss. Code Ann. § 89–7–33 (1972); Neb. Rev. Stat. § 25–508 (1979); N. H. Rev. Stat. Ann. §§ 510:2, 540:5 (Supp. 1979); N. C. Gen. Stat. § 42–29 (1976); W. Va. Code § 56–2–1 (1966), W. Va. Rule Civ. Proc. 4(d)(1) (1982).

however, that another process server, Mr. Gilbert Brutscher, cast doubt on Mr. Bacon's testimony by stating:

> "I had been warned beforehand that, by Mr. Bacon, Carter Bacon, that he suspected—he wasn't certain, but he suspected that on some occasions the Writs had been torn off the doors by kids. This is what he told me. Whether that is true or not, I don't know. And I don't think that he observed that, and the six months I was working at it there was no occasion where I saw anyone tear the Writs off of the door." *Id.*, at 112–113.

The Court also neglects to mention that another process server testified that in order to avoid problems with children, the process servers "always put [the writs] up high. So we never had any problems with that." App. 74. Corroborating this testimony, moreover, is the testimony of yet another process server, who asserted: "we always try to put the paper up above where, a, say a small child can't reach it." App. in No. 79–3477 (CA6), p. 74. This server, asked whether he had "had complaints about small children ripping them off," answered that he had never had a complaint and had never seen a child try to rip a notice off. *Ibid.*

Plainly, such conflicting testimony falls well short of what this Court should require before rushing to scrap Kentucky's considered legislative judgment that, as a last resort, posted notice is an appropriate form of service of process for forcible entry and detainer actions.

The Court, however, holds that notice via the mails is so far superior to posted notice that the difference is of constitutional dimension.[2] How the Court reaches this judgment re-

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[2] The Court gives lip service to the principle that "[i]t is not our responsibility to prescribe the form of service that [Kentucky] should adopt," *ante*, at 455, n. 9, but then goes on to do just that, first by explaining to the state legislature that, unlike notice by posting, notice by mail "would surely go a long way toward" satisfying the Court, *ante*, at 455, and then by remarking that, in the Court's view, the combination of posted service and mail service would be "constitutionally preferable" to posted service alone, *ante*, at 455, n. 9.

mains a mystery, especially since the Court is unable, on the present record, to evaluate the risks that notice mailed to public housing projects might fail due to loss, misdelivery, lengthy delay, or theft. Furthermore, the advantages of the mails over posting, if any, are far from obvious. It is no secret, after all, that unattended mailboxes are subject to plunder by thieves. Moreover, unlike the use of the mails, posting notice at least gives assurance that the notice has gotten as far as the tenant's door.

In sum, the Court has chosen to overturn Kentucky's procedures on the basis of a wholly inadequate record. In so doing, the Court apparently indulges a presumption that the state legislation challenged here is unconstitutional until proven otherwise. Regrettably, the Court seems to forget that we have long since discarded the concept that "due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). I respectfully dissent.

KREMER v. CHEMICAL CONSTRUCTION CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-6045. Argued December 7, 1981—Decided May 17, 1982

Title 28 U. S. C. § 1738 (as did its predecessors dating back to 1790) requires federal courts to afford the same full faith and credit to state court judgments that would apply in the State's own courts. Petitioner filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, and the EEOC, as required by the Act, referred the charge to the New York State Division of Human Rights (NYHRD), the agency charged with enforcing the New York law prohibiting employment discrimination. The NYHRD rejected the claim as meritless and was upheld on administrative appeal. The Appellate Division of the New York Supreme Court affirmed. Subsequently, a District Director of the EEOC ruled that there was no reasonable cause to believe that the discrimination charge was true and issued a right-to-sue letter. Petitioner then brought a Title VII action in Federal District Court. Ultimately, the District Court dismissed the complaint on res judicata grounds, and the Court of Appeals affirmed.

Held: The District Court was required under 28 U. S. C. § 1738 to give preclusive effect to the state court decision upholding the state administrative agency's rejection of the employment discrimination claim. Pp. 466–485.

(a) Where under New York law the New York court's determination precludes petitioner from bringing any other action based on the same grievance in the New York courts, § 1738, by its terms, precludes him from relitigating the same question in federal courts. Pp. 466–467.

(b) There is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that an employment discrimination claim is unproved. An exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal. *Allen* v. *McCurry*, 449 U. S. 90. Here, there is no claim that Title VII expressly repealed § 1738, and no implied repeal is evident from the language, operation, or legislative history of Title VII, there being no manifest incompatibility between Title VII and § 1738. Pp. 468–476.

(c) While *initial resort* to state administrative remedies does not deprive an individual of a right to a federal trial *de novo* on a Title VII claim, this does not mean that a prior state court judgment can be disregarded. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, distin-

guished. The comity and federalism interests embodied in § 1738 are not compromised by the application of res judicata and collateral estoppel in Title VII cases. Rather, to deprive state judgments of finality not only would violate basic tenets of comity and federalism but also would reduce the incentive for States to work toward effective and meaningful systems prohibiting employment discrimination. Pp. 476–478.

(d) The procedures provided in New York for the determination of employment discrimination claims, complemented by administrative as well as judicial review, offer a full and fair opportunity to litigate the merits and thus are sufficient under the Due Process Clause of the Fourteenth Amendment. State proceedings need do no more than satisfy the minimum procedural requirements of the Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments, but rather goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. Here, petitioner received all the process that was constitutionally required in rejecting his employment discrimination claim. Pp. 479–485.

623 F. 2d 786, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 486. STEVENS, J., filed a dissenting opinion, *post*, p. 508.

David A. Barrett argued the cause for petitioner. With him on the brief was *Frederick A. O. Schwarz, Jr.*

Robert Layton argued the cause and filed a brief for respondent.

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Reynolds, Joshua I. Schwartz, Constance L. Dupre, Philip B. Sklover*, and *Sandra G. Bryan.**

JUSTICE WHITE delivered the opinion of the Court.

As one of its first acts, Congress directed that all United

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts. Act of May 26, 1790, ch. 11, 1 Stat. 122, 28 U. S. C. § 1738. More recently, Congress implemented the national policy against employment discrimination by creating an array of substantive protections and remedies which generally allows federal courts to determine the merits of a discrimination claim. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV). The principal question presented by this case is whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738. Specifically, we decide whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts.

I

Petitioner Rubin Kremer emigrated from Poland in 1970 and was hired in 1973 by respondent Chemical Construction Corp. (Chemico) as an engineer. Two years later he was laid off, along with a number of other employees. Some of these employees were later rehired, but Kremer was not although he made several applications. In May 1976, Kremer filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), asserting that his discharge and failure to be rehired were due to his national origin and Jewish faith. Because the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter, § 706(c), 42 U. S. C. § 2000e-5(c),[1] the Commission re-

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[1] The statute provides that

"[i]n the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employ-

ferred Kremer's charge to the New York State Division of Human Rights (NYHRD), the agency charged with enforcing the New York law prohibiting employment discrimination. N. Y. Exec. Law §§ 295(6), 296(1)(a) (McKinney 1972 and Supp. 1981–1982).

After investigating Kremer's complaint,[2] the NYHRD concluded that there was no probable cause to believe that Chemico had engaged in the discriminatory practices complained of. The NYHRD explicitly based its determination on the finding that Kremer was not rehired because one employee who was rehired had greater seniority, that another employee who was rehired filled a lesser position than that previously held by Kremer, and that neither Kremer's creed nor age was a factor considered in Chemico's failure to rehire him. The NYHRD's determination was upheld by its Appeal Board as "not arbitrary, capricious or an abuse of discretion." Kremer again brought his complaint to the attention of the EEOC and also filed, on December 6, 1977, a petition with the Appellate Division of the New York Supreme Court to set aside the adverse administrative determination. On February 27, 1978, five justices of the Appellate Division unanimously affirmed the Appeal Board's order. Kremer could have sought, but did not seek, review by the New York Court of Appeals.

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ment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." 42 U. S. C. § 2000e-5(c).

See also *Love* v. *Pullman Co.*, 404 U. S. 522 (1972); 29 CFR § 1601.13 (1981).

[2] Kremer's complaint filed with the NYHRD alleged discrimination on the basis of age and religion, and did not contain a separate claim concerning national origin.

Subsequently, a District Director of the EEOC ruled that there was no reasonable cause to believe that the charge of discrimination was true and issued a right-to-sue notice.[3] The District Director refused a request for reconsideration, noting that he had reviewed the case files and considered the EEOC's disposition as "appropriate and correct in all respects."

Kremer then brought this Title VII action in District Court, claiming discrimination on the basis of national origin and religion.[4] Chemico argued from the outset that Kremer's Title VII action was barred by the doctrine of res judicata. The District Court initially denied Chemico's motion to dismiss. 464 F. Supp. 468 (SDNY 1978). The court noted that the Court of Appeals for the Second Circuit had recently found such state determinations res judicata in an action under 42 U. S. C. § 1981, *Mitchell* v. *National Broadcasting Co.*, 553 F. 2d 265 (1977), but distinguished Title VII cases because of the statutory grant of *de novo* federal review. Several months later the Second Circuit extended the *Mitchell* rule to Title VII cases. *Sinicropi* v. *Nassau*

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[3] Sections 706(f)(1) and (3), 42 U. S. C. §§ 2000e–5f(1) and (3), provide that where the EEOC determines that there is no reasonable cause to believe that a charge is true, it must dismiss the charge and issue the complainant a statutory right-to-sue letter. Where the Commission has not filed a civil action against the employer, it must, if requested, issue a right-to-sue letter 180 days after the charge was filed. Within 90 days after receipt of the right-to-sue letter, the complainant may institute a civil action in federal district court against the party named in the charge.

[4] No further mention was made of age discrimination, which is not covered by Title VII. Nor has petitioner argued at any point that his national origin claim was in any sense distinct from his claim of religious discrimination. Of course, if Kremer desired to make such a claim, he was obligated to first bring it before the NYHRD. See n. 1, *supra*. Moreover, "[a] party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters National Assur. Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Assn.*, 455 U. S. 691, 710 (1982); *Sherrer* v. *Sherrer*, 334 U. S. 343, 352 (1948).

379-671 O—83——16

County, 601 F. 2d 60 *(per curiam)*, cert. denied, 444 U. S. 983 (1979). The District Court then dismissed the complaint on grounds of res judicata. 477 F. Supp. 587 (SDNY 1979). The Court of Appeals refused to depart from the *Sinicropi* precedent and rejected petitioner's claim that *Sinicropi* should not be applied retroactively. 623 F. 2d 786 (1980).

A motion for rehearing en banc was denied, and petitioner filed for a writ of certiorari. We issued the writ, 452 U. S. 960 (1981), to resolve this important issue of federal employment discrimination law over which the Courts of Appeals are divided.[5] We now affirm.

II

Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.[6] Here the Appellate Division of the New York Supreme Court has issued a judgment affirming the decision of the NYHRD Appeals Board that the discharge and failure to rehire Kremer were not the product of the discrimination that he had alleged. There is no question

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[5] Three Courts of Appeals have held that a federal court may not attribute preclusive deference to prior state court decisions reviewing state agency determinations. *Smouse* v. *General Electric Co.*, 626 F. 2d 333 (CA3 1980) *(per curiam)*; *Unger* v. *Consolidated Foods Corp.*, 657 F. 2d 909 (CA7 1981); *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d 1079 (CA8), cert. denied, 446 U. S. 966 (1980). The Fourth Circuit has held that issues decided in a *de novo* state judicial proceeding are not subject to redetermination in a subsequent Title VII action. *Moosavi* v. *Fairfax County Board of Education*, 666 F. 2d 58 (1981).

[6] In the Act of May 26, 1790, ch. 11, 1 Stat. 122, Congress required all federal courts to give such preclusive effect to state court judgments "as they have by law or usage in the courts of the state from [which they are] taken." In essentially unchanged form, the Act, now codified as 28 U. S. C. § 1738, provides that

"[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States

that this judicial determination precludes Kremer from bringing "any other action, civil or criminal, based upon the same grievance" in the New York courts. N. Y. Exec. Law § 300 (McKinney 1972). By its terms, therefore, § 1738 would appear to preclude Kremer from relitigating the same question in federal court.

Kremer offers two principal reasons why § 1738 does not bar this action. First, he suggests that in Title VII cases Congress intended that federal courts be relieved of their usual obligation to grant finality to state court decisions. Second, he urges that the New York administrative and judicial proceedings in this case were so deficient that they are not entitled to preclusive effect in federal courts and, in any

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and its Territories and Possessions as they have by law or usage in the courts of such State . . . ."

Accordingly the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980); *Montana* v. *United States*, 440 U. S. 147 (1979); *Angel* v. *Bullington*, 330 U. S. 183 (1947). Indeed, from *Cromwell* v. *County of Sac*, 94 U. S. 351 (1877), to *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Allen* v. *McCurry*, *supra*, at 94; *Cromwell* v. *County of Sac*, *supra*, at 352. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana* v. *United States*, *supra*, at 153. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326, n. 5 (1979). Thus, invocation of res judicata and collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen* v. *McCurry*, 449 U. S., at 94. When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.*, at 96.

event, the rejection of a state employment discrimination claim cannot by definition bar a Title VII action. We consider this latter contention in Part III.

A

Allen v. *McCurry*, 449 U. S. 90, 99 (1980), made clear that an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal. There is no claim here that Title VII expressly repealed § 1738; if there has been a partial repeal, it must be implied. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored," *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976), and whenever possible, statutes should be read consistently. There are, however,

> "'two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . .'" *Radzanower* v. *Touche Ross & Co.*, *supra*, at 154, quoting *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).

The relationship of Title VII to § 1738 does not fall within either of these categories. Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). To this end the EEOC was created and the federal courts were entrusted with ultimate enforcement responsibility. State antidiscrimination laws, however, play

an integral role in the congressional scheme. Whenever an incident of alleged employment discrimination occurs in a State or locality which by law prohibits such discrimination and which has established an "authority to grant or seek relief from such [discrimination] or to institute criminal proceedings with respect thereto," no charge of discrimination may be actively processed by the EEOC until the state remedy has been invoked and at least 60 days have passed, or the state proceedings have terminated. § 706(c), 42 U. S. C. § 2000e–5(c). Only after providing the appropriate state agency an opportunity to resolve the complaint may an aggrieved individual press his complaint before the EEOC. In its investigation to determine whether there is reasonable cause to believe that the charge of employment discrimination is true, the Commission is required to "accord substantial weight to final findings and orders made by State and local authorities in proceedings commenced under State or local law" pursuant to the limited deferral provisions of § 706, but is not bound by such findings. *Alexander* v. *Gardner-Denver Co.*, *supra*, at 48, n. 8. If the EEOC finds reasonable cause to believe that discrimination has occurred, it undertakes conciliation efforts to eliminate the unlawful practice; if these efforts fail, the Commission may elect to bring a civil action to enforce the Act. If the Commission declines to do so, or if the Commission finds no reasonable cause to believe that a violation has occurred, "a civil action" may be brought by an aggrieved individual. § 706(f)(1), 42 U. S. C. § 2000e–5(f)(1).

No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought. While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative *agencies* to be a "trial *de novo*," *Chandler* v. *Roudebush*, 425 U. S. 840, 844–845 (1976); *Alexander* v. *Gardner-Denver Co.*, *supra*, at 38; *McDonnell Douglas Corp.* v. *Green*, *supra*, at

798–799, neither the statute nor our decisions indicate that the final judgment of a state *court* is subject to redetermination at such a trial. Similarly, the congressional directive that the EEOC should give "substantial weight" to findings made in state proceedings, § 706(b), 42 U. S. C. § 2000e–5(b), indicates only the minimum level of deference the EEOC must afford all state determinations; it does not bar affording the greater preclusive effect which may be required by § 1738 if judicial action is involved.[7] To suggest otherwise, to say that either the opportunity to bring a "civil action" or the "substantial weight" requirement implicitly repeals § 1738, is to prove far too much. For if that is so, even a full trial on the merits in state court would not bar a trial *de novo* in federal court and would not be entitled to more than "substantial weight" before the EEOC. The state courts would be placed on a one-way street; the finality of their decisions would depend on which side prevailed in a given case.[8]

Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatability between Title VII and § 1738 is enough to answer our inquiry. No different conclusion is suggested by the legislative history of Title VII. Although no inescapable

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[7] EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. *Batiste* v. *Furnco Constr. Corp.*, 503 F. 2d 447, 450, n. 1 (CA7 1974), cert. denied, 420 U. S. 928 (1975). Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts. *Garner* v. *Giarrusso*, 571 F. 2d 1330 (CA5 1978); *Batiste* v. *Furnco Constr. Corp.*, *supra*; *Cooper* v. *Philip Morris, Inc.*, 464 F. 2d 9 (CA6 1972); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889 (CA2 1971), cert. denied, 406 U. S. 918 (1972).

[8] Section 706(b) guarantees that the outcome of both agency and judicial proceedings will be given substantial weight. JUSTICE BLACKMUN interprets that provision as a ceiling on the deference federal courts are obli-

conclusions can be drawn from the process of enactment,[9] the legislative debates surrounding the initial passage of Title VII in 1964 and the substantial amendment adopted in 1972 plainly do not demonstrate that Congress intended to over-

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gated to give state court judgments. *Post*, at 489. The "substantial weight" requirement, however, was added to Title VII in 1972 not because the EEOC was giving state administrative decisions too much weight, but because it was affording them too little significance. See *infra*, at 474–475, and n. 16. Finding an implied repeal of § 1738 in an amendment directed exclusively at increasing the deference to be given state decisions would be contrary to normal principles of statutory interpretation, let alone the more difficult test of demonstrating an implied repeal.

It is even more implausible to find an implied repeal in the limited deferral to pending state and local proceedings, § 706(c), 42 U. S. C. § 2000e–5(c). First, that provision does not even address the issue of the proper weight to be afforded state decisions. Moreover, because the section requires complainants to wait no longer than 60 days before initating federal proceedings, it is doubtful that Congress even contemplated that the provision applied after a complaint had run the full course of state administrative and judicial consideration. See, *e. g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 755 (1979) (Section 706(c) "is intended to give state *agencies* a limited opportunity to resolve problems of employment discrimination") (emphasis added); *Love* v. *Pullman Co.*, 404 U. S., at 526 (The purpose of § 706(c) is "to give state *agencies* a prior opportunity to consider discrimination complaints") (emphasis added).

For the same reasons, the EEOC's authority to enter work-sharing agreements with state agencies is irrelevant. This provision, like the limited deferral and "substantial weight" requirements, is directed at increasing, not reducing, the authority of state agencies to resolve employment discrimination disputes. All of these provisions are directed toward administrative cooperation, and lend no evidence of congressional intent to compromise or circumscribe the validity of state *judicial* proceedings. Although JUSTICE BLACKMUN implies that work-sharing agreements constitute the one "narrow exception for possible exclusive state agency jurisdiction," *post*, at 496, left by Congress, neither the statute nor its background so indicates. Indeed, it is no "exception" at all; even though the EEOC declines to process a charge under a work-sharing agreement, the statute does not prevent the complainant from subsequently filing suit in federal court.

[9] Interpretation of Title VII is hampered by the fact that there are no authoritative legislative reports. The House Civil Rights bill went directly to the Senate floor without committee consideration in hopes that it

ride the historic respect that federal courts accord state court judgments.[10]

At the time Title VII was written, over half of the States had enacted some form of equal employment legislation.[11] Members of Congress agreed that the States should play an important role in enforcing Title VII, but also felt the federal system should defer only to adequate state laws.[12] Congress considered a number of possible ways of achieving these goals, ranging from limiting Title VII's jurisdiction to States without fair employment laws to having Congress

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would be approved without change. This did not happen. The bill including Title VII, was amended 87 times during the 83-day debate in the Senate. Upon being returned to the House, the bill was not subjected to the usual conference procedure. Instead, the House voted acceptance of the Senate measure. See EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 9–11 (1968) (hereafter 1964 Leg. Hist.).

[10] JUSTICE BLACKMUN reads the legislative history differently, *post*, at 494–499, seizing upon doubts expressed concerning the adequacy of state remedies. It does not follow, however, that an implied repeal of § 1738 has been demonstrated. For that, the intent of Congress "must be clear and manifest." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976). JUSTICE BLACKMUN never claims that this rigorous standard is satisfied. Nor would such a claim be persuasive. Similar expressions of congressional concern with state remedies were unsuccessfully mustered in *Allen* v. *McCurry*, 449 U. S. 90 (1980), where we refused to find an implied repeal of § 1738 in the passage of 42 U. S. C. § 1983. See *infra*, at 476. JUSTICE BLACKMUN also claims too much from the refusal of Congress to place employment discrimination within the exclusive jurisdiction of the States, 22 of whom lacked any fair employment laws at the time Title VII was enacted. Reluctance to rely entirely on the States does not require a departure from traditional rules of res judicata when a state fair employment law exists, a state agency has investigated and processed a grievance, and a state court has upheld the agency's decision as procedurally fair and substantively justified.

[11] See Bureau of National Affairs, State Fair Employment Laws and Their Administration (1964). See also 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark).

[12] In their interpretive memorandum, Senators Clark and Case, floor managers of the bill, stated that

"Title VII specifically provides for the continued effectiveness of state and local laws and procedures for dealing with discrimination in employment"

or the President assess the adequacy of state laws. As Title VII emerged from the House, it empowered the EEOC to assess the adequacy of state laws and procedures. § 708(b), H. R. 7152, 88th Cong., 2d Sess. (1964). The Senate bill that was finally signed into law widened the state role by guaranteeing all States with fair employment practices laws an initial opportunity to resolve charges of discrimination. 42 U. S. C. § 2000e–5(c). Senator Humphrey, an advocate of strong enforcement, emphasized the state role under the legislation:

> "We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government." 110 Cong. Rec. 12725 (1964).

Indeed, New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination.[13]

Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court. While striving to craft an optimal

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and that "it will not override any state law or municipal ordinance which is not inconsistent." *Id.*, at 7214, 7216.

See also *id.*, at 7205 (remarks of Sen. Clark); *id.*, at 12725 (remarks of Sen. Humphrey). See generally Jackson, Matheson, & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich. L. Rev. 1485, 1493–1497 (1981) (hereinafter Jackson, Matheson, & Piskorski).

[13] 110 Cong. Rec. 1635–1636 (1964), reprinted in 1964 Leg. Hist. 3345–3346 (remarks of Cong. Reid) ("The New York State Commission for Human Rights has pioneered effectively and it has now been copied in 22 States . . ."); 110 Cong. Rec. 1643 (1964), 1964 Leg. Hist. 3258–3259

niche for the States in the overall enforcement scheme, the legislators did not envision full litigation of a single claim in both state and federal forums.[14] Indeed, the requirement of a trial *de novo* in federal district court following EEOC proceedings was added primarily to protect employers from overzealous enforcement by the EEOC. A memorandum signed by seven Representatives accompanying the compromise measure ultimately adopted, concluded that "we believe the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Similar views were expressed in 1972 when Congress reconsidered whether to give the EEOC adjudicatory and enforcement powers.[15] There is also reason to believe that Congress required that the EEOC give state findings "substantial weight" because the Commission had

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(remarks of Cong. Ryan); 110 Cong. Rec. 12595 (1964), 1964 Leg. Hist. 3066 (remarks of Sen. Clark).

[14] Senator Dirksen, the principal drafter of the Senate bill, stated in no uncertain terms his desire to avoid multiple suits arising out of the same discrimination:

"What a layering upon layer of enforcement. What if the court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on the one arm, and the State forces of justice tug on the other? Should we draw and quarter the victim?" 110 Cong. Rec. 6449 (1964).

[15] See, *e. g.*, 117 Cong. Rec. 42026 (1971), reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, p. 571 (1972) (hereafter 1972 Leg. Hist.) (remarks of Sen. Allen); 118 Cong. Rec. 932 (1972), 1972 Leg. Hist. 807 (same); 118 Cong. Rec. 311, 933 (1972), 1972 Leg. Hist. 632, 809 (remarks of Sen. Ervin); 118 Cong. Rec. 595 (1972), 1972 Leg. Hist. 682 (remarks of Sen. Tower); 118 Cong. Rec. 699–703 (1972), 1972 Leg. Hist. 698–709 (remarks of Sen. Fannin).

Opponents successfully objected to combining investigatory, adjudicatory, and enforcement power in a single agency. A compromise, sponsored by Senator Dominick, was adopted which gave the EEOC the power to bring suit but retained a trial *de novo* in federal district court so that employers and other defendants would receive "an impartial judicial deci-

too freely ignored the determinations handed down by state agencies.[16]

An important indication that Congress did not intend Title VII to repeal § 1738's requirement that federal courts give full faith and credit to state court judgments is found in an exchange between Senator Javits, a manager of the 1972 bill, and Senator Hruska. Senator Hruska, concerned with the potential for multiple independent proceedings on a single discrimination charge, had introduced an amendment which would have eliminated many of the duplicative remedies for employment discrimination. Senator Javits argued that the amendment was unnecessary because the doctrine of res judicata would prevent repetitive litigation against a single defendant:

> "[T]here is the real capability in this situation of dealing with the question on the basis of res judicata. In other words once there is a litigation—a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual—the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted." 118 Cong. Rec. 3370 (1972).[17]

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sion free from accusation of institutional bias." S. Rep. No. 92–415, p. 86 (1971), 1972 Leg. Hist. 464 (views of Sen. Dominick).

[16] Prior to the 1972 amendments, the EEOC was free to ignore state administrative decisions. In the Senate debates, Senator Montoya asked Senator Williams, the floor manager of the amendments, and Senator Ervin, an opponent, to explain the purpose of the "substantial weight" directive. Senator Ervin responded that the provision's purpose was to prevent the EEOC from reversing state decisions "peremptorily." The Commission would be required to "give due respect to the findings of the State or local authorities." 118 Cong. Rec. 310 (1972), 1972 Leg. Hist. 627. Senator Williams did not dispute this answer. See also Jackson, Matheson, & Piskorski, *supra* n. 12, at 1504–1505.

[17] We reject petitioner's suggestion, repeated by JUSTICE BLACKMUN, *post*, at 499–501, that since the Hruska amendment excluded state pro-

Senator Williams, another proponent of the 1972 bill, echoed Senator Javits' remarks: "I do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again." *Id.*, at 3372. After Senator Javits and Senator Williams spoke, an evenly divided Senate refused to approve the Hruska amendment.

It is sufficiently clear that Congress, both in 1964 and 1972, though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws. We conclude that neither the statutory language nor the congressional debates suffice to repeal § 1738's longstanding directive to federal courts.

B

Our finding that Title VII did not create an exception to § 1738 is strongly suggested if not compelled by our recent decision in *Allen* v. *McCurry* that preclusion rules apply in 42 U. S. C. § 1983 actions and may bar federal courts from freshly deciding constitutional claims previously litigated in state courts. Indeed, there is more in § 1983 to suggest an implied repeal of § 1738 than we have found in Title VII. In *Allen*, we noted that "one strong motive" behind the enactment of § 1983, was the "grave congressional concern that the state courts had been deficient in protecting federal rights." 449 U. S., at 98–99. Nevertheless, we concluded that "much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id.*, at 99.

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ceedings, Senator Javits' comments "should in context also be read as excluding state proceedings from any application of res judicata in Title VII suits." Reply Brief for Petitioner 9, n. **. Not only is the idea that even a full state judicial proceeding be excluded from res judicata effect implausible on its face, but Senator Javits prefaced his res judicata statement by discussing the very New York employment discrimination laws under which Kremer proceeded. 118 Cong. Rec. 3370 (1972).

Because Congress must "clearly manifest" its intent to depart from § 1738, our prior decisions construing Title VII in situations where § 1738 is inapplicable are not dispositive. They establish only that *initial resort* to state administrative remedies does not deprive an individual of a right to a federal trial *de novo* on a Title VII claim. In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Chandler* v. *Roudebush*, 425 U. S. 840 (1976), we held that the "civil action" in federal court following an EEOC decision was intended to be a trial *de novo*. This holding, clearly supported by the legislative history, is not a holding that a prior state court judgment can be disregarded.

The petitioner and the Courts of Appeals which have denied res judicata effect to such judgments rely heavily on our statement in *Alexander* v. *Gardner-Denver* that "final responsibility for enforcement of Title VII is vested with federal courts." 415 U. S., at 44.[18] We did not say, and our language should not be read to imply, that by vesting "final responsibility" in one forum, Congress intended to deny finality to decisions in another. The context of the statement makes this clear. In describing the operation of Title VII, we noted that the EEOC cannot adjudicate claims or impose sanctions; that responsibility, the "final responsibility for enforcement," must rest in federal court.

The holding in *Gardner-Denver* was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts. Arbitration decisions, of course, are not subject to the mandate of § 1738. Furthermore, unlike arbitration hearings under collective-bargaining agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement scheme. Our decision in *Gardner-Denver* explicitly recognized the "distinctly separate nature of these contractual and statutory rights."

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[18] See, *e. g.*, *Smouse* v. *General Electric Co.*, 626 F. 2d, at 334–335; *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d, at 1082–1083.

Id., at 50. Here we are dealing with a state statutory right, subject to state enforcement in a manner expressly provided for by the federal Act.

Gardner-Denver also rested on the inappropriateness of arbitration as a forum for the resolution of Title VII issues. The arbitrator's task, we recognized, is to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Id.*, at 56–57. The arbitrator's specialized competence is "the law of the shop, not the law of the land," and "the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Ibid.* These characteristics cannot be attributed to state administrative boards and state courts. State authorities are charged with enforcing laws, and state courts are presumed competent to interpret those laws.

Finally, the comity and federalism interests embodied in § 1738 are not compromised by the application of res judicata and collateral estoppel in Title VII cases. Petitioner maintains that the decision of the Court of Appeals will deter claimants from seeking state court review of their claims ultimately leading to a deterioration in the quality of the state administrative process. On the contrary, stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials. Depriving state judgments of finality not only would violate basic tenets of comity and federalism, *Board of Regents* v. *Tomanio*, 446 U. S. 478, 488, 491–492 (1980), but also would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.[19]

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[19] Here JUSTICE BLACKMUN's dissent rests on two dubious premises: that plaintiffs will be deterred from seeking state judicial review of administrative decisions and that the more such cases are subject to judicial review, the better the system becomes. Obvious incentives remain for an individual with a truly meritorious claim to proceed. In New York, judi-

III

The petitioner nevertheless contends that the judgment should not bar his Title VII action because the New York courts did not resolve the issue that the District Court must hear under Title VII—whether Kremer had suffered discriminatory treatment—and because the procedures provided were inadequate. Neither contention is persuasive. Although the claims presented to the NYHRD and subsequently reviewed by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws.[20] The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim

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cial review of "no probable cause" determinations is rigorous in both a procedural and substantive sense, see *infra*, at 479–485, and n. 21. Forgoing such review ensures considerable delay and lengthening of the adjudicatory process. And the reward for such forbearance is a federal proceeding in which the existing adverse state decision must be given "substantial weight." JUSTICE BLACKMUN assumes, without supporting evidence, that this "strategy" is wise and very likely to be pursued in many cases. Even were this assumption plausible, it hardly follows that state proceedings are improved by the sheer quantity of administrative adjudications brought before them.

[20] The New York law is at least as broad as Title VII. Title 42 U. S. C. § 2000e–2(a) provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."

New York Exec. Law § 296(1) (McKinney Supp. 1981–1982) provides:

"It shall be an unlawful discriminatory practice:

"(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual."

We, of course, do not decide in this case whether jurisdiction to entertain Title VII claims is limited to the federal courts.

consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of national origin or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless.[21]

The more serious contention is that even though administrative proceedings and judicial review are legally sufficient to be given preclusive effect in New York, they should be deemed so fundamentally flawed as to be denied recognition under § 1738. We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim

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[21] JUSTICE BLACKMUN and JUSTICE STEVENS wrongly assert that the New York court's holding does not constitute a finding "one way or the other" on the merits of petitioner's claim. *Post*, at 492 (BLACKMUN, J., dissenting); *post*, at 509 (STEVENS, J., dissenting). When the NYHRD summarily dismisses a complaint, the Appellate Division must find that the petitioner's "complaint lacks merit as a matter of law." *Flah's, Inc.* v. *Schneider*, 71 App. Div. 2d 993, 420 N. Y. S. 2d 283, 284 (1979). See also *New York State Div. for Youth* v. *State Human Rights Appeal Board*, 83 App. Div. 2d 972, 973, 442 N. Y. S. 2d 813, 814 (1981) ("Since the investigation as conducted by the division involved separate meetings without hearings, it must appear in such instance that, as a matter of law, the complaint lacks merit in order for the division to dismiss the complaint"); *State Div. of Human Rights* v. *Blanchette*, 73 App. Div. 2d 820, 821, 423 N. Y. S. 2d 745, 746 (1979) ("[T]he division may not determine that there is no probable cause for the complaint and dismiss it when the facts revealed in the investigation do not 'generate conviction in and persuade a fair and detached fact finder' that that there is no substance in the complaint"); *Stasiak* v. *Montgomery Ward & Co.*, 66 App. Div. 2d 962, 411 N. Y. S. 2d 700, 701 (1978) ("In order to sustain a dismissal of a complaint before the complainant has had his opportunity to present his case in a formal manner, it must appear virtually as a matter of law that the complaint lacks merit"); *Altiery* v. *State Div. of Human Rights*, 61 App. Div. 2d 780, 781, 402 N. Y. S. 2d 405, 406 (1978) ("It cannot be said as a matter of law, that the complaint . . .

or issue, *Allen* v. *McCurry*, 449 U. S., at 95; *Montana* v. *United States*, 440 U. S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 328–329 (1971).[22] "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana* v. *United States*, *supra*, at 164, n. 11. Cf. *Gibson* v. *Berryhill*, 411 U. S. 564 (1973).

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the ef-

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lacked merit"). Decisions applying the standard employed in the foregoing cases are decisions on the merits, just as was the decision in *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, 59 App. Div. 2d 332, 336, 399 N. Y. S. 2d 541, 544 (1977) (when a complainant has a "full opportunity to present his evidence and exhibits, under oath if he so requests" the presence of a "rational basis in the record" for that decision will suffice). It is well established that judicial affirmance of an administrative detebmination is entitled to preclusive effect. *CIBA Corp.* v. *Weinberger*, 412 U. S. 640, 644 (1973); *Grubb* v. *Public Utilities Comm'n*, 281 U. S. 470, 475–477 (1930). There is no requirement that judicial review must proceed *de novo* if it is to be preclusive. Furthermore, as we have explained, Congress did not draft the *de novo* requirement in order to deny preclusive effect to state decisions. See *supra*, at 474.

[22] While our previous expressions of the requirement of a full and fair opportunity to litigate have been in the context of collateral estoppel or issue preclusion, it is clear from what follows that invocation of res judicata or claim preclusion is subject to the same limitation.

The lower courts did not discuss whether it is the doctrine of res judicata or collateral estoppel that applies here. Section 1738 requires dismissal of

fect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. *McElmoyle* v. *Cohen*, 13 Pet. 312, 326 (1839); *Mills* v. *Duryee*, 7 Cranch 481, 485 (1813). As we recently noted in *Allen* v. *McCurry*, *supra*, "though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." 449 U. S., at 96.

The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment,[23] and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there

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petitioner's Title VII suit whether his Title VII claim is precluded by the New York judgment or whether he is collaterally estopped by that judgment from complaining that Chemico had discriminated against him. Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes, *Nash County Bd. of Ed.* v. *Biltmore Co.*, 640 F. 2d 484, 488 (CA4), cert. denied, 454 U. S. 878 (1981). See also Restatement (Second) of Judgments § 61(1) (Tent. Draft No. 5, Mar. 10, 1978); Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 340–341 (1978). It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. However that may be, it is undebatable that petitioner is at least estopped from relitigating the issue of employment discrimination arising from the same events.

[23] Cf. *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917) ("[A]n ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it"); *Haddock* v. *Haddock*, 201 U. S. 562, 567, 568 (1906).

could be no constitutionally recognizable preclusion at all.[24]

We have little doubt that Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged contrary to the statute. We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 610 (1974); *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710 (1945). "'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Mitchell* v. *W. T. Grant Co.*, *supra*, at 610 (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)). Under New York law, a claim of employment discrimination requires the NYHRD to investigate whether there is "probable cause" to believe that the complaint is true. Before this determination of probable cause is made, the claimant is entitled to a "full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony." *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, 59 App. Div. 2d 332, 336, 399 N. Y. S. 2d 541, 544 (1977). The complainant also is entitled to an opportunity "to rebut evidence submitted by or obtained from the respondent." 9 N. Y. C. R. R. § 465.6 (1977). He may have an attorney assist him and may ask the division to issue subpoenas. 9 N. Y. C. R. R. § 465.12(c) (1977).

If the investigation discloses probable cause and efforts at conciliation fail, the NYHRD must conduct a public hearing

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[24] The Court's decisions enforcing the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the procedural requirements of due process. *Sherrer* v. *Sherrer*, 334 U. S., at 348 ("there is nothing in the concept of due process which demands that a defendant be afforded a second opportu-

to determine the merits of the complaint. N. Y. Exec. Law § 297(4)(a) (McKinney Supp. 1981–1982). A public hearing must also be held if the Human Rights Appeal Board finds "there has not been a full investigation and opportunity for the complainant to present his contentions and evidence, with a full record." *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, *supra*, at 337, 399 N. Y. S. 2d, at 544–545.[25] Finally, judicial review in the Appellate Division is available to assure that a claimant is not denied any of the procedural rights to which he was entitled and that the NYHRD's determination was not arbitrary and capricious. N. Y. Civ. Prac. Law § 7803 (McKinney 1981). See *Gregory* v. *New York State Human Rights Appeal Board*, 64 App. Div. 2d 775, 776, 407 N. Y. S. 2d 256, 257 (1978); *Tenenbaum* v. *State Div. of Human Rights*, 50 App. Div. 2d 257, 259, 376 N. Y. S. 2d 542, 544 (1975).

We have no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause.[26]

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nity to litigate the existence of jurisdictional facts"); *Baldwin* v. *Iowa Traveling Men's Assn.*, 283 U. S. 522, 524 (1931); *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 30 (1917). Section 1738 was enacted to implement the Full Faith and Credit Clause, *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 437 (1943), and specifically to insure that federal courts, not included within the constitutional provision, would be bound by state judgments. *Davis* v. *Davis*, 305 U. S. 32, 40 (1938) ("The Act extended the rule of the Constitution to all courts, federal as well as state"). See also *Underwriters National Assur. Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Assn.*, 455 U. S. 691 (1982). It is therefore reasonable that § 1738 be subject to no more restriction than the Full Faith and Credit Clause.

[25] The Human Rights Appeal Board is authorized to reverse or remand any order that is not "supported by substantial evidence on the whole record" or that is "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." N. Y. Exec. Law §§ 297–a(7)(d) and (e) (McKinney 1972).

[26] Certainly, the administrative nature of the factfinding process is not dispositive. In *United States* v. *Utah Construction & Mining Co.*, 384

Only where the evidence submitted by the claimant fails, as a matter of law, to reveal any merit to the complaint may the Department make a determination of no probable cause without holding a hearing. *Flah's, Inc.* v. *Schneider*, 71 App. Div. 2d 993, 420 N. Y. S. 2d 283, 284 (1979). See n. 21, *supra*. And before that determination may be reached, New York requires the Commission to make a full investigation, wherein the complainant has full opportunity to present his evidence, under oath if he so requests. *State Div. of Human Rights* v. *New York State Drug Abuse Control Comm'n*, *supra*, at 336, 399 N. Y. S. 2d, at 544. The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy. Cf. *Juidice* v. *Vail*, 430 U. S. 327, 337 (1977).

IV

In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.[27] Because there is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits, the judgment of the Court of Appeals is

Affirmed.

U. S. 394 (1966), we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity." *Id.*, at 422.

[27] One example is the authorization for federal courts to reexamine state findings upon a request for a writ of habeas corpus. 28 U. S. C. § 2254.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Today the Court follows an isolated Second Circuit approach and holds that a discrimination complainant cannot bring a Title VII suit in federal court after unsuccessfully seeking state court "review" of a state antidiscrimination agency's unfavorable decision. The Court embraces a rule that has been subject to challenge within the Second Circuit[1] and that has been "vigorously attacked and soundly rejected by other courts."[2] The Court reaches this result because it purports to find nothing in Title VII inconsistent with the application of the general preclusion rule of 28 U. S. C. § 1738 to the state court's affirmance of the state agency's decision. For a compelling array of reasons, the Court is wrong.

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[1] Before the Court of Appeals addressed the issue, one District Court in the Second Circuit held that a state court affirmance of a decision by the New York State Division of Human Rights did not preclude a subsequent Title VII suit. *Benneci* v. *Department of Labor, New York State Division of Employment*, 388 F. Supp. 1080 (SDNY 1975). Then in *Mitchell* v. *National Broadcasting Co.*, 553 F. 2d 265 (1977), the Second Circuit ruled, over a strong dissent, that a state court affirmance of a state agency decision barred a subsequent civil rights suit under 42 U. S. C. § 1981. Later, in a brief *per curiam* decision, *Sinicropi* v. *Nassau County*, 601 F. 2d 60, cert. denied, 444 U. S. 983 (1979), the Circuit concluded that *Mitchell* dictated the same res judicata result for Title VII, despite the significant differences between § 1981 and the complex structure of Title VII, which expressly addresses the role of state proceedings in the resolution of discrimination claims. The District Judge in this case appropriately felt himself bound by *Sinicropi*, but he wrote a persuasive opinion questioning its wisdom. 477 F. Supp. 587, 591–594 (SDNY 1979). On appeal, a panel of the Second Circuit also found the outcome in this case dictated by *Sinicropi*. 623 F. 2d 786 (1980). Two judges of that court voted for rehearing en banc. App. 80.

[2] *Unger* v. *Consolidated Foods Corp.*, 657 F. 2d 909, 914, n. 5 (CA7 1981). All other Courts of Appeals that have considered the issue have disagreed with the Second Circuit. In addition to *Unger*, see *Smouse* v. *General Electric Co.*, 626 F. 2d 333, 336 (CA3 1980) (expressly rejecting

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The Court, as it must, concedes that a state *agency* determination does not preclude a trial *de novo* in federal district court. *Ante*, at 468–470, and n. 7. Congress made it clear beyond doubt that state agency findings would not prevent the Title VII complainant from filing suit in federal court.

Title VII provides that no charge may be filed until 60 days "after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." § 706(c), 42 U. S. C. § 2000e–5(c). After a charge is filed, the Equal Employment Opportunity Commission (EEOC) may take action and, eventually, the complainant may file suit, §§ 706(b) and (f)(1). By permitting a charge to be filed after termination of state proceedings, the statute expressly contemplates that a plaintiff may bring suit despite a state finding of no discrimination.[3]

Sinicropi); *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d 1079, 1084 (CA8) ("questioning" *Sinicropi*), cert. denied, 446 U. S. 966 (1980). See also *Aleem* v. *General Felt Industries, Inc.*, 661 F. 2d 135[illegible]7 (CA9 1981) ("*Sinicropi* is inconsistent with the Supreme Court's decision in *Alexander* [v. *Gardner-Denver Co.*, 415 U. S. 36 (1974)]").

Commentators, too, agree that the Second Circuit's rule is ill-conceived. See Note, Res Judicata in Successive Employment Discrimination Suits, 1980 U. Ill. Law Forum 1049, 1099; Comment, 15 Harv. Civ. Rights-Civ. Lib. L. Rev. 29, 266–276 (1980) (criticizing application of Second Circuit's rule to 42 U. S. C. § 1981); Comment, 31 Rutgers L. Rev. 973 (1979) (same); Comment, 6 Ford. Urban L. J. 481, 492–494 (1978) (same); Comment, 62 Minn. L. Rev. 987 (1978); Note, 53 N. Y. U. L. Rev. 187 (1978). See also Jackson, Matheson, & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich. L. Rev. 1485, 1519–1520 (1981) (rejecting application of res judicata when, as in this case, the state court affirms a state agency finding of no probable cause); Comment, 30 Vand. L. Rev. 1260 (1977); Richards, Alexander v. Gardner-Denver: A Threat to Title VII Rights, 29 Ark. L. Rev. 129, 158 (1975) (interpreting Title VII contrary to Second Circuit's decisions, but before the relevant Second Circuit cases were decided).

[3] See also § 706(f)(1) (permitting the district court to stay a Title VII suit for not more than 60 days pending termination of "State or local pro-

This fact is also made clear by § 706(b). In 1972, by Pub. L. 92–261, § 4, 86 Stat. 104, Congress amended that section by directing that the EEOC "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law."[4] If the original version of Title VII had given the outcomes of state "proceedings" preclusive effect, Congress would not have found it necessary to amend the statute in 1972 to direct that they be given "substantial weight." And if in 1972 Congress had intended final decisions in state "proceedings" to have preclusive effect, it certainly would not have instructed that they be given "substantial weight."[5]

Thus, Congress expressly recognized in both § 706(b) and § 706(c) that a complainant could bring a Title VII suit in federal court despite the conclusion of state "proceedings." And, as the Court must acknowledge, see *ante*, at 470–471, n. 8, when Congress referred to state "proceedings," it referred to both state agency proceedings and state judicial

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ceedings," without suggesting that the termination would bar further district court proceedings).

[4] By indicating that final decisions in state proceedings have no preclusive effect on the EEOC, Congress also indicated that final decisions in state proceedings do not preclude a subsequent Title VII suit in federal court. "It would be meaningless for Congress to set up standards for E. E. O. C. examination of cases after determinations were made in state proceedings if Congress intended that those cases be barred from consideration in federal court," because the EEOC, "which lacks enforcement power, would be attempting to mediate with defendants who were already protected from any further legal action." *Batiste* v. *Furnco Constr. Corp.*, 503 F. 2d 447, 450, n. 1 (CA7 1974), cert. denied, 420 U. S. 928 (1975).

[5] Congress simply would have inserted the words "preclusive effect" instead of "substantial weight." The legislative history of the "substantial weight" amendment indicates that Congress intended for the EEOC to refrain only from overturning state decisions "peremptorily" and for the EEOC simply to give them "due respect." 118 Cong. Rec. 310 (1972) (remarks of Sen. Ervin).

review of those agency proceedings. "[T]hroughout Title VII the word 'proceeding,' or its plural form, is used to refer to all the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial." *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 62–63 (1980).

Yet the Court nevertheless finds that petitioner's Title VII suit is precluded by the termination of state "proceedings." In this case, the New York State Division of Human Rights (NYHRD) found no probable cause to believe that petitioner had been a victim of discrimination. Under the Court's own rule, that determination in itself does not bar petitioner from filing a Title VII suit in federal district court. According to the Court, however, petitioner lost his opportunity to bring a federal suit when he unsuccessfully sought review of the state agency's decision in the New York courts. As the Court applies preclusion principles to Title VII, the state court affirmance of the state agency decision—*not* the state agency decision itself—blocks any subsequent Title VII suit.

The Court reaches this result through a schizophrenic reading of § 706(b). See *ante*, at 469–470, and n. 8. According to the Court, when Congress amended § 706(b) so that state "proceedings" would be accorded "substantial weight," it meant two different things at the same time: it intended state agency "proceedings" to be accorded only "substantial weight," while, simultaneously, state judicial "proceedings" in review of those agency "proceedings" would be accorded "substantial weight and more"—that is, "preclusive effect." But the statutory language gives no hint of this hidden double meaning. Instead of reading an unexpressed intent into § 706(b), the Court should accept the plain language of the statute. All state "proceedings," whether agency proceedings or state judicial review proceedings, are entitled to "substantial weight," not "preclusive effect." As the Court implicitly concedes when it permits suit despite the conclusion

of agency proceedings, "substantial weight" is a very different concept from "preclusive effect," and Congress thus did not intend for the termination of any state "proceeding" to foreclose a subsequent Title VII suit.

In addition, the Court must disregard the clear import of § 706(c). That section explicitly contemplates that a complainant can bring a Title VII suit despite the termination of state "proceedings." Once again, the statute contains no suggestion that any state "proceeding" has preclusive effect on a subsequent Title VII suit. Nonetheless, contrary to § 706(c), the Court bars petitioner's Title VII suit because of the termination of state "proceedings."[6]

The Court's attempt to give § 706(b) a double meaning and to avoid the language of § 706(c) is made all the more awkward because the Court's decision artificially separates the proceedings before the reviewing state court from the state administrative process. Indeed, if Congress meant to permit a Title VII suit despite the termination of state agency proceedings, it is only natural to conclude that Congress also intended to permit a Title VII suit after the agency decision has been simply affirmed by a state court.

State court review is merely the last step in the administrative process, the final means of review of the state *agency's* decision. For instance, in New York, the NYHRD "is primarily responsible for administering the law and to that end has been granted broad powers to eliminate discriminatory practices." *Imperial Diner, Inc.* v. *State Human Rights Appeal Bd.*, 52 N. Y. 2d 72, 77, 417 N. E. 2d 525, 528 (1980). When, as in this case, the NYHRD finds no probable cause, a reviewing court must affirm the Division's decision unless it is "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," see

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[6] The Court observes that this section does not address the issue of the proper weight to be afforded state decisions. See *ante*, at 471, n. 8. It is

N. Y. Exec. Law § 297-a(7)(e) (McKinney 1972),[7] that is, unless the decision is "devoid of a rational basis." *State Office of Drug Abuse Servs.* v. *State Human Rights Appeal Bd.*, 48 N. Y. 2d 276, 284, 397 N. E. 2d 1314, 1318 (1979). If the agency decides to hold a hearing, its decision must be affirmed if it is "supported by substantial evidence on the whole record." N. Y. Exec. Law § 297-a(7)(d) (McKinney 1972). See *State Division of Human Rights* v. *Syracuse University*, 46 App. Div. 2d 1002, 362 N. Y. S. 2d 104 (1974). See generally N. Y. Exec. Law § 298 (McKinney Supp. 1981-1982).

This review, therefore, is not *de novo* in the state courts. When it affirms the agency's decision, the reviewing court does not determine that the Division was correct. In fact, the court may not "substitute its judgment for that of the [NYHRD]," *State Division of Human Rights* v. *Mecca Kendall Corp.*, 53 App. Div. 2d 201, 203-204, 385 N. Y. S. 2d 665, 666-667 (1976); the court is "not empowered to find new facts or take a different view of the weight of the evidence if the [NYHRD's] determination is supported by substantial evidence," *State Division of Human Rights* v. *Columbia University*, 39 N. Y. 2d 612, 616, 350 N. E. 2d 396, 398 (1976), cert. denied *sub nom. Gilinsky* v. *Columbia University*, 429 U. S. 1096 (1977). In affirming, the reviewing court finds only that the agency's conclusion "was a reason-

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true that § 706(c) does not specify the precise amount of deference due a state decision. But by permitting a complainant to file charges with the EEOC and ultimately to bring suit despite the termination of state proceedings, § 706(c) does provide that the termination of state proceedings will not have preclusive effect.

Section 706(f)(1) follows the same path. It permits the federal court to stay a Title VII suit pending termination of state "proceedings," without suggesting that the termination of state proceedings will preclude further action in the Title VII suit.

[7] Sections 297-a(7)(d) and (e) describe the scope of review by the New York Human Rights Appeal Board. Those standards also apply to review

able one and thus may not be set aside by the courts although a contrary decision may 'have been reasonable and also sustainable.'" *Imperial Diner, Inc.* v. *State Human Rights Appeal Bd.*, 52 N. Y. 2d, at 79, 417 N. E. 2d, at 529, quoting *Mize* v. *State Division of Human Rights*, 33 N. Y. 2d 53, 56, 304 N. E. 2d 231, 233 (1973).[8]

The Court purports to give preclusive effect to the New York court's decision. But the Appellate Division made no finding one way or the other concerning the *merits* of petitioner's discrimination claim. The NYHRD, not the New York court, dismissed petitioner's complaint for lack of probable cause. In affirming, the court merely found that the *agency's* decision was not arbitrary or capricious. Thus, although it claims to grant a state *court* decision preclusive ef-

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by the New York courts of NYHRD decisions. See *Mize* v. *State Division of Human Rights*, 33 N. Y. 2d 53, 57, 304 N. E. 2d 231, 233 (1973); N. Y. Civ. Prac. Law § 7803 (McKinney 1981); Gabrielli & Nonna, Judicial Review of Administrative Action in New York: An Overview and Survey, 52 St. John's L. Rev. 361, 369–373 (1978).

[8] Despite these express statutory provisions and explanations from New York's highest courts, this Court seems to insist that New York courts pass upon the merits of a complainant's discrimination claim. See *ante*, at 480–481, n. 21. If this is the basis for the Court's decision giving the New York court's ruling preclusive effect, then today's decision is much less important than some might think at first glance. If a state court in fact adheres to a pure arbitrary and capricious standard, the Court might not grant such a state court decision preclusive effect.

On the other hand, the Court may be stating only that use of an arbitrary and capricious standard involves some examination of the merits, because the reviewing court must look at the evidence to determine if the agency acted in an arbitrary fashion. If this is the gist of the Court's argument, the Court advances its case very little. When a court reviews an agency record under a deferential standard of review, the agency, not the court, decides the merits of the claim.

The Court states that "[t]here is no requirement that judicial review must proceed *de novo* if it is to be preclusive." *Ante*, at 481, n. 21. Whether that conclusion is correct in the usual case or not, it certainly cannot stand in the context of Title VII. As the Court itself holds, Congress

fect, in fact the Court bars petitioner's suit based on the state *agency's* decision of no probable cause. The Court thereby disregards the express provisions of Title VII, for, as the Court acknowledges, Congress has decided that an adverse state agency decision will not prevent a complainant's subsequent Title VII suit.[9]

Finally, if the Court is in fact giving preclusive effect only to the state *court* decision, the Court misapplies 28 U. S. C. § 1738 by barring petitioner's suit. The state reviewing court never considered the merits of petitioner's discrimination claim, the subject matter of a Title VII suit in federal court. It is a basic principle of preclusion doctrine, see *ante*, at 481–482, n. 22, that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision. "If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation." *Commissioner* v. *Sunnen*, 333 U. S. 591, 600 (1948). See also *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980). Here, the state court decided only whether the state agency decision was arbitrary or capricious. Since the discrimination claim, not the validity of the state agency's decision, is the issue before the federal court, under § 1738 the state court's decision by itself cannot preclude a federal Title VII suit.

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expressly intended that a state agency's determination would not bar a Title VII suit. When the state court does not conduct a *de novo* review, it accepts the determination of the state agency. When the Court gives such a state court affirmance preclusive effect, it thereby forecloses a Title VII suit based on a state agency's resolution of the complainant's discrimination charge—a result that Title VII condemns.

[9] The primacy of the state agency's decision is underscored by the source of the preclusion rule upon which the Court relies. To determine the preclusive effect the state court affirmance would have in the New York courts, the Court quotes N. Y. Exec. Law § 300 (McKinney 1972). *Ante*, at 467. But § 300 makes no reference to state court decisions; it prevents state suit after a final decision in any proceeding brought before the

Thus, the Court is doing one of two things: either it is granting preclusive effect to the state agency's decision, a course that it concedes would violate Title VII, or it is misaping § 1738 by giving preclusive effect to a state court decision that did not address the issue before the federal court. Instead of making one of these two mistakes, the Court should accept the fact that the New York state court judicial review is simply the end of the state administrative process, the state "proceedings." The Court searches in vain for a partial repeal of § 1738 in Title VII because it is blind to the fact that judicial review is a part—indeed, a distinctly secondary part—of the administration of discrimination claims filed before the NYHRD.[10]

II

A

The Court's decision also flies in the face of Title VII's legislative history. Under the Court's ruling, a complainant is foreclosed from pursuing his federal Title VII remedy if he unsuccessfully seeks judicial correction of the state agency's adverse disposition of his discrimination charge. Thus, state proceedings are the complainant's sole remedy when he unsuccessfully pursues judicial review on the state side. But Title VII's legislative history makes clear that Congress never intended the outcome of state agency proceedings to be the discrimination complainant's exclusive remedy.

One of the principal issues during congressional consideration of Title VII in 1964 was the proper role of state fair employment practices commissions. See, *e. g.*, 110 Cong. Rec. 7216 (1964). At various times, Congress considered proposals to give the state commissions exclusive jurisdiction over

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NYHRD. Thus, for the purposes of state preclusion, a state court affirmance of the state agency's final decision is mere happenstance.

[10] One reason for the Court's decision is its fear that a state court affirmance of a state agency decision cannot be distinguished from a full state

discrimination charges. But, repeatedly, Congress rejected those proposals.

When Title VII was before the House for the first time, the House twice rejected attempts to prevent the application of Title VII in States that were enforcing adequate fair employment laws. See 110 Cong. Rec. 2727 (1964); *id.*, at 2828. In the end, the House provided for exclusive jurisdiction in the States, but only under certain conditions. Under the House version, the EEOC would have been given authority to determine the adequacy of state agency procedures. If it found the procedures to be adequate, the EEOC was directed to enter into a written agreement with the state agency. In States covered by those agreements, the EEOC would not bring civil actions in cases referred to in the agreements *and* the complainants would likewise be barred from bringing a civil suit in federal court. H. R. 7152, 88th Cong., 2d Sess., § 708(b) (1964). See 110 Cong. Rec. 7214 (1964).

But when the bill went to the Senate, the House approach was discarded for the present provisions of the statute.

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court trial of a discrimination claim. See *ante*, at 469–470. This fear is unfounded.

When Congress permitted a complainant to bring a Title VII suit despite the termination of his state proceedings, it had proceedings connected with state antidiscrimination agencies clearly in mind. See §§ 706(c) and 709(b). Thus, the Court easily could hold that Congress referred to state administrative processing of discrimination claims, including judicial review of agency decisions, when it referred to "proceedings" in §§ 706(b) and (c), and, at the same time, could refuse to hold that Congress intended to include a state court trial on the merits of the complainant's claim within the term "proceedings."

Such a decision would be buttressed by the fact that the procedures available in state court closely approximate those available in federal court. Moreover, the policies favoring preclusion under 28 U. S. C. § 1738 would be considerably stronger if the merits of the discrimination claim had been settled by the state court itself. The Fourth Circuit recently had no difficulty distinguishing a state court trial on a discrimination claim from a

Senator Dirksen presented the explanation of the changes. *Id.*, at 12817. Among these was the statement that the exclusive-jurisdiction provision of the House bill "which provides for the ceding of Federal jurisdiction is deleted." *Id.*, at 12819. Instead, "it has been replaced by the new provisions of section 706 which provide that where there is a State or local law prohibiting the alleged unlawful employment practice, the State or local authorities are given exclusive jurisdiction *for a limited period of time*" (emphasis added). *Ibid.* Thus, after state proceedings had terminated, the complainant was free to seek federal remedies. See *id.*, at 12721 (remarks of Sen. Humphrey); *id.*, at 12595 (remarks of Sen. Clark) (accepting final version because complainant can "eventually" pursue federal remedies after applying for state relief).

Congress left open only a narrow exception for possible exclusive state agency jurisdiction. The EEOC was empowered to enter into worksharing agreements with state agencies. A worksharing agreement did not automatically foreclose a complainant from filing a federal civil suit, but the EEOC was free to include such a provision in a worksharing agreement if it considered that course wise. *Id.*, at 12820. See § 709(b).

Thus, in the end, Congress expressly decided that no discrimination complainant should be left solely to his remedies before state fair employment commissions, unless the EEOC agreed otherwise. Yet, contrary to this congressional choice, the Court would deny some discrimination victims any federal remedy and would make the decisions of state commissions their exclusive redress, even in the absence of an EEOC agreement. When a state court refuses to overturn a state commission's rejection of a complainant's dis-

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state court affirmance of a state agency's determination. *Moosavi* v. *Fairfax County Bd. of Educ.*, 666 F. 2d 58 (1981).

crimination claim, the Court declares the state remedy to be exclusive.

B

But the Court qualifies its holding. The Court permits the state agency's decision to be the complainant's exclusive remedy only if the agency's procedures satisfy the minimal requirements of due process. *Ante*, at 481–485. The Court surveys the procedures of the NYHRD and concludes that they are in accord with due process. *Ante*, at 483–485.[11] This discussion by itself demonstrates the fallacy of the Court's attempt to differentiate between the state agency's decision and the state court's affirmance of that decision. By relying more heavily on the adequacy of the state *agency's* procedures than on the adequacy of the state *court's* procedures, the Court underscores that it is, in fact, granting preclusive effect to a state administrative decision.

It is important, also, to note that in two different ways the Court's inquiry violates the congressional intent. First, the Court undertakes to determine whether the state procedures are adequate when Congress has expressly left that decision to the EEOC. Congress explicitly permitted a state complainant to file suit in federal court despite a final state agency decision, unless the EEOC has signed a worksharing agreement with the state agency foreclosing subsequent federal suits. If the EEOC agreed with the Court that minimal due process in agency procedures justified barring subsequent Title VII suits when the state agency's decision had been affirmed by a state court, the EEOC could sign worksharing agreements with state agencies on those terms. By assuming the authority to make that decision, the Court usurps a role that Congress reserved to the EEOC.

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[11] The Court is quite correct in holding that a state decision must satisfy at least due process before it can be given preclusive effect in the federal courts. Indeed, this aspect of the Court's decision follows directly from

Second, throughout its consideration of Title VII, Congress was concerned that state agency procedures were not the equivalent of those that it intended federal authorities to employ. Senator Clark told the Senate that "State and local FEPC laws vary widely in effectiveness." 110 Cong. Rec. 7205 (1964). He continued: "In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget." *Ibid.* Unlike the Court, Congress realized that no legal doctrine could accurately gauge the effectiveness of state agencies and laws in eliminating discrimination. In their interpretative memorandum, Senators Clark and Case[12] explained:

> "It has been suggested . . . that there should be some provision automatically providing for exclusive State jurisdiction where adequate State remedies for discrimination in employment exist. Such a proposal is unworkable. Congress cannot determine nor can we devise a formula for determining which State laws and procedures are adequate. . . . An antidiscrimination law cannot be evaluated simply by an examination of its provisions, 'for the letter killeth, but the spirit giveth life.'" *Id.*, at 7214.

Yet the Court concludes that minimal due process standards provide safeguards sufficient to warrant denying a discrimination victim federal remedies if a state court rejects his request to overturn an adverse state agency decision. In Title VII, Congress wanted to assure discrimination victims more than bare due process; it wanted them to have the benefit of a vigorous effort to eliminate discrimination. See *Al-*

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our decision earlier this term in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982).

[12] The Clark-Case memorandum is a particularly authoritative source for determining the congressional intent behind Title VII. See *Teamsters* v. *United States*, 431 U. S. 324, 350–352, and 351, n. 35 (1977).

exander v. *Gardner-Denver Co.*, 415 U. S. 36, 44–45 (1974). By affording some discrimination complainants less, the Court contravenes the congressional intent behind Title VII.

C

The Court's search of the legislative history uncovers only a single bit of concrete support for its interpretation of Title VII.[13] But, ironically, the legislative history cited by the Court actually undercuts its position. During the 1972 debates over changes in Title VII, Senator Hruska proposed an amendment that would have made Title VII the exclusive remedy for a discrimination victim, with certain exceptions. One of the exceptions permitted concurrent state proceedings. The Senator explained: "[T]here would be a further exception and that would be proceedings in a State agency. Those proceedings could continue notwithstanding the pendency of an employee's action under section 706 of title VII.

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[13] The Court also cites legislative materials indicating that congressional defenders of employers and unions preferred trial *de novo* in federal court over conclusive administrative proceedings before the EEOC. See *ante*, at 473–475. But the Court focuses on the wrong choice. The question is not why Congress chose federal trial *de novo* over conclusive EEOC proceedings, but why Congress chose to provide a federal remedy rather than relying on state remedies. The reason is that Congress wanted to provide a federal remedy, whether before a federal court or the EEOC, separate from and independent of the antidiscrimination procedures afforded by the States.

Furthermore, the Court's decision is contrary to its own reading of the legislative history. Presumably, if the complainant prevails before the state agency and also before the state courts, the Court would give that decision in his favor preclusive effect. Thus, if state law provides the complainant with an inadequate remedy, evidently he will be able to bring a Title VII suit in federal court asserting the state decision as res judicata on the issue of the employer's liability. Yet the Court insists that Congress intended that employers not be bound by administrative findings but instead intended that employers have the protection of a trial *de novo* in federal court. *Ibid.*

It seems to me and others that this is only fair." 118 Cong. Rec. 3369 (1972). Thus, even Senator Hruska would not have prevented duplicative state and federal proceedings. Here is strong evidence of a congressional consensus that state and federal remedies should exist independently of each other.

The Court quotes part of Senator Javits' response to Senator Hruska's proposal. See *ante*, at 475. What the Court fails to point out is that the bulk of Senator Javits' response rejected the suggestion that the number of discrimination remedies should be reduced. Senator Javits quoted with approval from the testimony of an official of the Department of Justice:

> "In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination. . . .
>
> "At this juncture, when we are all agreed that some improvement in the enforcement of Title VII is needed, it would be . . . unwise to diminish in any way the variety of enforcement means available to deal with discrimination in employment." 118 Cong. Rec. 3369–3370 (1972).

Thus, since Senator Javits was responding to a proposed amendment that expressly provided for separate federal and state proceedings, he certainly did not suggest that state proceedings should bar Title VII suits when he spoke of res judicata. See *ante*, at 475.[14] At the most, he may have been

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[14] The Court finds it significant that Senator Javits referred to New York state administrative proceedings during his remarks. *Ante*, at 475–476, n. 17. But Senator Javits cited New York proceedings only to show that businessmen had not been subject to harassment through discrimination complaints; he did not mention state proceedings during his discussion of res judicata. See 118 Cong. Rec. 3370 (1972). Furthermore, when Senator Javits discussed res judicata, he spoke of litigation instigated by the EEOC, the Attorney General, and an individual. See *ante*, at 475. Thus, Senator Javits was addressing only federal proceedings; he was not sug-

referring to suits brought under overlapping federal statutes. And, given his reluctance to reduce the number of available antidiscrimination remedies, it is not clear that his remarks were intended to reach even that far.[15] In no sense can the defeat of Senator Hruska's amendment be interpreted as a congressional endorsement of the Court's decision to bar a complainant's Title VII suit based on a state court affirmance of an adverse state agency decision.[16] In Senator Javits' own words, "[w]e should not cut off the range of remedies which is available." 118 Cong. Rec. 3370 (1972).[17]

III

The Court's opinion today is also contrary to the rationales underlying its past Title VII decisions. Time and again, the Court has held that Congress did not intend to foreclose a

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gesting that the outcome of state proceedings might have res judicata effect. The EEOC and the Attorney General of the United States obviously do not participate in proceedings before the New York state agency.

[15] Since Senator Javits specifically mentioned successive suits brought by the EEOC, the Attorney General, and an individual, see *ibid.*, he may have been referring only to successive suits brought under Title VII. See also 118 Cong. Rec. 3371–3372 (1972) (remarks of Sen. Williams) (rejecting Hruska amendment and insisting that 42 U. S. C. § 1981 and Title VII should not be mutually exclusive).

[16] The Court quotes Senator Williams' statement that "the individual claimant should [not] be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again." 118 Cong. Rec. 3372 (1972). See *ante*, at 476. But the Court fails to quote Senator Williams' immediately succeeding statement: "I do feel that where one form of relief proves unresponsive or impractical, . . . [the complainant] should have that right." 118 Cong. Rec. 3372 (1972). Indeed, the feared unresponsiveness of some state agencies was a principal reason for the enactment of Title VII. See 110 Cong. Rec. 7214 (1964); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 48, n. 9 (1974).

[17] This reading of the statute is fully supported by the original legislative history of Title VII. In 1964, Senator Tower offered an amendment similar to Senator Hruska's 1972 amendment, making Title VII the exclusive federal employment discrimination remedy. 110 Cong. Rec. 13650 (1964). Like Senator Hruska's amendment, Senator Tower's made an exception for state proceedings. *Ibid.* There was no mention of res judicata during the

Title VII suit because of the conclusion of proceedings in another forum.

The case list begins with *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), when the Court refused to prevent a plaintiff from bringing suit in federal court because of an EEOC determination of no reasonable cause. The Court cited "the large volume of complaints before the Commission and the nonadversary character of many of its proceedings," *id.*, at 799; noted that Title VII "does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause," *id.*, at 798; and refused to "engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts," *id.*, at 798–799. The Court today could just as easily have written about "the nonadversary character" of state agency proceedings and the fact that Title VII does not "restrict a complainant's right to sue" to those charges as to which a state court has not affirmed the state agency's findings.

In *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), the Court repeated the same theme by permitting a Title VII suit despite a prior adverse arbitration under a collective-bargaining agreement. The Court emphasized that Congress intended a scheme of overlapping, independent, supplementary discrimination remedies:

> "[L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII provides for consideration of employment-discrimination claims in several forums. . . . *And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative his-*

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debates, see *id.*, at 13650–13652, and the Senate rejected the amendment by a vote of 29 to 59. *Id.*, at 13652.

> *tory of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.*" *Id.*, at 47–48 (footnotes omitted) (emphasis added).

The Court today disregards the congressional intent described in *Alexander* when it makes state agency proceedings the exclusive remedy for those complainants who unsuccessfully pursue state judicial review.

Finally, in two subsequent decisions, the Court adhered to *Alexander*. In *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 461 (1975), it held that Title VII and 42 U. S. C. § 1981, although "related" and "directed to most of the same ends," provide "separate, distinct, and independent" discrimination remedies. And in *Chandler* v. *Roudebush*, 425 U. S. 840 (1976), the Court permitted a federal employee to bring a Title VII suit even though the Civil Service Commission had affirmed a federal agency's rejection of the employee's discrimination claim.

In each of these four cases, the Court refused to close the doors of the federal courthouse to the Title VII plaintiff. The Court has allowed Title VII plaintiffs to sue in federal court, though they had failed before the EEOC, an arbitrator, and a federal agency. And even today's majority must add another forum to this list, namely, a state antidiscrimination agency. Until now, it has been "clear from [the] scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S., at 65. The Court departs from the reasoning of an unbroken line of its prior decisions when it bars a discrimination complainant from suing under Title VII simply because he unsuccessfully sought state judicial "review" of an adverse state agency decision.

IV

Perhaps the most disturbing aspect of the Court's decision is its tendency to cut back upon two critical policies underlying Title VII.

First, Congress intended that state antidiscrimination procedures be an integral part of the Nation's battle against discrimination. For that reason, Congress did not pre-empt state antidiscrimination agencies, see 110 Cong. Rec. 7216 (1964), and instead gave state and local authorities an initial opportunity to resolve discrimination complaints. See, *e. g.*, *id.*, at 12725 (remarks of Sen. Humphrey).

The Court's decision is directly contrary to this congressional intent. The lesson of the Court's ruling is: *An unsuccessful state discrimination complainant should not seek state judicial review.*[18] If a discrimination complainant pursues state judicial review and loses—a likely result given the deferential standard of review in state court—he forfeits his right to seek redress in a federal court. If, however, he simply bypasses the state courts, he can proceed to the EEOC and ultimately to federal court. Instead of a deferential review of an agency record, he will receive in federal court a *de novo* hearing accompanied by procedural aids such as broad discovery rules and the ability to subpoena witnesses. Thus, paradoxically, the Court effectively has eliminated state reviewing courts from the fight against discrimination in an entire class of cases. Consequently, the state courts will not have a chance to correct state agency errors when the agencies rule against discrimination victims, and the quality of

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[18] Indeed, a prudent discrimination complainant may make every effort to *prevent* the state agency from reaching a final decision. If the complainant prevails after a full hearing, he runs the risk that his adversary may seek judicial review. He could then find himself closed out of federal court if a state court decides that the agency's decision is unsupported by sufficient evidence. See *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d, at 1084. In some future case, the Court may find such a result inimical to Title VII but, given today's decision, no complainant could safely predict

state agency decisionmaking can only deteriorate.[19] It is a perverse sort of comity that eliminates the reviewing function of state courts in the name of giving their decisions due respect.

This argument against preclusion is not novel. In prior decisions, the Court has refused to set up incentives for discrimination complainants to abandon alternative remedies. In *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 59, it concluded: "Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII

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that the Court would not apply § 1738. For a complainant with some evidence to support his claim, the wiser course might well be to thwart all state proceedings and wait for EEOC attempts at conciliation and the full procedural advantages of federal court adjudication.

[19] The Court's response to this is unconvincing. The Court argues tnat, if it does not give the state court affirmance preclusive effect, it will "lesse[n] the incentive for full participation by the parties and for searching review by state officials." *Ante*, at 478. It is difficult to see how this result will come about, when a complainant can win a ruling in his favor if he succeeds on judicial review and when his adversary risks losing the state court judgment if he does not rebut the complainant's arguments. Moreover, the parties will have another incentive to litigate vigorously during state judicial review, because no one disputes that state court affirmances "may be admitted as evidence and accorded such weight as the [federal] court deems appropriate." *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 60, that is, "substantial weight," see § 706(b).

The Court also insists that a reversal in this case would "reduce the incentive for States to work towards effective and meaningful antidiscrimination systems." *Ante*, at 478. This fact will undoubtedly surprise state officials in the 47 States outside the Second Circuit—States which have not been governed by the preclusion rule currently followed only in that Circuit. See n. 2, *supra*. These state officials unquestionably recognize, as did Congress when it passed Title VII, that state procedures can provide efficient dispute resolution, even if the possibility of a subsequent Title VII suit exists. In any event, the Court hardly increases the quality of state decisionmaking when it effectively writes the state courts out of a large number of administrative cases.

claims would thus be reduced, and the result could well be more litigation, not less." In *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S., at 65, the Court addressed state proceedings directly, explaining: "Complainants unable to recover fees in state proceedings may be expected to wait out the 60-day deferral period, while focusing efforts on obtaining federal relief. . . . Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme." In this case, the Court has chosen preclusion over common sense, with the result that the state courts will decline, not grow, in importance.[20]

Second, the Court, for a small class of discrimination complainants, has undermined the remedial purpose of Title VII. Invariably, there will be some complainants who will not be aware of today's decision. The Court has thus constructed a rule that will serve as a trap for the unwary *pro se* or poorly represented complainant. For these complainants, their sole remedy lies in the state administrative processes. Yet, inevitably those agencies do not give all discrimination complaints careful attention. Often hampered by "inadequate

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[20] Thus, when the Court labels this line of reasoning "dubious," see *ante*, at 478, n. 19, it is doubting not only the logic of this dissent, but also the logic of two prior decisions of this Court. In addition, it seems unlikely that many discrimination complainants will find the "delay," see *ante*, at 479, n. 19, of a Title VII suit a measurable burden when they take into account the procedural advantages of federal court litigation as compared with state judicial review of agency decisions.

The Court also questions whether the state decisionmaking process will improve through practice. See *ante*, at 478–479, n. 19. Although some might argue the point, it seems that state agencies will be more careful if their decisions are subject to state court review and that state decisionmakers will learn from experience. But even if the quality of state decisionmaking does not decline as fewer complainants seek state judicial review, a reduction in the number of discrimination cases handled by state courts obviously carries with it a reduction in the role of state authorities in resolving discrimination charges. This result is directly contrary to the congressional intent.

procedures" or "an inadequate budget," see 110 Cong. Rec. 7205 (1964), the state antidiscrimination agency may give a discrimination charge less than the close examination it would receive in federal court.[21] When, as in this case, the state agency dismisses for lack of probable cause, the discrimination complainant is particularly at risk, because inadequate staffing of state agencies can lead to "a tendency to dismiss too many complaints for alleged lack of probable cause."[22] Though state courts may be diligent in reviewing agency dismissals for no probable cause, the nature of the agency's deliberations combined with deferential judicial review can lead only to discrimination charges receiving less careful consideration than Congress intended when it passed Title VII. The Court's decision thus cannot be squared with the congressional intent that the fight against discrimination be a policy "of the highest priority." *Newman* v. *Piggie Park Enterprises*. 390 U. S. 400, 402 (1968).[23]

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[21] See *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 57–58 (concluding that the informal procedures use dduring arbitration "mak[e] arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts").

[22] Bonfield, An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws (Part II), 42 N. Y. U. L. Rev. 1035, 1048–1049 (1967). "[T]he vagueness of the probable cause concept makes it a flexible tool in the hands of a commissioner"; "[b]y tightening it he can cut the Agency's caseload, perhaps to allow the Agency to devote its resources to cases that may be expected to produce a higher return in terms of job opportunities, or perhaps only to disguise his own personal timidity." Note, The California FEPC: Stepchild of the State Agencies, 18 Stan. L. Rev. 187, 191 (1965).

The risk is heightened by the fact that the complainant evidently must present more proof to establish probable cause than to survive a summary judgment motion in federal court. Probable cause exists when there is "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated." See *Goldberg* v. *State Commission for Human Rights*, 54 Misc. 2d 676, 680, 283 N. Y. S. 2d 347, 352 (1966).

[23] There is one final irony in the Court's decision. While the Court holds that a New York court's affirmance of an adverse state agency decision

V

For all these reasons, the Court's decision is neither "strongly suggested" nor "compelled" by *Allen* v. *McCurry*, 449 U. S. 90 (1980). See *ante*, at 476. In *McCurry*, the Court found only "the most equivocal support," 449 U. S., at 99, for an argument that Congress intended to override the general preclusion rule of § 1738 when it enacted 42 U. S. C. § 1983. But here, the language, the legislative history, and the fundamental policies of Title VII all demonstrate that Congress contemplated relitigation of a discrimination claim in federal court, even though a state court had refused to disturb a state agency decision adverse to the complainant.

And no drastic consequences would flow from a decision finding § 1738 inapplicable in this case. The Court would not be forced to permit a subsequent Title VII suit in federal court if the complainant already had lost a trial on the merits in state court. See n. 10, *supra*. Furthermore, the state court affirmance of the state agency's decision would not be discarded. The state decision could be "admitted as evidence and accorded such weight as the court deems appropriate," *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 60, that is, "substantial weight," see § 706(b).

But despite the reasonableness of the rule followed by other Courts of Appeals, see n. 2, *supra*, the Court improperly applies § 1738 to bar petitioner from bringing a Title VII suit in federal court. I dissent.

JUSTICE STEVENS, dissenting.

The issue that divides the Court is fairly narrow. The majority concedes that state agency proceedings will not bar a

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precludes a complainant from bringing a federal Title VII suit, a New York court has held that an unsuccessful Title VII suit in federal court does *not* preclude a proceeding before the NYHRD. *State Division of Human Rights* v. *County of Monroe*, 88 Misc. 2d 16, 386 N. Y. S. 2d 317 (1976). Citing *Alexander* v. *Gardner-Denver Co.*, *supra*, the court noted that "dual or overlapping remedies were contemplated and expressly intended

federal claim under Title VII, *ante*, at 470, n. 7, and JUSTICE BLACKMUN assumes, *arguendo*, that a state court decision on the merits of a discrimination claim would create such a bar, *ante*, at 494–495, n. 10, and 508 (dissenting opinion). Thus, the area of dispute is limited to cases in which an adverse agency decision has been reviewed and upheld by a state court.

The proper resolution of the dispute depends, I believe, on the character of the judicial review to which the agency decision is subjected. If it is the equivalent of a *de novo* trial on the merits, then I would agree that the analysis in the Court's opinion leads to the conclusion that 28 U. S. C. § 1738 forecloses a second lawsuit in a federal court. But as JUSTICE BLACKMUN has demonstrated, *ante*, at 490–493, that is not the character of the relevant judicial review in New York. The New York court's holding that the agency decision was not arbitrary or capricious merely establishes as a matter of law that a rational adjudicator might have resolved the discrimination issue either way.* It is therefore entirely

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by Congress in Title VII," 88 Misc. 2d, at 19, 386 N. Y. S. 2d, at 320, and held that "neither res judicata nor collateral estoppel applies," *id.*, at 20, 386 N. Y. S. 2d, at 321.

*In the two cases cited in *Flah's, Inc.* v. *Schneider*, 71 App. Div. 2d 993, 420 N. Y. S. 2d 283 (1979), the Appellate Division had developed the standard for reviewing agency dismissals for lack of probable cause. According to *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 App. Div. 2d 310, 307 N. Y. S. 2d 691, motion for leave to appeal dism'd, 26 N. Y. 2d 962, 259 N. E. 2d 477 (1970), the test is whether the agency determination "was arbitrary, capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." 33 App. Div. 2d, at 313, 307 N. Y. S. 2d, at 694 (paraphrasing N. Y. Exec. Law § 297–a(7)(e) (McKinney 1972)). The Appellate Division observed that "[f]or the [Divison of Human Rights] to dismiss his complaint under such circumstances it must appear virtually that as a matter of law the complaint lacks merit." 33 App. Div., at 313, 307 N. Y. S. 2d, at 695.

In *State Div. of Human Rights* v. *New York State Drug Abuse Control Comm'n*, 59 App. Div. 2d 332, 399 N. Y. S. 2d 541 (1977), the Division of Human Rights had dismissed the complaint after an investigation but with-

consistent with § 1738 for a federal district court to accept the New York judgment as having settled that proposition, and then to proceed to resolve the discrimination issue in a *de novo* trial.

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out a hearing. The Appeal Board had reversed and remanded for further proceedings. In sustaining the Human Rights Division, the Appellate Division clarified its holding in *Mayo:*

"In [*Mayo*] it was not our intention to deprive the commissioner [of the Division of Human Rights] of his statutory duty to [determine whether there is a reasonable basis for sustaining the complaint, based upon complainant's evidence, and for requiring the employer to answer and submit to a hearing]. Thus, after the commissioner has made a full investigation, wherein the complainant has had full opportunity to present his evidence and exhibits, under oath if he so requests, if the commissioner determines that complainant has not shown probable cause for his complaint, the appeal board has no authority to reverse such determination and order a [hearing], provided that the commissioner's determination is rationally supported by the record before him." *Id.*, at 336–337, 399 N. Y. S. 2d, at 544 (citations omitted).

These cases demonstrate that the issue before a New York court reviewing an agency dismissal of a discrimination complaint is not the equivalent of the merits issue in a Title VII action.

The Court's citations to New York cases, *ante*, at 480–481, n. 21, simply do not support the general proposition that a New York court's affirmance of an agency's dismissal of a complaint necessarily determines that the complaint lacked merit as a matter of law. It is true that some of those cases contain language similar to the observation in *Mayo* that the agency may summarily dismiss a complaint only if it appears "virtually that as a matter of law the complaint lacks merit." As in *Mayo*, however, other language in those cases refutes the notion that only complaints meritless as a matter of law are permitted to be dismissed without hearings by the agency. See, *e. g.*, *New York State Division for Youth* v. *State Human Rights Appeal Board*, 83 App. Div. 2d 972, 973, 442 N. Y. S. 2d 813, 814 (1981) ("We conclude that here, absent a full investigation including an opportunity for confrontation, the determination of the division was based on a record which was inadequate to meet the test of substantial evidence and was, therefore, arbitrary and capricious"); *State Division of Human Rights* v. *Blanchette*, 73 App. Div. 2d 820, 821, 423 N. Y. S. 2d 745 (1979) ("After the State Division of Human Rights has conducted an investigation of a complaint, with full opportunity to the complainant to support his or her claims of discrimination, the Division's determination of no probable

Both the text of Title VII and its legislative history indicate that Congress intended the claimant to have at least one opportunity to prove his case in a *de novo* trial in court. Thus, while I agree with the Court that Title VII did not impliedly repeal § 1738, I cannot accept the Court's construction of § 1738 in this case. In New York, as JUSTICE BLACKMUN demonstrates, the judicial review is simply a part of the "proceedings" that are entitled to "substantial weight" under Title VII.

Accordingly, I respectfully dissent.

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cause and dismissal of the complaint may not be vacated by the Appeal Board or the court if it is supported by substantial evidence"). The facts of the cases also demonstrate that allegations that clearly state a cause of action are not necessarily sufficient to avoid dismissal without a hearing. See, *e. g.*, *Stasiak* v. *Montgomery Ward & Co.*, 66 App. Div. 2d 962, 411 N. Y. S. 2d 700 (1978). Moreover, it is perfectly clear that the New York courts do not reach an independent conclusion on the merits of a discrimination claim that has been adjudicated against the claimant by the agency after a formal hearing.

NORTH HAVEN BOARD OF EDUCATION ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-986. Argued December 9, 1981—Decided May 17, 1982

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person," on the basis of sex, shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Section 902 authorizes each agency awarding federal financial assistance to any education program to promulgate regulations ensuring that aid recipients adhere to § 901(a), and as a sanction for noncompliance provides for termination of federal funds limited to the particular program, or part thereof, in which such noncompliance has been found. Pursuant to § 902, the Department of Health, Education, and Welfare (HEW), interpreting "person" in § 901(a) to encompass employees as well as students, issued regulations (Subpart E) prohibiting federally funded education programs from discriminating on the basis of sex with respect to employment. Petitioners, federally funded public school boards, when threatened with enforcement proceedings for alleged violations of § 901(a) with respect to board employees, brought separate suits challenging HEW's authority to issue the Subpart E regulations on the alleged ground that § 901(a) was not intended to apply to employment practices, and seeking declaratory and injunctive relief. The District Court in each case granted the school board's motion for summary judgment. In a consolidated appeal, the Court of Appeals reversed, holding that § 901(a) was intended to prohibit employment discrimination and that the Subpart E regulations were consistent with § 902.

Held:

1. Employment discrimination comes within Title IX's prohibition. Pp. 520–535.

(a) While § 901(a) does not expressly include employees within its scope or expressly exclude them, its broad directive that "no person" may be discriminated against on the basis of gender, on its face, includes employees as well as students. Pp. 520–522.

(b) Title IX's legislative history corroborates the conclusion that employment discrimination was intended to come within its prohibition. Pp. 523–530.

(c) Title IX's postenactment history provides additional evidence of Congress' desire to ban employment discrimination in federally financed education programs. Pp. 530–535.

2. The Subpart E regulations are valid. Pp. 535–540.

(a) An agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901(a) and 902. The Subpart E regulations are not inconsistent with this restriction. Pp. 535–539.

(b) But whether termination of petitioners' federal funds is permissible under Title IX is a question that must be answered by the District Court in the first instance. Pp. 539–540.

629 F. 2d 773, affirmed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 540.

Susan K. Krell argued the cause for petitioner North Haven Board of Education. *Paul E. Knag* argued the cause for petitioner Trumbull Board of Education. With them on the briefs were *Clifford R. Oviatt, Jr.*, and *Richard W. Rutherford*.

Solicitor General Lee argued the cause for the federal respondents. With him on the brief were *Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Brian K. Landsberg*, and *Marie E. Klimesz*. *Beverly J. Hodgson* argued the cause and filed a brief for respondent Linda Potz.*

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*Briefs of *amici curiae* urging reversal were filed by *Robert E. Williams* and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *Gordon C. Coffman* and *John Michael Facciola* for Hillsdale College.

Briefs of *amici curiae* urging affirmance were filed by *Margaret A. Kohn* for the American Association of University Women et al.; by *Joseph Onek* for Birch Bayh et al.; and by *Barbara D. Underwood* and *Burke Marshall* for the Yale Law Women's Association.

379-671 O—83——19

JUSTICE BLACKMUN delivered the opinion of the Court.

At issue here is the validity of regulations promulgated by the Department of Education pursuant to Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681 *et seq.* These regulations prohibit federally funded education programs from discriminating on the basis of gender with respect to employment.

I

Title IX proscribes gender discrimination in education programs or activities receiving federal financial assistance. Patterned after Title VI of the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 252, 42 U. S. C. § 2000d *et seq.* (1976 ed. and Supp. IV), Title IX, as amended, contains two core provisions. The first is a "program-specific" prohibition of gender discrimination:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." § 901(a).

Nine statutory exceptions to § 901(a)'s coverage follow. See §§ 901(a)(1)–(9).[1]

The second core provision relates to enforcement. Section 902 authorizes each agency awarding federal financial assistance to any education program to promulgate regulations ensuring that aid recipients adhere to § 901(a)'s mandate. The ultimate sanction for noncompliance is termination of

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[1] Section 901(a)(1) provides that, with respect to admissions, § 901(a) applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education. Specific exceptions are made for the admissions policies of schools that begin admitting students of both sexes for the first time,

federal funds or denial of future grants.[2] Like § 901, § 902 is program-specific:

> "[S]uch termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding [of noncompliance] has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . ."[3]

In 1975, the Department of Health, Education, and Welfare (HEW) invoked its § 902 authority to issue regulations

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§ 901(a)(2); religious schools, § 901(a)(3); military schools, § 901(a)(4); the admissions policies of public institutions of undergraduate higher education that traditionally and continually have admitted students of only one gender, § 901(a)(5); social fraternities and sororities, and voluntary youth service organizations, § 901(a)(6); Boys/Girls State/Nation conferences, § 901(a)(7); father-son and mother-daughter activities at educational institutions, § 901(a)(8); and scholarships awarded in "beauty" pageants by institutions of higher education, § 901(a)(9).

[2] Funding may not be terminated, however, until after the agency determines that noncompliance cannot be achieved by voluntary means; the recipient is given a hearing before an administrative law judge, who makes a recommendation subject to administrative and judicial review; and a report is filed with the appropriate House and Senate committees and no action is taken on that report for 30 days. See §§ 902, 903; 34 CFR §§ 106.71, 100.6–100.11, pt. 101 (1980).

[3] Section 902 provides in full:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an

governing the operation of federally funded education programs.[4] These regulations extend, for example, to policies involving admissions, textbooks, and athletics. See 34 CFR pt. 106 (1980).[5] Interpreting the term "person" in § 901(a) to encompass employees as well as students, HEW included among the regulations a series entitled "Subpart E," which deals with employment practices, ranging from job classifications to pregnancy leave. See 34 CFR §§ 106.51–106.61 (1980). Subpart E's general introductory section provides:

> "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment,

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express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report." 86 Stat. 374 (emphasis in original).

[4] HEW's functions under Title IX were transferred in 1979 to the Department of Education by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 96–88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). Because many of the relevant actions in this case were taken by HEW prior to reorganization, both agencies are referred to herein as HEW.

[5] The regulations initially appeared at 34 CFR pt. 86 (1972), but were recodified in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802 (1980). See n. 4, *supra*.

consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance." § 106.51(a)(1).[6]

II

Petitioners are two Connecticut public school boards that brought separate suits challenging HEW's authority to issue the Subpart E regulations. Petitioners contend that Title IX was not meant to reach the employment practices of educational institutions.

A. *The North Haven case.* The North Haven Board of Education (North Haven) receives federal funds for its education programs and activities and is therefore subject to Title IX's prohibition of gender discrimination. Since the 1975–1976 school year, North Haven has devoted between 46.8% and 66.9% of its federal assistance to the salaries of its employees; this practice is expected to continue.[7]

In January 1978, Elaine Dove, a tenured teacher in the North Haven public school system, filed a complaint with HEW, alleging that North Haven had violated Title IX by refusing to rehire her after a one-year maternity leave. In response to this complaint, HEW began to investigate the school board's employment practices and sought from petitioner information concerning its policies on hiring, leaves of absence, seniority, and tenure. Asserting that HEW lacked authority to regulate employment practices under Title IX, North Haven refused to comply with the request.

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[6] The Department of Agriculture also has issued regulations implementing Title IX. These include employment practices provisions that track the regulations at issue here. See 7 CFR §§ 15a.51–15a.61 (1980). In addition, the Small Business Administration has promulgated regulations prohibiting employment discrimination, which are based in part on Title IX. See 13 CFR § 113.3 (1981). See generally Comment, 129 U. Pa. L. Rev. 417, 418, nn. 7 and 8 (1980).

[7] See *North Haven Bd. of Ed.* v. *Hufstedler*, 629 F. 2d 773, 774–775 (CA2 1980).

ment regulations as unauthorized by Title IX,[9] we granted certiorari to resolve the conflict. 450 U. S. 909 (1981).

III

A

Our starting point in determining the scope of Title IX is, of course, the statutory language. See *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322, 330 (1978). Section 901(a)'s broad directive that "no person" may be discriminated against on the basis of gender appears, on its face, to include employees as well as students. Under that provision, employees, like other "persons," may not be "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" education programs receiving federal financial support.

Employees who directly participate in federal programs or who directly benefit from federal grants, loans, or contracts clearly fall within the first two protective categories described in § 901(a). See *Islesboro School Comm.* v. *Califano*, 593 F. 2d 424, 426 (CA1), cert. denied, 444 U. S. 972

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[9] Four Courts of Appeals and several District Courts have so held. See *Seattle University* v. *HEW*, 621 F. 2d 992 (CA9), cert. granted *sub nom. United States Dept. of Ed.* v. *Seattle Univ.*, 449 U. S. 1009 (1980); *Romeo Community Schools* v. *HEW*, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979); *Junior College Dist.* v. *Califano*, 597 F. 2d 119 (CA8), cert. denied, 444 U. S. 972 (1979); *Islesboro School Comm.* v. *Califano*, 593 F. 2d 424 (CA1), cert. denied, 444 U. S. 972 (1979); *Grove City College* v. *Harris*, 500 F. Supp. 253 (WD Pa. 1980), appeal pending, Nos. 80-2383, 80-2384 (CA3); *Kneeland* v. *Bloom Township High School Dist.*, 484 F. Supp. 1280 (ND Ill. 1980); *McCarthy* v. *Burkholder*, 448 F. Supp. 41 (Kan. 1978).

But see *Piascik* v. *Cleveland Museum of Art*, 426 F. Supp. 779, 781, n. 1 (ND Ohio 1976). Cf. *Dougherty Cty. School System* v. *Harris*, 622 F. 2d 735 (CA5 1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80-1023. The Fifth Circuit invalidated the Subpart E regulations on the ground that they do not apply only to specific programs that receive federal financial assistance, but ruled that Title IX permits the Secretary to regulate at least some employment practices.

(1979). In addition, a female employee who works in a federally funded education program is "subjected to discrimination under" that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues. See *Dougherty Cty. School System* v. *Harris*, 622 F. 2d 735, 737–738 (CA5 1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80–1023.

There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U. S. 787, 801 (1966); see also *Griffin* v. *Breckenridge*, 403 U. S. 88, 97 (1971); *Daniel* v. *Paul*, 395 U. S. 298, 307–308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437 (1968); *Piedmont & Northern R. Co.* v. *ICC*, 286 U. S. 299, 311–312 (1932). Because § 901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary. After all, Congress easily could have substituted "student" or "beneficiary" for the word "person" if it had wished to restrict the scope of § 901(a).[10]

Petitioners, however, point to the nine exceptions to § 901(a)'s coverage set forth in §§ 901(a)(1)–(9). See n. 1, *supra*. The exceptions, the school boards argue, are directed only at students, and thus indicate that § 901(a) similarly applies only to students. But the exceptions are not concerned solely with students and student activities: two of them exempt an entire class of institutions—religious and military schools—and are not limited to student-related activities at such schools. See §§ 901(a)(3), (4). Moreover, petitioners' argument rests on an inference that is by no means compelled; in fact, the absence of a specific exclusion for em-

[10] According to the dissent, the ease to which any confusion "could have been avoided by the legislative draftsman . . ." suggests that "person" should be given its ordinary meaning. *Post*, at 551.

ployment among the list of exceptions tends to support the Court of Appeals' conclusion that Title IX's broad protection of "person[s]" does extend to employees of educational institutions. See *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 616–617 (1980).[11]

Although the statutory language thus seems to favor inclusion of employees, nevertheless, because Title IX does not expressly include or exclude employees from its scope, we turn to the Act's legislative history for evidence as to whether Congress meant somehow to limit the expansive language of § 901.[12]

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[11] Nor does § 901(b) qualify the broad language of § 901(a). Section 901(b) repeats the language identifying certain of the categories of persons listed in § 901(a); it provides no clearer indication of the intended scope of § 901(a) than does that section itself.

[12] In construing a statute, this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration. See, *e. g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969). But the administrative interpretation of Title IX has changed, and a split has occurred between the federal agencies responsible for promulgating Title IX regulations. On July 27, 1981, respondent Bell, Secretary of Education, wrote to the Attorney General expressing his dissatisfaction with the existing Subpart E regulations and his belief that they were ultra vires. The Secretary sought to amend the regulations to make them parallel with the Department of Education regulations implementing Title VI of the Civil Rights Act of 1964. See 34 CFR pt. 100 (1980). Specifically, Secretary Bell proposed to have the regulations cover employment practices "only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students, or when the complaint shows that the complainant is a beneficiary of a program in which a primary objective of the Federal financial assistance is to provide employment." Letter from Terrel H. Bell to William French Smith, reprinted in Daily Labor Report, No. 150, p. A–5 (Aug. 5, 1981). Cf. 34 CFR § 100.3(c) (1980). In response, the Attorney General, to whom the President has delegated the authority given him by § 902 to approve regulations promulgated pursuant to Title IX, refused to approve the Department's suggestion and continues to defend the existing regulations. See Brief for Federal Respondents 37, n. 26; Tr. of Oral Arg. 18–19.

B

In the early 1970's, several attempts were made to enact legislation banning discrimination against women in the field of education. Although unsuccessful, these efforts included prohibitions against discriminatory employment practices.[13]

The Department of Education has withdrawn its request to the Attorney General pending this Court's decision in this case. See *id.*, at 17–18. Because the Subpart E regulations therefore are still in effect, respondent Bell's changed view does not moot the litigation. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 505, n. 25 (1981). It, however, does undercut the argument that the regulations are entitled to deference as the interpretation of the agency charged with Title IX's enforcement. See *Southeastern Community College* v. *Davis*, 442 U. S. 397, 412, n. 11 (1979).

[13] Title IX grew out of hearings on gender discrimination in education, held in 1970 by a special House Subcommittee on Education chaired by Representative Green. See Discrimination Against Women: Hearings on Section 805 of H. R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970) (1970 Hearings). Much of the testimony focused on discrimination against women in employment. See generally, *e. g.*, Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L. J. 49, 59–60 (1976); Comment, 1976 B. Y. U. L. Rev. 133, 140–141. The proposal on which the hearings were held, however, never emerged from committee. That provision, § 805 of H. R. 16098, would have extended the prohibitions of Title VI of the Civil Rights Act of 1964 to discrimination based on gender by adding the word "sex" to § 601; would have made Title VII of the Civil Rights Act of 1964 applicable to public school employees and education employees generally; would have amended the Civil Rights Act of 1957 to include gender discrimination within the jurisdiction of the Civil Rights Commission; and would have extended the application of the Equal Pay Act to executive, administrative, and professional employees.

Then, in 1971, Senator Bayh introduced an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971, which would have forbidden recipients of federal education funds from discriminating against women. The amendment, which Senator Bayh characterized as identical to the prohibition against discrimination on the basis of race contained in Title VI of the Civil Rights Act of 1964, plainly was meant to proscribe discrimination in employment. See 117 Cong. Rec. 30155, 30403 (1971); see also *id.*, at 30411 (Sen. McGovern announces his intent to support Sen. Bayh's "similar amendment" rather than introducing his own,

In 1972, the provisions ultimately enacted as Title IX were introduced in the Senate by Senator Bayh during debate on the Education Amendments of 1972. In addition to prohibiting gender discrimination in federally funded education programs and threatening termination of federal assistance for noncompliance, the amendment included provisions extending the coverage of Title VII and the Equal Pay Act to educational institutions. Summarizing his proposal, Senator Bayh divided it into two parts—first, the forerunner of § 901(a), and then the extensions of Title VII and the Equal Pay Act:

> "Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . *[T]he heart of this amendment* is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women." 118 Cong. Rec. 5803 (1972) (emphasis added).

The Senator's description of § 901(a), the "heart" of his amendment, indicates that it, as well as the Title VII and Equal Pay Act provisions, was aimed at discrimination in employment.[14]

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which explicitly forbade gender discrimination in employment). The amendment never came to a vote on the floor of the Senate, however, because it was ruled nongermane. See *id.*, at 30415.

[14] Senator Bayh's 1971 proposal, see n. 13, *supra*, did not include provisions amending Title VII and the Equal Pay Act. His statements that the

Similarly, in a prepared statement summarizing the amendment, Senator Bayh discussed the general prohibition against gender discrimination:

> "Central to my amendment are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs. . . .
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> . . . . .
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> "This portion of the amendment covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators*, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth." 118 Cong. Rec. 5807 (1972) (emphasis added).

Petitioners observe that the discussion of this portion of the amendment appears under the heading "A. Prohibition of Sex Discrimination in Federally Funded Education Programs," while the provisions involving Title VII and the Equal Pay Act are summarized under the heading "B. Prohibition of Education-Related Employment Discrimination." But we are not willing to ascribe any particular significance to these headings. The Title VII and Equal Pay Act portions of the Bayh amendment are more narrowly focused on employment discrimination than is the general ban on gender discrimination, and the headings reflect that difference. Especially in light of the explicit reference to employment practices in the description of the amendment's general provision, however, the headings do not negate Senator Bayh's intent that employees as well as students be protected by the first portion of his amendment.[15]

1971 amendment nevertheless would prohibit employment discrimination thus rebut petitioners' contention that the Senator's discussion of employment discrimination during debate on the 1972 version of his amendment referred solely to the provisions regarding Title VII and the Equal Pay Act.

[15] The headings and corresponding divisions of Senator Bayh's summary of his amendment do suggest, however, that the Senator's reference to

The final piece of evidence from the Senate debate on the Bayh amendment appears during a colloquy between Senator Bayh and Senator Pell, chairman of the Senate Subcommittee on Education and floor manager of the education bill. In response to Senator Pell's inquiry about the scope of the sections that in large part became §§ 901(a) and (b), Senator Bayh stated:

> "As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and *discrimination in employment within an institution, as a member of a faculty or whatever.*
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> "*In the area of employment, we permit no exceptions.*" *Id.*, at 5812 (emphasis added).[16]

Although the statements of one legislator made during debate may not be controlling, see, *e. g.*, *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 311 (1979), Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted,

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"sections 1001–1005" in describing the prohibition of discrimination in federally funded education programs is of little significance. Although, as the dissent points out, *post*, at 548, § 1005 of the amendment comprised the Title VII provisions, the detailed discussion of the Title VII amendments in part B of the summary, the absence of any further mention of those provisions in part A's description of Title IX, and the fact that the Title VII provisions were not limited to "federally funded education programs" indicate that the Senator's reference to § 1005 in part A was inadvertent.

[16] Moreover, in reply to Senator Pell's questions regarding Title IX's application to the faculty of religious and military schools, Senator Bayh made clear that such institutions were explicitly excepted from the reach of § 901(a). See 118 Cong. Rec. 5813 (1972). His response makes no sense if Senator Bayh thought that the provision was not aimed at protecting any employees; in that event, he could have answered Senator Pell's questions simply by stating that employment discrimination was dealt with in the Title VII and Equal Pay Act portions of the amendment, rather than in § 901.

are an authoritative guide to the statute's construction. See, *e. g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 564 (1976) (such statements "deserv[e] to be accorded substantial weight . . ."); *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951). And, because §§ 901 and 902 originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.

The legislative history in the House is even more sparse. H. R. 7248, 92d Cong., 1st Sess. (1971), the Higher Education Act of 1971, contained, as part of its Title X, a general prohibition against gender discrimination in federally funded education programs that was identical to the corresponding section of the Bayh amendment and to § 901(a) as ultimately enacted. But § 1004 of Title X, like § 604 of Title VI, see 42 U. S. C. § 2000d–3, provided that nothing in Title X authorized action "by any department or agency with respect to any employment practice . . . except where a primary objective of the Federal financial assistance is to provide employment." The debate on Title X included no discussion of this limitation. See 117 Cong. Rec. 39248–39263 (1971).[17]

When the House and Senate versions of Title IX were sub-

[17] Portions of that debate suggest, however, that, despite § 1004, Members of the House thought that the ban on discrimination protected employees. In discussing a proposed amendment to § 1001 of the bill, the section similar to § 901(a) of Title IX, Representative Smith quoted § 1001, described it as containing the "effective provisions" of Title X, and observed that the amendment "would exempt out of this title all undergraduate schools and would leave the prohibition against sex discrimination to apply to graduate education and faculty employment and salaries." 117 Cong. Rec. 39255 (1971); see also *id.*, at 39260 (remarks of Rep. Erlenborn); *id.*, at 39262 (remarks of Rep. Quie). Despite the explicit exclusion of employment discrimination in § 1004, then, there was at least some feeling on the

mitted to the Conference Committee, § 1004 was deleted. The Conference Reports simply explained:

> "[T]he House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes." S. Conf. Rep. No. 92–798, p. 221 (1972); H. R. Conf. Rep. No. 92–1085, p. 221 (1972).

Expressly a conscious choice, therefore, the omission of § 1004 suggests that Congress intended that § 901 prohibit gender discrimination in employment.

Petitioners and the dissent contend, however, that § 1004 was deleted in order to avoid an inconsistency: Title IX included provisions relating to the Equal Pay Act,[18] which obviously concerned employment, and § 1004 conflicted with those portions of the Act. See Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 409 (1975) (1975 Hearings) (remarks of Rep. O'Hara) (arguing that Title IX was a "cut and paste job," using "a Xerox" of Title VI, and that § 1004 "got in through a drafting error"). As the Court of Appeals observed, however, the Conference Committee could easily have altered the wording of § 1004 to make clear that its limitation applied only to § 901[19] or could have noted in the Con-

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floor of the House that employment discrimination was nonetheless prohibited by the provision that would become § 901(a).

[18] The proposed amendments to Title VII had been deleted because identical provisions had already been enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103, 42 U. S. C. § 2000e(a).

[19] The Court of Appeals suggested the following language: "'Nothing in § 901 shall apply to any employees of any educational institution subject to

ference Reports that the omission was necessitated by the apparent inconsistency. Instead, by stating that "[t]he House receded," the Reports suggest that the Senate version of Title IX, which was intended to ban discriminatory employment practices, prevailed for substantive reasons. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–200 (1974) (deletion of a provision by a Conference Committee "militates against a judgment that Congress intended a result that it expressly declined to enact"); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S., at 391–392. Identical language—"The House recedes" or "The Senate recedes"—appears in the Conference Reports with respect to all other changes made in Title IX during the conference. See S. Conf. Rep. No. 92–798, pp. 221–222 (1972). See also 118 Cong. Rec. 18437 (1972) (letters printed in the record during the Senate debate on the Conference Report, which imply that employment discrimination is prohibited by § 901).

Petitioners insist additionally that a specific exclusion for employment, such as that contained in § 1004, was unnecessary to limit the scope of § 901. Pointing out that Title IX was patterned after Title VI of the Civil Rights Act of 1964, the school boards contend that the addition of § 604 to Title VI was not viewed by Congress as diminishing the scope of the Act; rather, petitioners argue, it was agreed that Title VI would not prohibit employment discrimination even before § 604 made the exclusion explicit.

This focus on the history of Title VI—urged by petitioners and adopted by the dissent—is misplaced. It is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 710–711 (1979). The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation. Moreover,

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this title except where a primary objective of the Federal financial assistance is to provide employment.'" 629 F. 2d, at 783.

379-671 O—83——20

whether § 604 clarified or altered the scope of Title VI,[20] it is apparent that § 601 alone was not considered adequate to exclude employees from the statute's coverage. If Congress had intended that Title IX have the same reach as Title VI, therefore, we assume that it would have enacted counterparts to both § 601 and § 604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them. See *Lorillard* v. *Pons*, 434 U. S. 575, 584–585 (1978).

In our view, the legislative history thus corroborates our reading of the statutory language and verifies the Court of Appeals' conclusion that employment discrimination comes within the prohibition of Title IX.[21]

C

The postenactment history of Title IX provides additional evidence of the intended scope of the Title and confirms Con-

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[20] Petitioners oversimplify the role of § 604. Some Members of Congress did not find the language of § 601 clearly limited to a certain class of beneficiaries. See 110 Cong. Rec. 2484 (1964) (remarks of Rep. Poff); Civil Rights: Hearings on H. R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., 228 (1964) (colloquy between Rep. Avery and Rep. McCulloch); *id.*, at 143 (remarks of Rep. Celler); *id.*, at 197–198 (colloquy between Rep. Avery and Rep. Celler); *id.*, at 379–380 (remarks of Rep. Poff). Section 604 was thereafter added in the Senate, as part of the Dirksen-Mansfield substitute bill; although the provision has been viewed as merely clarifying the scope of Title VI, see 110 Cong. Rec. 12714, 12720 (1964) (remarks of Sen. Humphrey); Kuhn, 65 Geo. L. J., at 53, it has also been considered a substantive change, see 110 Cong. Rec. 14219–14220 (1964) (remarks of Sen. Holland); Comment, 129 U. Pa. L. Rev., at 447 ("The employment exemption in title VI was amended onto the statute as part of a substitute written during informal bargaining between the Senate's Democratic and Republican leadership with the intention of providing a compromise that would garner enough votes to end the ongoing filibuster").

[21] Thus, we do not, as the dissent charges, "rel[y] on legislative history to add omitted words . . . ." *Post*, at 550. Rather, we use the legislative history as a guide to interpreting the "critical words" that Congress did include in Title IX. *Ibid.* It is the dissent that uses the legislative history—of a different statute—to rewrite Title IX so as to restrict its reach.

gress' desire to ban employment discrimination in federally financed education programs. Following the passage of Title IX, Senator Bayh published in the Congressional Record a summary of the final version of the bill. That description expressly distinguishes Title VI of the Civil Rights Act of 1964 with respect to employment practices:

> "Title VI . . . specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). *There is no similar exemption for employment* in the sex discrimination provisions relating to federally assisted education programs." 118 Cong. Rec. 24684, n. 1 (1972) (first emphasis in original; second emphasis added).

See also 120 Cong. Rec. 39992 (1974) (remarks of Sen. Bayh).

Then, in June 1974, HEW published proposed Title IX regulations pursuant to § 902. See 39 Fed. Reg. 22228 (1974). Included among these regulations was Subpart E, containing provisions prohibiting discriminatory employment practices in federally funded education programs. During the comment period, nearly 10,000 formal responses to the regulations were submitted, reputedly the most HEW had ever received on one of its proposals. See Salomone, Title IX and Employment Discrimination: A Wrong in Search of a Remedy, 9 J. Law & Ed. 433, 436 (1980). But not one suggested that § 901 was not meant to prohibit discriminatory employment practices. See 1975 Hearings 479 (statement of Peter E. Holmes, Director of the Office for Civil Rights).

On June 4, 1975, HEW published its final Title IX regulations, see 40 Fed. Reg. 24128 (1975), and, as required by § 431(d)(1) of the General Education Provisions Act, Pub. L. 93–380, 88 Stat. 567, as amended, 20 U. S. C. § 1232(d)(1), submitted the regulations to Congress for review. This "laying before" provision was designed to afford Congress an opportunity to examine a regulation and, if it found the regulation "inconsistent with the Act from which it derives its au-

thority . . . ," to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective.

Resolutions of disapproval were introduced in both Houses of Congress. The two Senate resolutions, which did not mention the employment regulations, were not acted upon.[22] In the House, the Subcommittee on Postsecondary Education of the House Committee on Education and Labor held six days of hearings to determine whether the HEW regulations were "consistent with the law and with the intent of the Congress in enacting the law." 1975 Hearings 1 (remarks of Rep. O'Hara). One witness expressed opposition to the employment regulations, interpreting the legislative history much as petitioners have. *Id.*, at 406–408 (statement of Janet L. Kuhn); see also Kuhn, 65 Geo. L. J., at 49. Senator Bayh testified, however, that the regulations, "as the Congress mandated, call for equality in admissions . . . and in the case of teachers and other educational personnel, employment, pay and promotions." 1975 Hearings 169.[23] And HEW Secretary Weinberger stated that he did not see "any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class . . . ." *Id.*, at 478. See also *id.*, at 140 (statement of Jean Simmons,

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[22] Senator Laxalt introduced a resolution disapproving the regulations governing athletic programs. S. Con. Res. 52, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 22940 (1975). Senator Helms' resolution was a blanket disapproval of the HEW regulations, S. Con. Res. 46, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 17300 (1975), but he did voice disapproval specifically of the employment regulations when he introduced the resolution. *Id.*, at 17301. Senator Helms later explained that the Committee on Labor and Public Welfare had met in executive session on his resolution but had decided not to report it to the full Senate. *Id.*, at 23846.

[23] Senator Bayh also stressed the similarity between Title IX and Title VI, see 1975 Hearings 169–171, thereby confirming that his references to Title VI during the debate on his amendment did not indicate an intent that employment discrimination be excluded from its coverage.

President, Federation of Organizations for Professional Women); 154–155 (statement of Rep. Carr); 164 (statement of Rep. Mink); 329 (statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women, Association of American Colleges).

Following the hearings, members of the Subcommittee on Postsecondary Education introduced concurrent resolutions disapproving certain portions of the HEW regulations, but not referring specifically to the employment regulations. H. R. Con. Res. 329, 94th Cong., 1st Sess. (1975); H. R. Con. Res. 330, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 21687 (1975). Representatives Quie and Erlenborn introduced an amendment to H. R. Con. Res. 330 that explicitly sought to disapprove the employment regulations as inconsistent with Title IX. See Unpublished Amendment to H. R. Con. Res. 330, quoted in 629 F. 2d, at 783.[24] Neither resolution was passed, and HEW's regulations went into effect on July 21, 1975.

Admittedly, Congress' failure to disapprove the HEW regulations does not necessarily demonstrate that it consid-

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[24] H. R. Con. Res. 330 was referred to the House Committee on Education and Labor, which in turn submitted it to its Subcommittee on Equal Opportunities. That Subcommittee held a one-day hearing on the resolution, see Hearing on House Concurrent Resolution 330 (Title IX Regulation) before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) (H. R. Con. Res. 330 Hearing), and then voted to recommend against passage of the resolution. Interestingly, Representative O'Hara testified at this hearing, but, despite his remarks during the hearings conducted by his own Subcommittee, see 1975 Hearings 408–409, he did not challenge the employment regulations. See H. R. Con. Res. 330 Hearing 2–21, 33–34, 38.

In addition to the two concurrent resolutions mentioned in the text, Representative Martin introduced two resolutions in the House—one broad resolution disapproving all the Title IX regulations, H. R. Con. Res. 310, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 19209 (1975), and one focusing on the sections governing athletic programs, H. R. Con. Res. 311, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 19209 (1975). Neither referred to the employment regulations. No action was taken on the Martin resolutions.

ered those regulations valid and consistent with the legislative intent. See § 431(d)(1) of the General Education Provisions Act (as amended approximately four months after the Title IX regulations went into effect), 20 U. S. C. § 1232(d)(1). But the postenactment history of Title IX does indicate that Congress was made aware of the Department's interpretation of the Act and of the controversy surrounding the regulations governing employment, and it lends weight to the argument that coverage of employment discrimination was intended. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14–16 (1941); Comment, 1976 B. Y. U. L. Rev., at 153–157. And the relatively insubstantial interest given the resolutions of disapproval that were introduced seems particularly significant since Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute.[25] While amending these other portions of § 901, however, Congress has not seen fit to disturb the Subpart E regulations.

In fact, Congress has refused to pass bills that would have amended § 901 to limit its coverage of employment discrimination. On the day the 45-day review period for the HEW regulations expired, Senator Helms introduced a bill that would have added a provision to Title IX stating that "[n]othing in [§ 901] shall apply to employees of any educational institution subject to this title." S. 2146, § 2(1), 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 23845–23847 (1975). No action was taken on the bill. Similarly, Senator McClure

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[25] In 1974, Congress, by adding § 901(a)(6), excepted social fraternities and sororities and voluntary youth service organizations from the reach of § 901(a). Pub. L. 93–568, § 3(a), 88 Stat. 1862. See 120 Cong. Rec. 41390–41391 (1974) (remarks of Reps. Green, Steiger, Perkins, Quie, and Ashbrook). The amendment was enacted prior to the period of regulations review, but after HEW had published for comment the Title IX regulations, including those pertaining to employment practices. Then, in 1976, Congress added three new exceptions, §§ 901(a)(7)–(9). See 122 Cong. Rec. 27979–27987 (1976) (remarks of Sens. Fannin, Dole, Thurmond, Bayh, Humphrey, and Eagleton).

sponsored an amendment to S. 2657, 94th Cong., 2d Sess. (1976), the Education Amendments of 1976, which would have restricted the meaning of the term "educational program or activity" in § 901(a) to the "curriculum or graduation requirements of the institutions . . ." receiving federal funds. 122 Cong. Rec. 28136 (1976). Senator Bayh successfully opposed the amendment, in part on the ground that it "would exempt those areas of traditional discrimination against women that are the reason for the congressional enactment of title IX[,]" including "employment and employment benefits . . . ." *Id.*, at 28144. The McClure amendment was rejected. *Id.*, at 28147.

Although postenactment developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX . . . ." *Cannon* v. *University of Chicago*, 441 U. S., at 687, n. 7. Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U. S. 544, 554, n. 10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489 (1940). See also *Cannon* v. *University of Chicago*, 441 U. S., at 702–703; *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956). These subsequent events therefore lend credence to the Court of Appeals' interpretation of Title IX.[26]

IV

Although we agree with the Second Circuit's conclusion that Title IX proscribes employment discrimination in feder-

[26] Petitioners' final two arguments rely on policy judgments: the school boards insist that the victims of employment discrimination have remedies other than those available under Title IX and that terminating all federal

ally funded education programs, we find that the Court of Appeals paid insufficient attention to the "program-specific" nature of the statute. The court acknowledged that, under § 902, termination of funds "shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found," but implied that the Department's authority to issue regulations is considerably broader. See 629 F. 2d, at 785–786.[27] We disagree.

It is not only Title IX's funding termination provision that

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funds to an education program because of discrimination suffered by one employee will injure numerous innocent students. These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even were we to disagree with the legislative choice.

Moreover, even if alternative remedies are available and their existence is relevant, but cf. *Cannon* v. *University of Chicago*, 441 U. S., at 711; Comment, 129 U. Pa. L. Rev., at 442–446, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination. See, *e. g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 236–239 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47–49 (1974). And petitioners do not dispute that all funds may be terminated for an education program that discriminates against only one *student*.

Similarly, the views of the dissent as to the competence of the drafters of Title IX, the need for the legislation, the type of procedural, remedial, and enforcement provisions that should have been included, and the language that should have been used, see *post*, at 551–555, may be interesting, and may be the sorts of considerations that Congress should take into account in enacting legislation; but they are not relevant to the inquiry we must undertake in ascertaining legislative intent. Rather, in order to avoid the oft-criticized practice of second-guessing Congress, we must rely on the legislative history, however "truncated," *post*, at 551, and not on our perceptions of the soundness of the legislative judgment.

[27] To the extent that the Court of Appeals was suggesting only that regulations may be broadly worded and need not be directed at specific programs—as long as they are applied only to programs that receive federal funds—we do not dispute the court's conclusion. See § 902 (referring to "rules, regulations, or orders of general applicability").

is program-specific. The portion of § 902 authorizing the issuance of implementing regulations also provides:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 901 *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." (Emphasis added.)

Certainly, it makes little sense to interpret the statute, as respondents urge, to authorize an agency to promulgate rules that it cannot enforce. And § 901(a) itself has a similar program-specific focus: it forbids gender discrimination "under any education program or activity receiving Federal financial assistance . . . ."

Title IX's legislative history corroborates its general program-specificity. Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds. See 117 Cong. Rec. 30155–30157, 30408 (1971) (Sen. Bayh's 1971 amendment); H. R. 5191, 92d Cong., 1st Sess., § 1001(b) (1971) (administration proposal); 1970 Hearings 690–691 (Dept. of Justice's proposed alternative to § 805 of H. R. 16098); cf. Title IX, § 904 (proscribing discrimination against the blind by a recipient of federal assistance with no program-specific limitation). In contrast, Senator Bayh indicated that his 1972 amendment, which in large part was ultimately adopted, was program-specific. See 118 Cong. Rec. 5807 (1972) (observing that the amendment "prohibit[s] discrimination on the basis of sex in federally funded education programs," and that "[t]he effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found . . ."); cf. 117 Cong. Rec. 39256 (1971) (colloquies be-

tween Reps. Green and Waggoner and between Reps. Green and Steiger).

Finally, we note that language in §§ 601 and 602 of Title VI, virtually identical to that in §§ 901 and 902 and on which Title IX was modeled, has been interpreted as being program-specific. See *Board of Public Instruction* v. *Finch*, 414 F. 2d 1068 (CA5 1969). We conclude, then, that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902. Cf. *Cannon* v. *University of Chicago*, 441 U. S., at 690–693.

Examining the employment regulations with this restriction in mind, we nevertheless reject petitioners' contention that the regulations are facially invalid. Although their import is by no means unambiguous, we do not view them as inconsistent with Title IX's program-specific character. The employment regulations do speak in general terms of an educational institution's employment practices, but they are limited by the provision that states their general purpose: "to effectuate title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity* receiving Federal financial assistance . . . ." 34 CFR § 106.1 (1980) (emphasis added).[28]

HEW's comments accompanying publication of its final Title IX regulations confirm our view that Subpart E is consistent with the Act's program-specificity.[29] The Depart-

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[28] Similarly, for example, the specific Title IX regulations governing student admissions policies—which are indisputably covered by the statute—are phrased generally, providing that "[n]o person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient . . . ." 34 CFR § 106.21(a) (1980). The reach of those regulations is likewise limited by § 106.1 to conform to Title IX's program-specific nature. See also 45 CFR § 80.3(b)(1) (1980) (Title VI regulation providing that "[a] recipient under any program to which this part applies may not . . . [discriminate] on ground of race, color, or national origin . . .").

[29] In construing regulations, the Court normally defers to the agency's interpretation. See, *e. g.*, *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969); *Udall* v.

ment recognized that § 902 limited its authority to terminate funds to particular programs that were found to have violated Title IX, and it continued:

> "Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it[30] receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they 'are infected by a discriminatory environment . . .' *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068, 1078–79 (5th Cir. 1969)." 40 Fed. Reg. 24128 (1975).

By expressly adopting the Fifth Circuit opinion construing Title VI as program-specific, HEW apparently indicated its intent that the Title IX regulations be interpreted in like fashion. So read, the regulations conform with the limitations Congress enacted in §§ 901 and 902.

Whether termination of petitioners' federal funds is per-

Tallman, 380 U. S. 1, 16–17 (1965). Here, however, that interpretation has fluctuated from case to case, and even as this case has progressed. See Brief for Federal Respondents 46; compare 1975 Hearings 485 (testimony of HEW Secretary Weinberger), and *Dougherty Cty. School System* v. *Harris*, 622 F. 2d, at 737, with Brief for Federal Respondents 44–46. Accordingly, there is no consistent administrative interpretation of the Title IX regulations for us to evaluate. Cf. n. 12, *supra*.

[30] Whether "it" refers to "recipient" or "education program or activity" is somewhat unclear, but we find the latter reading more plausible, especially given the approving citation to the Fifth Circuit's opinion in *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068 (CA5 1969). Moreover, "a recipient of Federal financial assistance" by definition "receives or benefits from such assistance," whereas "an education program or activity . . . operated by a recipient" may not; the subordinate clause therefore adds nothing unless "it" means "program or activity." See also 34 CFR § 106.51(a) (1980) (prohibiting gender discrimination "under any education program or activity operated by a recipient *which* receives or benefits from Federal financial assistance" (emphasis added)).

missible under Title IX is a question that must be answered by the District Court in the first instance. Similarly, we do not undertake to define "program" in this opinion. Neither of the cases before us advanced beyond a motion for summary judgment, and the record therefore does not reflect whether petitioners' employment practices actually discriminated on the basis of gender or whether any such discrimination comes within the prohibition of Title IX. Neither school board opposed HEW's investigation into its employment practices on the grounds that the complaining employees' salaries were not funded by federal money, that the employees did not work in an education program that received federal assistance, or that the discrimination they allegedly suffered did not affect a federally funded program.[31] Instead, petitioners disputed the Department's authority to regulate any employment practices whatsoever, and the District Court adopted that view, which we find to be error. Accordingly, we affirm the judgment of the Court of Appeals but remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)[1] promulgated regulations prohibit-

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[31] Petitioner North Haven, for example, has conceded that it uses a substantial percentage of its federal funds to pay the salaries of its employees, including teachers. See App. 6, 18–20, 21–22, 24.

[1] As noted by the Court, *ante*, at 516, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 96–88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the Court in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at 516, n. 4.

ing discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several postenactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.[2]

I

Although the Court begins with the language of the statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at 520. This is not what the statutory language provides.

In relevant part, the statute states:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or who are denied the benefits of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) de-

[2] The Court acknowledges that the postenactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at 535.

nied *participation* in a program or activity;[3] (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimination *under* an education program or activity. Moreover, Congress made no reference whatever to employers or employees in Title IX, in sharp contrast to quite explict language in other statutes regulating employment practices.[4]

It is noteworthy that not one of the other five Courts of Appeals to consider the question before us reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee* v. *Califano*, 593 F. 2d 424, 426, cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681(a), on its face, is aimed at the beneficiaries of the federal monies, *i. e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.[5] *Ibid.*

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[3] I agree with the Court that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at 520–521. Respondents Elaine Dove and Linda Potz were not, however, participants in any grant program or in any other federally funded program or activity. Elaine Dove was a teacher and Linda Potz a guidance counselor. Both alleged only discrimination in employment.

[4] See, *e. g.*, 42 U. S. C. § 2000e–2(a) (Title VII: "[i]t shall be an unlawful employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees . . .").

[5] The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeals' conclusion" that Title IX does protect employees. *Ante*, at 521–522. I am unable to follow this reasoning. The absence of employment-related exceptions may not be

In the next appellate decision, *Romeo Community Schools* v. *HEW*, 600 F. 2d 581, cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Sixth Circuit also rejected the interpretation of the statute now relied on by this Court, noting: "[A]s actually written, the statute is not nearly so broad. The words 'no person' are modified by later language which clearly limits their meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.[6] *Ibid.*

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conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e-2(h).

[6] The question also has been presented to the Courts of Appeals for the Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis* v. *Califano*, 597 F. 2d 119, 121, cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in *Islesboro*. And in *Seattle University* v. *HEW*, 621 F. 2d 992, 993, cert. granted *sub nom. United States Dept. of Ed.* v. *Seattle Univ.*, 449 U. S. 1009 (1980), the Court of Appeals for the Ninth Circuit followed the three earlier Circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, and stated that the "language is more ambiguous than HEW suggests." 629 F. 2d 773, 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System* v. *Harris*, 622 F. 2d 735 (1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case,

II

A

The Court acknowledges, as it must, that § 901 of Title IX "does not expressly include . . . employees." But it finds a strong negative inference in the fact that § 901 does not "exclude employees from its scope." *Ante*, at 522. The Court then turns to the legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination. *Ibid.* I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unambiguously that Congress did intend what it failed to state.[7] The Court's elaborate exposition of the history of Title IX falls far short of this standard.

Title IX originated in a floor amendment sponsored by Senator Bayh to Senate bill S. 659, 92d Cong., 2d Sess. (1972). The amendment was intended to close loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See Discrimination Against Women: Hearings on Section 805 of H. R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st

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the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. 622 F. 2d, at 737–738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.*, hourly employees, secretaries, and administrators as well as teachers.

[7] See, *e. g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 412, n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent").

Cong., 2d Sess. (1970). Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to the employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. 88–352, Title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See 29 U. S. C. § 213(a)(1) (1970 ed.) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. *Ibid.* Sections 1009–1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.* And §§ 1001–1003 created a new Title IX banning discrimination on the basis of sex in federally funded *educational* programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001–1003 of the Bayh amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded educational programs and activities. This interpretation of Title IX is confirmed by the fact that it was modeled after Title VI, a statute limited in its scope to

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discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.[8] 42 U. S. C. § 2000d–3.[9] And, as this Court noted in *Cannon* v. *University of Chicago*, 441 U. S. 677, 694–701 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX." *Ante*, at 529 (citing *Cannon* v. *University of Chicago*, *supra*, at 710–711). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.*, § 604, 42 U. S. C. § 2000d–3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word "sex." In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment,

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[8] The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681(a) (Title IX).

[9] Title 42 U. S. C. § 2000d–3 states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

Title VI itself might be "gutted" on the floor of the Congress. Sex Discrimination Regulations: Review of Regulations to Implement Title IX, Hearings Before the Subcommittee on Postsecondary Education and Labor of the House Committee on Education and Labor, 94th Cong., 1st Sess., 409 (1975) (1975 Hearings).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate's Bayh amendment originally contained a provision, § 1004, equivalent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*, at 527–528. A strong argument, however, can be made that there was a nonsubstantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at Conference simply to eliminate, as quietly as possible, a recently discovered drafting error. 1975 Hearings 409. Even without reference to Representative O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,[10] the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substan-

[10] See, *e. g.*, 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H. R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., 198 (1964) (statement of Cong. Celler, House Floor Manager of Title VI).

tive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the Court is forced to rely primarily on the statements of a single Senator.[11] The first statement, *ante*, at 524 (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but *prior* to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001–1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. *Ante*, at 525 (quoting 118 Cong. Rec. 5807 (1972)). But § 1005 of the Bayh amendment is the section amending Title VII and thus §§ 1001–1005 cover employment discrimination regardless of whether Title IX does.[12] Moreover, the Court uses an ellip-

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[11] The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

[12] See description of various sections of the Bayh amendment, *supra*, at 545. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

The Court argues against the relevance of the portion of Senator Bayh's statement that is inconsistent with its position, characterizing that portion as "inadvertent." See *ante*, at 526, n. 15. This hardly gives one confidence that the Senator's statements, selectively relied upon by the Court, are not also inadvertent. Moreover, the Court's decision concededly is

sis rather than include the following words from the second Bayh statement:

> "Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in ellipsis, *ante*, at 525).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at 526 (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro*:

> "A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were

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based solely on discussion on the floor of the Senate. We note—as evidence of how little that discussion actually supports the Court—that the views of Courts of Appeals judges with respect to its import have ranged from viewing it as indicating *no intention* to include employment discrimination in Title IX to recognizing that, like most floor debates, the oral statements of Senators must be viewed with skepticism even when not ambiguous. See *Seattle University* v. *HEW*, 621 F. 2d 992, 995 (CA9), cert. granted *sub nom. United States Dept. of Education* v. *Seattle University*, 449 U. S. 1009 (1980); *Romeo Community Schools* v. *HEW*, 600 F. 2d 581, 585 (CA6), cert. denied, 444 U. S. 972 (1979); *Islesboro School Committee* v. *Califano*, 593 F. 2d 424, 428 (CA1), cert. denied, 444 U. S. 972 (1979).

> specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form . . . ." 593 F. 2d, at 427.

Rather than supporting the Court's view, the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modeled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.[13]

As indicated above, when critical words, in this case "employment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

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[13] The Court devotes considerable time to describing postenactment actions or inaction on the part of subsequent Congresses. See *ante*, at 530–535. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW's regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact, bills limiting Title IX's coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimination within Title IX.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination. *Ante*, at 522. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to congressional intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and provided remedies for the conduct in question. When these factors are considered, there is no justification for reading sex employment discrimination language into § 901.

If there had been such an intent, no competent legislative draftsman would have written § 901 as above set forth. The draftsman would have been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered Title VII and the Equal Pay Act also were amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress hardly would have enacted a *third* statute addressing this

problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of the latter with respect to remedies and procedures. Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal-court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV). This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.[14]

[14] It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), it enacted no comparable provisions in Title IX, see 20 U. S. C. § 1681 *et seq.* Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7–80.10 (1980).

The administrative procedures enacted by Congress in the United States Code and promulgated by HEW in the Code of Federal Regulations are quite different, though addressing a single problem. The HEW regulations provide for Administrative Procedure Act hearings, followed by judicial review. See 45 CFR §§ 80.9–80.11 (1980). In contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV).

Compare 20 U. S. C. § 1681 *et seq.* (Title IX) with 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV) (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.[15] See Tr. of Oral Arg. 27.

Finally, Congress delegated the administration of Title IX to the Department of HEW. In contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.[16] The District Court in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (ED Mich. 1977), aff'd, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), correctly observed:

> "These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legisla-

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[15] An employee could presumably bring actions against the school district under Title VII and the Equal Pay Act, seeking redress of his or her wrong in the form of backpay and injunctive relief, and, in addition, request that funds be terminated under Title IX.

[16] The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief for Federal Respondents 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event of noncompliance are quite different. See discussion in text *supra*, at 552.

> tion has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* court thought was self-evident:

> "The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief for Federal Respondents 37, n. 26.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on five perceptions of congressional action that I am unable to share: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; (iii) that Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; (iv) that it vested the authority to enforce the third statute in HEW, a department that even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation; and finally (v) that in Title IX, it gave a new "remedy" for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race.

In response to this dissent, see *ante*, at 536, n. 26, the Court states that the factors considered in this Part III, summarized above, "are *not* relevant" to "ascertaining legislative

intent." If this were a "plain language" case, this statement probably would be unobjectionable. But the Court recognizes that its position cannot be sustained solely by the plain language of the statute, and it therefore relies heavily on ambiguous and muddled oral statements made on the floor of the Senate. In these circumstances, it defies reason to say that a court should not consider what reasonable legislators surely would have considered. Where ambiguity exists it is not "irrelevant," to the process of ascertaining the intention of Congress, to consider specifically other statutes on the same subject. Nor must a court shun common sense in resolving ambiguities.[17]

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[17] See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 77 (1976) (when statute is ambiguous, Court must "draw upon 'those common-sense assumptions that must be made in determining direction without a compass'") (citation omitted); *Fairport R. Co.* v. *Meredith*, 292 U. S. 589, 595 (1934) (the interpretation that a reasonable Congress would have intended is adopted by the Court); 2A C. Sands, Sutherland on Statutory Construction § 456.12, p. 38 (4th ed. 1973) (legislative bodies presumed to act reasonably). See also *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974) ("When 'interpreting a statute, the court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law . . .'").

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1765. Argued January 13, 1982—Decided May 17, 1982

Petitioner, a nonprofit membership corporation with over 90,000 members drawn from all fields of mechanical engineering, promulgates codes for areas of engineering and industry. Much of its work is done through volunteers from industry and government. The codes, while only advisory, have a powerful economic influence, many of them being incorporated by reference in federal regulations and state and local laws. Respondent marketed a safety device for use in water boilers and secured a customer that previously had purchased the competing product of McDonnell & Miller, Inc. (M&M). One of M&M's officials, a vice president (James), was vice chairman of petitioner's subcommittee that drafted, revised, and interpreted the segment of petitioner's code governing the safety device in question. Subsequently he and other M&M officials met with the subcommittee's chairman (Hardin). As a result, M&M sent a letter to petitioner asking whether a safety device with a feature such as one contained in respondent's device satisfied the pertinent code requirements. The letter was referred to Hardin, as chairman of the subcommittee, and ultimately an "unofficial response" was issued, prepared by Hardin but mailed on petitioner's stationery over the signature of one of petitioner's full-time employees. The response in effect declared respondent's product unsafe. Thereafter, M&M's salesmen used the subcommittee's response to discourage customers from buying respondent's product. Respondent subsequently sought a correction from petitioner of the unofficial response; respondent continued to suffer market resistance after the pertinent committee replied. After James' part in the drafting of the original letter of inquiry became public, respondent filed suit in Federal District Court against petitioner (and others who settled), alleging violation of the Sherman Act. The trial court rejected respondent's request for jury instructions that petitioner could be held liable for its agents' conduct if they acted within the scope of their apparent authority. Instead, the jury was instructed that petitioner could be held liable only if it had ratified its agents' actions or if the agents had acted in pursuit of petitioner's interests. The jury, nonetheless, returned a verdict for respondent. The Court of Appeals affirmed, concluding that petitioner could be held liable if its agents had

acted within the scope of their apparent authority, and that thus the charge was more favorable to petitioner than the law required.

Held: Petitioner is civilly liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority. Pp. 565–576.

(a) Under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts analogous to the antitrust violation presented here. An agent who appears to have authority to make statements for his principal gives to his statements the weight of the principal's reputation—in this case, the weight of petitioner's acknowledged expertise in boiler safety. Pp. 565–570.

(b) Petitioner's liability under a theory of apparent authority is consistent with the congressional intent behind the antitrust laws to encourage competition. Petitioner wields great power in the Nation's economy, and when it cloaks its subcommittee officials with the authority of its reputation, it permits those agents to affect the destinies of businesses and thus gives them the power—as illustrated by the facts of this case—to frustrate competition in the marketplace. A rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations. On the other hand, a ratification rule would have anticompetitive effects, encouraging petitioner to do as little as possible to oversee its agents since it could avoid liability by ensuring that it remained ignorant of its agents' conduct. And a rule whereby petitioner would not be liable unless its agents acted with an intent to benefit petitioner would be irrelevant to the antitrust laws' purposes. The anticompetitive practices of petitioner's agents are repugnant to the antitrust laws even if the agents act without any intent to aid petitioner, and petitioner should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in petitioner solely for their own benefit or the benefit of their employers. Pp. 570–574.

(c) Application of the theory of apparent authority is not improper on the asserted ground that treble damages for antitrust violations are punitive and that under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents. Since treble damages also serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold petitioner liable for the acts of agents committed with apparent authority. Nor does the fact that petitioner is a nonprofit organization

weaken the force of the antitrust and agency principles that indicate that it should be liable for respondent's antitrust injuries. Pp. 574–576.

635 F. 2d 118, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 578. POWELL, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 578.

Harold R. Tyler, Jr., argued the cause for petitioner. With him on the briefs were *Richard D. Parsons*, *Frederick T. Davis*, and *Stephen C. Charen*.

Carl W. Schwarz argued the cause for respondent. With him on the brief were *Stephen P. Murphy* and *William H. Barrett*.

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Barry Grossman*, and *Ernest J. Isenstadt*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner, the American Society of Mechanical Engineers, Inc. (ASME), is a nonprofit membership corporation organized in 1880 under the laws of the State of New York. This case presents the important issue of the Society's civil liability under the antitrust laws for acts of its agents performed

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*Briefs of *amici curiae* urging reversal were filed by *Michael D. Brown* for the American Association of Engineering Societies, Inc.; by *Lewis H. Van Dusen, Jr.*, for the American Society for Testing and Materials; by *Robert J. Siverd* for the Institute of Electrical and Electronics Engineers, Inc.; by *David Crump* for the Legal Foundation of America; and by *Daniel J. Piliero II* for the National Fire Protection Association.

Merle L. Royce and *James P. Chapman* filed a brief for ECOS Electronic Corp. as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Henry A. Field, Jr.*, for Adolph J. Ackerman; and by *Kim Zeitlin* for the National Commission for Health Certifying Agencies.

with apparent authority. Because the judgment of the Court of Appeals upholding civil liability is consistent with the central purposes of the antitrust laws, we affirm that judgment.

I

ASME has over 90,000 members drawn from all fields of mechanical engineering. It has an annual operating budget of over $12 million. It employs a full-time staff, but much of its work is done through volunteers from industry and government. The Society engages in a number of activities, such as publishing a mechanical engineering magazine and conducting educational and research programs.

In addition, ASME promulgates and publishes over 400 separate codes and standards for areas of engineering and industry. These codes, while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most States, the ordinances of major cities, and the laws of all the Provinces of Canada. See Brief for Petitioner 2. Obviously, if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace.

Among ASME's many sets of standards is its Boiler and Pressure Vessel Code. This set, like ASME's other codes, is very important in the affected industry; it has been adopted by 46 States and all but one of the Canadian Provinces. See Brief for Petitioner 5. Section IV of the code sets forth standards for components of heating boilers, including "low-water fuel cutoffs." If the water in a boiler drops below a level sufficient to moderate the boiler's temperature, the boiler can "dry fire" or even explode. A low-water fuel cutoff does what its name implies: when the water in the boiler falls below a certain level, the device blocks the flow of fuel to the boiler before the water level reaches a dangerously low point. To prevent dry firing and boiler explosions, ¶ HG–605 of Section IV provides that each boiler "shall have an automatic low-water fuel cutoff so located as to automatically cut

off the fuel supply when the surface of the water falls to the lowest visible part of the water gage glass." Plaintiff's Exhibit 30A. See 635 F. 2d 118, 121 (CA2 1980).

For some decades, McDonnell & Miller, Inc. (M&M), has dominated the market for low-water fuel cutoffs. But in the mid-1960's, respondent Hydrolevel Corporation entered the low-water fuel cutoff market with a different version of this device. The relevant distinction, for the purposes of this case, was that Hydrolevel's fuel cutoff, unlike M&M's, included a time delay.[1]

In early 1971, Hydrolevel secured an important customer. Brooklyn Union Gas Company, which had purchased M&M's product for several years, decided to switch to Hydrolevel's probe. Not surprisingly, M&M was concerned.

Because of its involvement in ASME, M&M was in an advantageous position to react to Hydrolevel's challenge. ASME's governing body had delegated the interpretation, formulation, and revision of the Boiler and Pressure Vessel Code to a Boiler and Pressure Vessel Committee. See App. 120. That committee in turn had authorized subcommittees to respond to public inquiries about the interpretation of the code. An M&M vice president, John W. James, was vice chairman of the subcommittee which drafted, revised, and interpreted Section IV, the segment of the Boiler and Pressure Vessel Code governing low-water fuel cutoffs.

After Hydrolevel obtained the Brooklyn Union Gas account, James and other M&M officials met with T. R. Hardin,

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[1] M&M's fuel cutoff is a floating bulb that falls with the boiler's water level. When the level reaches the critical point, the bulb causes a switch to cut off the boiler's fuel supply. Hydrolevel's product, in contrast, was an immovable probe inserted in the side of the boiler; when the water level dropped below the probe, the fuel supply was interrupted. Because water in a boiler surges and bubbles, the level intermittently would seem to fall slightly below the probe even though the overall level remained safe. To prevent premature fuel cutoff because of these intermittent fluctuations, Hydrolevel's probe included a time delay that allowed the boiler to operate for a brief period after the water level dropped beneath the probe.

the chairman of the Section IV subcommittee.[2] The participants at the meeting planned a course of action. They decided to send an inquiry to ASME's Boiler and Pressure Vessel Committee asking whether a fuel cutoff with a time delay would satisfy the requirements of ¶ HG–605 of Section IV. James and Hardin, as vice chairman and chairman, respectively, of the relevant subcommittee, cooperated in drafting a letter, one they thought would elicit a negative response.

The letter was mailed over the name of Eugene Mitchell, an M&M vice president, to W. Bradford Hoyt, secretary of the Boiler and Pressure Vessel Committee and a full-time ASME employee. App. 62. Following ASME's standard routine, Hoyt referred the letter to Hardin, as chairman of the subcommittee. Under the procedures of the Boiler and Pressure Vessel Committee, the subcommittee chairman—Hardin—could draft a response to a public inquiry without referring it to the entire subcommittee if he treated it as an "unofficial communication."

As a result, Hardin, one of the very authors of the inquiry, prepared the response. *Id.*, at 63. Although he retained control over the inquiry by treating the response as "unofficial," the response was signed by Hoyt, secretary of the Boiler and Pressure Vessel Committee, and it was sent out on April 29, 1971, on ASME stationery. *Id.*, at 64. Predictably, Hardin's prepared answer, utilized verbatim in the Hoyt letter, condemned fuel cutoffs that incorporated a time delay:

> "A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG–602(b), it is the intent of Par. HG–605(a) that the low-water fuel

[2] Hardin was an executive vice president of Hartford Steam Boiler Inspection and Insurance Company. A controlling interest in Hartford was owned by International Telephone and Telegraph Corporation, which acquired M&M within the year. See 635 F. 2d 118, 122, n. 2 (CA2 1980).

cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.

"There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." *Ibid.*

As the Court of Appeals in this case observed, the second paragraph of the response does not follow from the first: "If the cut-off is positioned sufficiently above the lowest permissible water level, a cut-off with a time-delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water-gauge glass." 635 F. 2d, at 122–123. Hoyt signed and mailed the response without checking its accuracy. See App. 124–126.

As anticipated, M&M seized upon this interpretation of Section IV to discourage customers from buying Hydrolevel's product. It instructed its salesmen to tell potential customers that Hydrolevel's fuel cutoff failed to satisfy ASME's code. See 635 F. 2d, at 123. And M&M's employees did in fact carry the message of the subcommittee's response to customers interested in buying fuel cutoffs. Thus, M&M successfully used its position within ASME in an effort to thwart Hydrolevel's competitive challenge.

Several months later, Hydrolevel learned of the subcommittee interpretation from a former customer. Hydrolevel wrote ASME for a copy of the April 29 response. On February 8, 1972, over the signature of the assistant secretary of the Boiler and Pressure Vessel Committee, ASME sent Hydrolevel a letter quoting the two paragraphs of the April 29 interpretation of Section IV. App. 66–67.

On March 23, Hydrolevel's president wrote Hoyt and demanded that ASME cure the effect of the April 29 letter by sending a correction to whomever might have received it.

Id., at 68–73. Hoyt placed Hydrolevel's complaint on the agenda for the meetings of the Boiler and Pressure Vessel Committee and Subcommittee to be held on May 4 and 5.

On May 4, the subcommittee voted to confirm the intent of the first quoted paragraph of the April 29 letter. James, by then the chairman of the subcommittee, reported this recommendation to the committee on May 5. *Id.*, at 82. Thereafter, the committee designated two persons to propose a response to Hydrolevel. *Id.*, at 83. In the end, on June 9 the committee mailed Hydrolevel a reply that "confirmed the intent" of the April 29 letter. *Id.*, at 84.[3] The committee's letter further advised that there was

> "no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG–605(a). This paragraph relates itself to Par. HG–602(b) which specifically delineates the location of the lowest visible part of the water gage glass." *Ibid.*

The committee concluded the letter with a warning paragraph suggested by James, see *id.*, at 111–112:

> "If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass." *Id.*, at 84.

After this response to its complaint, Hydrolevel continued to suffer from market resistance. Two years later, the Wall Street Journal published an article describing Hydrolevel's predicament in trying to sell a fuel cutoff that many in the industry thought to be in violation of ASME's code. Wall Street Journal, July 9, 1974, p. 44, col. 1; App. 94–98. Re-

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[3] Actually, the committee "confirmed the intent" of ASME's February 8, 1972, letter to Hydrolevel. That letter, however, simply quoted the original April 29, 1971, response. See App. 66–67.

acting to this story, ASME's Professional Practice Committee opened an investigation. It never discovered that James had been involved with the original inquiry. In a resolution reporting the results of its investigation, the committee decided that all ASME officials had acted properly. Further, the Professional Practice Committee "commend[ed] [James] for conducting himself in a forthright manner." *Id.*, at 104.

Subsequently, James' part in drafting the original letter of inquiry became public because of his testimony in March 1975 before a Senate Subcommittee. See Voluntary Industrial Standards: Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 186–199 (1975) (testimony of John W. James of M&M (ITT)); see also *id.*, at 171–185 (testimony of Eugene Mitchell, Manager of Original Equipment Sales, ITT Fluid Handling Division). Within a few months, Hydrolevel filed suit against ITT, ASME, and Hartford in the United States District Court for the Eastern District of New York. Hydrolevel alleged that the defendants' actions had violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. App. 11. Prior to trial, Hydrolevel sold all its assets, except this suit, for salvage value. Ultimately, ITT and Hartford settled.

The lawsuit proceeded to trial against ASME, as the remaining defendant. Hydrolevel requested the trial court to instruct the jury that ASME could be held liable under the antitrust laws for its agents' conduct if the agents acted within the scope of their apparent authority. See *id.*, at 59. The District Court, however, rejected this approach and, instead, at ASME's suggestion, charged the jury that ASME could be held liable only if it had ratified its agents' actions or if the agents had acted in pursuit of ASME's interests. The District Court explained to the jury:

> "If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation,

> and this action was not ratified or adopted by the defendant [ASME], their misconduct cannot be considered that of the corporation with which they are associated." *Id.*, at 49.

The jury, nonetheless, returned a verdict for Hydrolevel.

Before the Court of Appeals, the parties disputed the sufficiency of the evidence to support a verdict based on the District Court's instruction. See 635 F. 2d, at 125. But the Court of Appeals chose not to decide whether the evidence was sufficient to demonstrate that ASME had ratified its agents' actions or that the agents had acted to advance ASME's interests. Instead, after surveying the law of agency and the policies underlying the antitrust laws, the Court of Appeals concluded that ASME could be held liable if its agents had acted within the scope of their apparent authority. *Id.*, at 124–127. Since, therefore, the District Court had delivered "a charge that was more favorable to the defendant than the law requires," *id.*, at 127, the Court of Appeals affirmed the judgment on liability, that is, the jury's finding that ASME was liable under § 1 of the Sherman Act for its agents' actions.[4]

Because the Court of Appeals' decision presents an important issue concerning the interpretation of the antitrust laws, we granted certiorari. 452 U. S. 937 (1981).

II

A

As the Court of Appeals observed, under general rules of agency law, principals are liable when their agents act with

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[4] The Court of Appeals remanded the case to the District Court after finding that the damages awarded Hydrolevel were excessive and that the District Court had made errors in its calculation of damages. 635 F. 2d, at 128–131. The damages issue is the subject of a pending cross-petition for certiorari, No. 80–1771, filed April 22, 1981. Hydrolevel's damages arguments are not now before us, and we express no opinion on that aspect of the Court of Appeals' decision.

apparent authority[5] and commit torts analogous to the antitrust violation presented by this case. See generally 10 W. Fletcher, Cyclopedia of the Law of Private Corporations ¶4886, pp. 400–401 (rev. ed. 1978); W. Seavey, Law of Agency §92 (1964). For instance, a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority. See, *e. g.*, *Standard Surety & Casualty Co.* v. *Plantsville Nat. Bank*, 158 F. 2d 422 (CA2 1946), cert. denied, 331 U. S. 812 (1947). Similarly, a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of his apparent authority. Restatement (Second) of Agency §§249, 262 (1957) (Restatement); see *Rutherford* v. *Rideout Bank*, 11 Cal. 2d 479, 80 P. 2d 978 (1938). Also, if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement. Restatement §§247, 254. Finally, a principal is responsible if an agent acting with apparent authority tortiously injures the business relations of a third person. *Id.*, §248 and Comment *b*, p. 548.

Under an apparent authority theory, "[l]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." *Id.*, §261, Comment *a*, p. 571. See *Record* v. *Wagner*, 100 N. H. 419, 128 A. 2d 921 (1957). As with the April 29 letter issued by the Boiler and Pressure Vessel Subcommittee, the injurious statements are "effective, in part at least, because of the personality of the one

[5] "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement (Second) of Agency §8 (1957).

publishing it." Restatement § 247, Comment *c*, p. 545. In other words, "one who appears to have authority to make statements for the [principal] gives to his statements the weight of the [principal's] reputation," *ibid.*—in this case, the weight of ASME's acknowledged expertise in boiler safety. See generally W. Prosser, Law of Torts 467 (4th ed. 1971).

ASME's system of codes and interpretative advice would not be effective if the statements of its agents did not carry with them the assurance that persons in the affected industries could reasonably rely upon their apparent trustworthiness. Behind the principal's liability under an apparent authority theory, then, is "business expediency—the desire that third persons should be given reasonable protection in dealing with agents." Restatement § 262, Comment *a*, p. 572. See *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757 (CA2 1946). The apparent authority theory thus benefits both ASME and the public whom ASME attempts to serve through its codes: "It is . . . for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal." Restatement § 262, Comment *a*, p. 572.

The apparent authority theory has long been the settled rule in the federal system. See *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d, at 759. In *Friedlander* v. *Texas & Pacific R. Co.*, 130 U. S. 416 (1889), the Court held that an employer was not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud. But *Gleason* v. *Seaboard Air Line R. Co.*, 278 U. S. 349 (1929), discarded that rule. In *Gleason*, a railroad's employee sought to enrich himself by defrauding a customer of the railroad through a forged bill of lading. The Court of Appeals had absolved the railroad from liability because the employee perpetrated the fraud solely for his own benefit. But this Court re-

versed, overruling *Friedlander*. 278 U. S., at 357. Noting that "there was . . . no want of authority in the agent," *id.*, at 355, the Court held the railroad liable despite the agent's desire to benefit only himself. It explained that "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Id.*, at 356.

In a wide variety of areas, the federal courts, like this Court in *Gleason*, have imposed liability upon principals for the misdeeds of agents acting with apparent authority. See, *e. g.*, *Dark* v. *United States*, 641 F. 2d 805 (CA9 1981) (federal tax liability); *National Acceptance Co.* v. *Coal Producers Assn.*, 604 F. 2d 540 (CA7 1979) (common-law fraud); *Holloway* v. *Howerdd*, 536 F. 2d 690 (CA6 1976) (federal securities fraud); *United States* v. *Sanchez*, 521 F. 2d 244 (CA5 1975), cert. denied, 429 U. S. 817 (1976) (bail bond fraud); *Kerbs* v. *Fall River Industries, Inc.*, 502 F. 2d 731 (CA10 1974) (federal securities fraud); *Gilmore* v. *Constitution Life Ins. Co.*, 502 F. 2d 1344 (CA10 1974) (common-law fraud).[6]

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[6] The dissent delves into the agency law of the late 19th century and concludes that "it was far from clear" that a principal could be held liable for the deliberate torts of his agent. *Post*, at 587. But in fact, while there was a division of authority, many courts had made it very clear that principals could be held liable for torts analogous to the antitrust violations committed by ASME's agents.

For instance, a treatise of that era noted that a "considerable number of American courts" had held the principal liable for the agent's fraud, though the agent acted solely for his own benefit, and praised a leading opinion for its "singular ability and lucidity." E. Huffcut, Elements of the Law of Agency § 155, p. 168 (1895). Indeed, the author commented that the cases holding a principal liable when his agent acted with apparent authority and for the agent's sole benefit were "too various to be referred to in detail." *Id.*, § 157.

In holding a telegraph company liable for the fraud of its agent committed solely for his personal benefit, one court summarized the reasoning that became widespread during the last half of the 19th century: "Persons receiving dispatches in the usual course of business, when there is nothing to

In the past, the Court has refused to permit broad common-law barriers to relief to constrict the antitrust private right of action. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968). It stated there that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat" to deter antitrust violations. *Id.*, at 139. In *Perma Life Mufflers*, the Court honored that purpose by denying defendants the right to invoke a common-law defense (the doctrine of *in pari delicto*) that was inconsistent with the antitrust laws. In this case, we can honor the statutory purpose best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981); *Perma Life*

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excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message." *McCord* v. *Western Union Tel. Co.*, 39 Minn. 181, 185, 39 N. W. 315, 317 (1888). See, *e. g.*, *Bank of Batavia* v. *New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. 433 (1887).

Thus, based on the agency law of the late 19th century, there is ample support for holding ASME liable, particularly since Congress intended that the antitrust laws be given broad, remedial effect. See, *e. g.*, *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 312–313 (1978). But, as we have made clear before, Victorian common law does not define the limits of the antitrust private action. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968) (refusing to apply the ancient defense of *in pari delicto* in antitrust cases). We look to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978), but our decisions are determined by the congressional intent that led to the enactment of the antitrust laws, a desire to enhance competition, see *id.*, at 688, 691. Here, general agency principles would lead to a finding of liability if the violation in this case were a mere tort; and imposing liability on ASME in accord with those common-law principles honors the congressional intent behind the antitrust statutes.

Mufflers, 392 U. S., at 138. Our remaining inquiry, then, is whether ASME's liability under a theory of apparent authority is consistent with the intent behind the antitrust laws.[7]

B

We hold that the apparent authority theory is consistent with the congressional intent to encourage competition. ASME wields great power in the Nation's economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry. H. R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968). ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 465 (1941). When it cloaks its subcommittee officials with the authority of its reputation,

[7] Evidently, in recent years no Court of Appeals other than the Second Circuit has directly decided whether a principal can be held liable for antitrust damages based on an apparent authority theory. But cf. *Truck Drivers' Local No. 421* v. *United States*, 128 F. 2d 227 (CA8 1942). The dissent cites several cases, stating that they appear to reject antitrust liability based on apparent authority. See *post*, at 581–582, and n. 6. *United States* v. *Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1090 (CA5), cert. denied, 437 U. S. 903 (1978); *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000, 1004–1007 (CA9 1972), cert. denied *sub nom. Western International Hotels Co.* v. *United States*, 409 U. S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204 (CA3 1970), cert. denied, 401 U. S. 948 (1971). A fair reading of those cases, however, reveals that they did not discuss the merits of an apparent authority theory of antitrust liability. The dissent then dismisses other cases that also do not directly discuss the validity of the apparent authority theory, but that contain language approving apparent authority instructions, see *post*, at 583–584, n. 8. *United States* v. *Continental Group, Inc.*, 603 F. 2d 444, 468, n. 5 (CA3 1979), cert. denied, 444 U. S. 1032 (1980); *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 150–151 (CA6 1960).

ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.

The facts of this case dramatically illustrate the power of ASME's agents to restrain competition. M&M instigated the submission of a single inquiry to an ASME subcommittee. For its efforts, M&M secured a mere "unofficial" response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M&M was able to use that one "unofficial" response to injure seriously the business of a competitor.

Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.[8]

Again, the facts of this case are illustrative. Hardin was able to issue an interpretation of ASME's Boiler and Pressure Vessel Code which in effect declared Hydrolevel's product unsafe. Hardin's interpretation of the code was sent out

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[8] For example, James' employer did not overlook his usefulness as an ASME official. In November 1973, even after the Hydrolevel events had taken place, an M&M executive recommended that James be retained by M&M. The recommendation stated:

"A major reason for the continued success at M&M is a result of [James'] efforts and skill in influencing the various code making bodies to 'legislate' in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %." App. 86.

The writer emphasized a number of James' ASME activities, including: "Member of main boiler and pressure code committee" and "Chairman of the heating boiler sub-committee (section 4)." *Ibid.*

under Hoyt's name as secretary of the committee, though Hoyt exercised only ministerial duties and played no role in confirming the substance of the April 29, 1971, letter. See App. 125–126. Thus, without any meaningful safeguards,[9] ASME entrusted the interpretation of one of its codes to Hardin. As a result, M&M was able to use ASME's reputation to hinder Hydrolevel's competitive threat.

A principal purpose of the antitrust private cause of action, see 15 U. S. C. § 15, is, of course, to deter anticompetitive practices. *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 314 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S., at 139; see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 342–344 (1979). It is true that imposing liability on ASME's agents themselves will have some deterrent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. "[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States* v. *A & P Trucking Co.*, 358 U. S. 121, 126 (1958). Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps.[10] Thus, a rule that imposes liability on the

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[9] ASME suggests that Hardin's response did undergo a form of committee review, because he sent copies to the chairman and vice chairman of the full committee. Brief for Petitioner 8. But there is no indication that those officers carefully scrutinized Hardin's response. And certainly they will be encouraged to give responses a closer look in the future if ASME is subject to antitrust liability under an apparent authority theory.

[10] Permitting private plaintiffs to sue defendants like ASME will make that incentive especially powerful, because private suits are an important element of the Nation's antitrust enforcement effort:

"Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These pri-

standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.[11]

The wisdom of the apparent authority rule becomes evident when it is compared to the alternative approaches advanced by the District Court's instructions to the jury, see *supra*, at 564–565, and advocated by ASME.[12] First, ASME insists that it should not be held liable unless it ratified the actions of its agents. But a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws. ASME could avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents. Thus, ASME's ratification theory would actually enhance the likelihood that the Society's reputation would be used for anticompetitive ends.

Second, ASME contends that it should not be held liable unless its agents act with an intent to benefit the Society. This proposed rule falls short, though, because it is simply irrelevant to the purposes of the antitrust laws. Whether

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vate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344 (1979) (emphasis in original).

[11] The apparent authority rule is also consistent with the congressional desire that the antitrust laws sweep broadly. Congress extended antitrust liability to "[e]very person," 15 U. S. C. §§ 1, 2, and defined "person" to include corporations and associations, 15 U. S. C. § 7.

[12] ASME insists that the Court foreclosed imposition of civil antitrust liability based on apparent authority in *Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922), and *Coronado Coal Co.* v. *Mine Workers*, 268 U. S. 295 (1925). Those cases, however, are not controlling here. The Court expressly pointed out: "Here it is not a question . . . of holding out an appearance of authority on which some third person acts." 259 U. S., at 395; 268 U. S., at 304–305. In fact, it noted: "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation." 259 U. S., at 395; 268 U. S., at 304.

they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers.[13]

C

Finally, ASME makes two additional arguments in an attempt to avoid antitrust liability. It characterizes treble damages for antitrust violations as punitive, and urges that

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[13] The dissent argues, unconvincingly to us, that imposing antitrust liability on ASME will not advance enforcement of the antitrust laws.

The dissent claims that the apparent authority rule will "encourag[e] plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefitted from the violation." *Post*, at 591. Here, the dissent engages in "curious reasoning," see *ibid.*, because today's decision does not encourage a plaintiff to sue any particular defendant to the exclusion of others; it merely lists organizations like ASME among the possible defendants in cases similar to this one. Indeed, although the litigation in this case ended with ASME as the only remaining defendant, it seems likely that, in general, a plaintiff will prefer to bring a corporate defendant like M&M (ITT) before a jury, rather than a nonprofit organization that understandably may appeal to a jury's sympathies and that may not provide so deep a pocket as a commercial enterprise.

In addition, the dissent insists that ASME and other such organizations cannot take steps to reduce the likelihood that antitrust violations like the one that occurred in this case will take place in the future. *Post*, at 591–592, n. 17. Evidently ASME does not agree, because it has instituted new procedures specifically in response to this suit. See n. 15, *infra*. The dissent simply refuses to accept that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation.

under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents. See *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101 (1893); *United States* v. *Ridglea State Bank*, 357 F. 2d 495 (CA5 1966); see also Restatement §217C.[14] It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S., at 639. But treble damages were also designed to deter future antitrust violations. *Ibid.* Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 (1977); see *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746–747 (1977). Treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws. *Brunswick Corp.*, *supra*, at 486, n. 10, quoting 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman). Since treble damages serve as a means of deterring

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[14] A majority of courts, however, have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification. See W. Prosser, Law of Torts 12 (4th ed. 1971). *E. g.*, *Kelite Products, Inc.* v. *Binzel*, 224 F. 2d 131, 144 (CA5 1955) ("[T]he jury may in its discretion assess punitive damages against a corporate defendant for oppressive acts of its agent done in the course of his employment, regardless of actual authority or ratification"); *Mayo Hotel Co.* v. *Danciger*, 143 Okla. 196, 200, 288 P. 309, 313 (1930) (holding corporate principal liable for punitive damages, noting that "the legal malice of the servant is the legal malice of the corporation"). In fact, the Court may have departed from the trend of late 19th-century decisions when it issued *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101 (1893), requiring the principal's participation, approval, or ratification. See *Singer Manufacturing Co.* v. *Holdfodt*, 86 Ill. 455, 459 (1877) ("if the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages"); see also *Pullman Palace Car Co.* v. *Lawrence*, 74 Miss. 782, 803–805, 22 So. 53, 57–59 (1897); *Goddard* v. *Grand Trunk R. Co.*, 57 Me. 202, 223–224 (1869).

antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority. See Restatement § 217C, Comment *c*, p. 474 (rule limiting principal's liability for punitive damages does not apply to special statutes giving triple damages).

In addition, ASME contends it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that nonprofit organizations can be held liable under the antitrust laws. See, *e. g.*, *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Associated Press* v. *United States*, 326 U. S. 1 (1945). Although ASME may not operate for profit, it does derive benefits from its codes, including the fees the Society receives for its code-related publications and services, the prestige the codes bring to the Society, the influence they permit ASME to wield, and the aid the standards provide the profession of mechanical engineering. Since the antitrust violation in this case could not have occurred without ASME's codes and ASME's method of administering them, it is not unfitting that ASME be liable for the damages arising from that violation. See W. Prosser, Law of Torts 459 (4th ed. 1971); W. Seavey, Law of Agency § 83 (1964). Furthermore, as shown above, ASME is in the best position to take precautions that will prevent future antitrust violations.[15] Thus, the fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that indicate that ASME should be liable for Hydrolevel's antitrust injuries.

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[15] Indeed, ASME has initiated procedures to protect against similar misadventures in the future. After its experience with the Hydrolevel affair, ASME began issuing a publication containing all written technical inquiries pertaining to codes and their interpretations, a publication available through subscription. See ASME Court of Appeals Exhibit Volume,

III

We need not delineate today the outer boundaries of the antitrust liability of standard-setting organizations for the actions of their agents committed with apparent authority. There is no doubt here that Hardin acted within his apparent authority when he answered an inquiry about ASME's Boiler and Pressure Vessel Code as the chairman of the relevant ASME subcommittee. And in this case, we do not face a challenge to a good-faith interpretation of an ASME code reasonably supported by health or safety considerations. See *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963). We have no difficulty in finding that this set of facts falls well within the scope of ASME's liability on an apparent authority theory.

When ASME's agents act in its name, they are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. By holding ASME liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, we recognize the important role of ASME and its agents in the economy, and we help to ensure that standard-setting organizations will act with care when they permit their agents to

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p. 110; App. in Nos. 79-7254, 79-7260 (CA2), pp. 784 and 804. Apparently, ASME now gives its interpretations close scrutiny through the publication process. According to the publication's foreword, "[i]n some few instances, a review of the interpretation revealed a need for corrections of a technical nature." In those cases, ASME published "a corrected interpretation . . . immediately after the original reply." See Interpretations, ASME Boiler and Pressure Vessel Code, Foreword (No. 7: Replies to Technical Inquiries January 1, 1980, through June 30, 1980). In addition, the readers are advised that ASME may reconsider its interpretation "when or if additional information is available which the inquirer believes might affect the interpretation." *Ibid.*

ASME's new procedure illustrates that the standard-setting organization itself is in the best position to prevent antitrust violations committed by its agents acting with apparent authority, and therefore that the policies of antitrust and agency law call for imposition of liability upon ASME.

379-671 O—83——23

speak for them. We thus make it less likely that competitive challengers like Hydrolevel will be hindered by agents of organizations like ASME in the future.

The judgment of the Court of Appeals is affirmed.

So ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment. However, I do not agree with the reasoning that leads the Court to its conclusion. I agree with the result reached since petitioner permitted itself to be used to further the scheme which caused injury to respondent. At no time did petitioner disavow the challenged conduct of its members who misused their positions in the Society. Under the instructions approved by petitioner and given by the District Court, the jury found that petitioner had "ratified or adopted" the conduct in question.* On that basis the judgment against petitioner should be affirmed but no general rule can appropriately be drawn from the Court's holding.

JUSTICE POWELL, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

The Court today adopts an unprecedented theory of antitrust liability, one applied specifically to a nonprofit, standard-setting association but a theory with undefined boundaries that could encompass a broad spectrum of our country's nonprofit associations. The theory, based on the agency concept of "apparent authority," would impose the poten-

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*The District Court instructed the jury that it could find petitioner liable for the acts of its members only if they acted on behalf of the corporation within the scope of their actual authority or if the corporation thereafter ratified or adopted their acts. Judge Weinstein refused to give the apparent authority instruction proposed by respondent. Nevertheless, the Court of Appeals did not rest on the narrow ratification theory underlying the District Court judgment, but instead reached out to decide that petitioner is liable for the acts of its members if those acts are found to be within their apparent authority: the jury never found liability on that the-

tially crippling burden of treble damages. In this case, the Court specifically holds that standard-setting organizations may be held liable for the acts of their agents even though the organization never ratified, authorized, or derived any benefit whatsoever from the fraudulent activity of the agent and even though the agent acted solely for his private employer's gain. In my view such an expansive rule of strict liability, at least as applied to nonprofit organizations, is inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law that the Court purports to apply, and irrelevant to the achievement of the goals of the antitrust laws. Accordingly, I dissent.

I

The American Society of Mechanical Engineers (ASME) is a nonprofit, tax-exempt, membership corporation with over 90,000 members. Among its many activities, ASME drafts over 400 codes and standards. These codes have been developed through the voluntary efforts of ASME's members, and are a valuable public service. The Boiler and Pressure Vessel Code, relevant in this case, is of some 18,000 pages in length. In addition to preparing codes and standards, ASME members—through committees—perform the further service of responding to public inquiries concerning interpretation of the codes. Some measure of the extent of this service can be gathered from the 20,000–30,000 inquiries a year received by the organization concerning just the Boiler and Pressure Vessel Code alone. As a result of a fraudulent answer given by an ASME subcommittee chairman to one of these thousands of inquiries, the entire organization has been exposed to potentially crippling liability.[1]

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ory and the Court of Appeals went "out of bounds." I regard that aspect of the Court of Appeals' opinion and that part of the Court's opinion today as dictum not essential to support the result reached.

[1] The District Court entered a judgment against ASME in an amount in excess of $7 million—a sum that would destroy many such organizations. By contrast McDonnell & Miller, Inc., and Hartford Steam Boiler Inspec-

Of course, nonprofit associations are subject to the antitrust laws. The Court has so held on several occasions. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975).[2] Yet the Court also has noted that the antitrust laws need not be applied to professional organizations in precisely the same manner as they are applied to commercial enterprises. In *Goldfarb*, *supra*, for example, the Court recognized that "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts that originated in other areas."[3] *Id.*, at 788, n. 17. In view of this recognition, one would not have expected the Court to take

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tion and Insurance Co., commercial enterprises owned by International Telephone and Telegraph Corp., and the beneficiaries of the fraudulent conduct in this case, have settled for $725,000 and $75,000 respectively. Curiously, the Court speaks of the "wisdom" of a rule that encourages such an inequitable result. *Ante*, at 573. The Court correctly notes that the Court of Appeals reversed the damages award against ASME and remanded for a new estimation. Perhaps the final award against ASME will be substantially less than the $7.5 million judgment originally entered. Yet there is no assurance of this.

[2] Although associations now are viewed as being within the scope of the antitrust laws, to my knowledge this is the first case in which the Court has held explicitly that a nonprofit, tax-exempt association is subject to treble-damages liability. Cf. Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv. L. Rev. 435, 455 (1981) (footnote omitted) ("[A]ntitrust liability does not necessarily call for a damage remedy. . . . The Supreme Court may come to agree that antitrust liability may vary according to the remedies sought").

ASME refers to itself as a "society." I use the words "organization" and "association" interchangeably to describe a broad range of nonprofit, membership entities and tax-exempt organizations.

[3] *Goldfarb* "properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 699 (1978) (BLACKMUN, J., concurring in part and concurring in judgment). See *id.*, at 701 (stressing the need for "elbow-room for realistic application of the Sherman Act" to other than commercial enterprises).

the occasion of this case to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization.

Indeed, the Court points to no case in which any court has held the apparent authority theory of liability applicable in an antitrust case. Nor does the Court cite a single decision in which the apparent authority theory of liability has been applied in a case involving treble or punitive damages and an agent who acts without any intention of benefitting the principal.[4] In a word, the Court makes *new* law, largely ignoring existing precedent.

In *Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922), and *Coronado Coal Co.* v. *Mine Workers*, 268 U. S. 295 (1925), the Court held that the national union was not liable as principal for the antitrust violations of the local union. The Court was hesitant to impose treble-damages liability on a membership organization in the absence of clear evidence showing ratification or authorization.[5] Even in the context

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[4] The Court cites to several decisions, *ante*, at 575, n. 14, in which courts have levied punitive damages upon the principal for the "unauthorized" acts of an agent. It is not clear that *any* of these decisions holds the principal liable upon the apparent authority of an agent acting without intent to benefit the principal. None of them concerns the antitrust laws. None involves a nonprofit entity.

[5] "[A] trades-union . . . might be held liable . . . but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Coronado Coal Co.*, 268 U. S., at 304. The Court refused to impose liability on the national union simply because it had the authority to discipline the local. See *Mine Workers*, 259 U. S., at 395. Moreover, the Court indicated that this was not a case in which a theory of apparent authority might be applied—despite the national union's power over the local and despite the support of the strike by the president of the national union: "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts." *Ibid.* The majority quotes this language, see *ante*, at 573, n. 12, but misses its point. The *Mine Workers* Court well could have characterized the case before it as involving an exercise of apparent authority by the local

of commercial enterprises, the Courts of Appeals that have considered the matter appear to reject antitrust liability upon mere apparent authority.[6]

Moreover, the Court as much as concedes that an apparent authority rule of liability has rarely, if ever, been used to impose punitive damages upon the principal. See *ante*, at 570, n. 7.[7] Rather than contest this well-established rule of

union or the national president; it refused to do so. See *Truck Drivers' Local No. 421* v. *United States*, 128 F. 2d 227, 235 (CA8 1942) (viewing the holding in *Mine Workers* as rejecting an apparent authority theory of antitrust liability).

[6] See *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204 (CA3 1970); *United States* v. *Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1090 (CA5 1978); *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000 (CA9 1972). Accord *Truck Drivers' Local No. 421* v. *United States*, *supra*, at 235 (union not liable for the antitrust violations of a local division: "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent authority would not be sufficient").

In *United States* v. *Hilton Hotels Corp.*, *supra*, for example, the Court of Appeals for the Ninth Circuit ruled out liability on apparent authority by requiring that the agent hold a "purpose to benefit the corporation." *Id.*, at 1006, n. 4. In light of the rule adopted by the Court today, it is ironic that the Court of Appeals in *Hilton Hotels* considered that its rule of liability was actually a broad one. Although implicitly rejecting a rule of apparent authority, the court held that a corporation could be liable for the acts of its agents "even when done against company orders." *Id.*, at 1004. The court argued that such an expansive rule of liability was justified in the case before it, involving a commercial enterprise, because the Sherman Act was "primarily concerned with the activities of business entities." *Ibid.* A rule promoting corporate liability was supported further by the consideration that antitrust violations "are usually motivated by a desire to enhance profits," "involve basic policy decisions, and must be implemented over an extended period of time," and "if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized the profits from the illegal activity." *Id.*, at 1006. None of these considerations in support of a broad rule of liability applies to the fraudulent, self-interested conduct of ASME members in this case. Yet the Court adopts a rule of liability far broader than that stated by the Ninth Circuit with such care.

[7] In *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101, 107 (1893), the Court held that "[a] principal . . . cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious in-

agency law, the Court argues that treble damages are not punitive or, even if they are, the purposes of the antitrust laws override this basic rule of the law of agency. In fact the Court often has characterized treble-damages liability as punitive: "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981). See P. Areeda & D. Turner, Antitrust Law ¶311b (1978) ("whether or not compensatory damages ever punish, treble damages are indisputably punishment"). In the context of a nonprofit, tax-exempt organization it would seem even clearer that treble damages primarily punish and are intended to do so. There is no element of restitution here; ASME has derived no ill-gotten gain from the misdeeds of its disloyal agent.

In short, the Court launches on an uncharted course. I know of no antitrust decision that has imposed treble-damages liability upon a commercial enterprise, let alone a nonprofit organization, solely on an apparent authority theory of liability.[8] The antitrust laws have been effectively enforced for over 90 years without the need for such a theory of liability. Indeed, the very facts of this case belie the neces-

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tent on the part of the agent." In a generally similar context, the Court of Appeals for the Fifth Circuit held that a principal was not subject to double damages under the False Claims Act, 31 U. S. C. §231, for the fraud of an agent acting without intent to benefit the principal. See *United States* v. *Ridglea State Bank*, 357 F. 2d 495, 500 (1966) ("[T]he present action is not primarily one for the recovery of a loss caused by an employee, but is one which, if successful, must result in a recovery wholly out of proportion to actual loss. . . . [T]he case calls for the application of the rule . . . that the knowledge or guilty intent of an agent not acting with a purpose to benefit his employer, will not be imputed to the employer").

[8] Hydrolevel argues that *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 150–151 (CA6 1960), and *United States* v. *Continental Group, Inc.*, 603 F. 2d 444, 468, n. 5 (CA3 1979), support an apparent authority theory of liability in antitrust cases. Yet in *Continental Baking* the court endorsed an instruction that included an "apparent" authority component on the theory that a corporation must "answer for [an agent's] violations of law which inure to the corporation's benefit." There was no such benefit

sity of simply *creating* a new theory of liability; the jury found ASME liable not upon a theory of apparent authority but upon the traditional basis of ratification or authorization. The apparent authority rationale was not even argued to the Second Circuit on appeal. The Second Circuit, and now this Court, reach out unnecessarily to embrace a dubious new doctrine. That the Court chooses the case of a nonprofit, tax-exempt organization to announce its new rule is particularly inappropriate. Nor can the Court's decision be squared with the intent of Congress in enacting the Sherman Act.

II

This case comes before us as an antitrust suit under the Sherman Act. Our focus should be on the intent of Congress.[9] See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, at 639. And that intent emerges clearly from the legislative history:

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in this case. Moreover, in *Continental Group* the court simply affirmed an apparent authority instruction without comment, in a footnote, in a case presenting many other issues. The agents in that case were clearly acting for the benefit of their corporations, and the court may have considered that the apparent authority instruction, if error, was harmless.

In any event, the comparative paucity of authority on the question of apparent authority liability in antitrust cases simply underscores that the Court today is making new law. It also is doing so needlessly as ASME was neither tried nor found liable on the basis of apparent authority.

[9] Relying on a novel public policy as to nonprofit associations, the Court makes little effort to ascertain the intent of Congress either through examining the legislative history or the common law then existing. Indeed, the Court implies that the agency law of the 19th century and "Victorian" common law are irrelevant. See *ante*, at 568–569, n. 6. In seeking to understand the Sherman Act, this Court frequently has found it necessary to "delve" into the history of the common law both "Victorian" and from earlier eras. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51–62 (1911). The Civil Rights Acts of the 19th century were also the work of a "Victorian" Congress, yet we have looked both to the legislative history and to the common law when interpreting those Acts. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547 (1967).

> "[The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 492–493 (1940).

Senator Sherman twice explained that his bill was directed at anticompetitive *business* activity and not at voluntary associations. In response to a request that the legislation be more clearly tailored to "these great trusts, these great corporations, these large moneyed institutions," Senator Sherman answered as follows:

> "The bill as reported contains three or four simple propositions which relate only to contracts, combinations, agreements made with a view and designed to carry out a certain purpose . . . . It does not interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation. . . . They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them." 21 Cong. Rec. 2562 (1890).

When Senator Hoar expressed the concern that the bill would prohibit temperance organizations, and proposed an amendment to exclude them from the bill, Senator Sherman spoke reassuringly:

> "I have no objection to [this] amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of

> moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce." *Id.*, at 2658.

This legislative history does not indicate that nonprofit associations are exempt from the antitrust laws. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). But it does counsel against adopting a new rule of agency law that extends the exposure of such organizations to potentially destructive treble-damages liability.

In addition to the legislative history, it is particularly relevant—in view of the Court's reliance on the modern law of agency—to consider the accepted law of agency as it existed at the time the Sherman Act was passed.[10] It was clear under basic principles then established that charitable organizations were not liable for the torts of their agents.[11]

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[10] In *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 644, n. 17 (1981), the Court stated that the rules of common law in effect at the time the Act was passed were relevant to an inquiry into congressional intent: "[I]t is clear that when the Sherman Act was adopted the common law did not provide a right to contribution among tortfeasors participating in proscribed conduct. One permissible, though not mandatory, inference is that Congress relied on courts' continuing to apply principles in effect at the time of enactment." The contemporary case law is relevant precisely because "Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *National Society of Professional Engineers* v. *United States*, 435 U. S., at 688.

[11] "Where a corporation or trustees are conducting a charity with funds devoted to that purpose, the charitable organization is not liable for the torts of its agents or servants, as 'it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants.'" E. Huffcut, Elements of the Law of Agency § 161, pp. 176–177 (1895).

Whether a nonprofit, tax-exempt, public service association would have been considered a "charity" is not clear, but one would think that it well might have been.[12]

Moreover, under the laws of agency as known to the Congress that passed the Sherman Act it was far from clear—even in cases involving commercial enterprises—that a principal could be held liable for the deliberate torts of his agent. According to one treatise of the time, "[w]hile . . . it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act." F. Mechem, Law of Agency § 740 (1889) (hereafter Mechem).[13] Indeed, the Court acknowl-

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[12] In describing the liability of the principal for the torts of the agent, the First Restatement of Agency, published in 1933, cautioned that it did not address "any limitations upon liability because of . . . rules applicable to special classes, such as charitable organizations." Restatement of Agency 458.

[13] The complete statement of the rule by Mechem is as follows:

"While . . . it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act. . . .

"The tendency of modern cases, however, is to attach less importance to the intention of the agent and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the willful or malicious acts of his agent, if they are done in the course of his employment and within the scope of his authority; *but that the principal is not liable for such acts, unless previously expressly authorized, or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own*" (emphasis added, footnotes omitted).

Although the concept of within "scope of authority" is not always easy to apply, it is beyond rational doubt that in this case the fraudulent activity of Hardin and James, on behalf of McDonnell & Miller, Inc., was not within the scope of any authority of ASME. In addition, some courts have found that "[a] purpose to benefit the corporation is necessary to bring the

edges this much when it notes that in *Friedlander* v. *Texas & Pacific R. Co.*, 130 U. S. 416 (1889)—decided the year before the Sherman Act was passed—"the Court held that an employer was not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud." *Ante*, at 567.[14]

Finally, no principle of agency law was more firmly established in 1890—or now for that matter—than that *punitive* damages are not awarded against a principal for the acts of an agent acting only with apparent authority and without any intention of benefitting the principal. Indeed, this Court

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agent's acts within the scope of his employment." See *United States* v. *Hilton Hotels Corp.*, 467 F. 2d, at 1006, n. 4. It is just such a purpose that was lacking in this case. Indeed, the "agents" in this case were not acting simply for their own malicious purposes, they were acting on behalf of another principal with interests inimical to those of ASME. It is far from clear under principles of agency law that Hardin and James are properly described as the "agents" of ASME when they act to serve a different principal and without any intention of benefitting ASME. See Mechem § 67 ("A person may act as agent of two or more principals . . . if his duties to each are not such as to require . . . incompatible things").

The Court suggests that there was a division among the state courts on the question of the principal's liability for the malicious acts of an agent. See *ante*, at 568–569, n. 6. But there was no division in the federal courts, the courts charged with enforcement of the Sherman Act. In any event, surely the point is not whether every state court recognized the rule stated by this Court in *Friedlander* v. *Texas & Pacific R. Co.*, 130 U. S. 416 (1889). Rather, if there was any uncertainty as to the liability of a commercial principal for the torts of an agent acting in the course of employment, how much clearer must it be that a nonprofit, voluntary association would not have been held liable in treble damages for the acts of an agent acting with apparent authority only.

[14] The Court notes that *Friedlander* was later overruled by *Gleason* v. *Seaboard Air Line R. Co.*, 278 U. S. 349 (1929). The relevance of this fact to *Congress'* intentions is not clear to me. There is "no federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938). There is no federal general law of agency. Rather we are engaged here in an exercise in statutory construction. Cf. 21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan) ("It is very true that we use common-law terms

went further, holding more generally that "'punitive or vindictive damages, or smart money, [are] not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent.'" *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S., at 114, quoting *Hagan* v. *Providence & Worcester R. Co.*, 3 R. I. 88, 91 (1854).[15]

Although an inquiry into the legislative history and the law of agency is not conclusive, it does cast serious doubt on the Court's choice of this case to promulgate a new rule of antitrust liability. Whatever the merits of an apparent authority rule of liability for commercial enterprises, in the case of a treble-damages action against a nonprofit organization, such a rule is inconsistent with what appears to have been the intent of Congress in enacting the Sherman Act.

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here and common-law definitions in order to define an offense which is in itself comparatively new, but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States," quoted in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S., at 644).

[15] The Court responds by citing to several *state* law decisions indicating that in some States a principal might have been held liable in punitive damages for the acts of an agent. See *ante*, at 575, n. 14. I believe the Court overstates the extent to which 19th-century state courts imposed punitive damages on the principal for the deliberate torts of an agent. See Mechem § 751; cf. *Mayo Hotel Co.* v. *Danciger*, 143 Okla. 196, 200, 288 P. 309, 312 (1930) ("There are . . . respectable authorities, some of them recent ones, definitely holding that a corporation cannot be subjected to exemplary damages because of the malicious . . . acts of its agents and servants where such acts are not authorized or afterwards ratified . . . . Many of the state courts, *and a majority of the federal courts*, expressly adhere to that doctrine") (emphasis added). More significantly, the Court does not make clear which, if any, of the state decisions it relies upon held the principal liable for punitive damages upon the apparent authority of an agent acting without any intention of benefitting the principal. I had thought that this was the question before us. And again the Court misses the basic point: If the rule of liabilty adopted by the Court today would have seemed questionable in 1890 even as applied to a commercial enterprise, can there be any basis for believing that Congress intended such an extreme rule of liability to be applied to voluntary, nonprofit associations?

III

The underlying theme of the Court's opinion seems to be that any rule of agency law that widens the net of antitrust enforcement and liability should be adopted. Yet the Court has never used such a single-minded approach in the past. In *United States* v. *United States Gypsum Co.*, 438 U. S. 422 (1978), for example, the Court held that intent is a necessary element of a criminal antitrust offense. The Court was unwilling to assume that Congress had intended to create a strict liability crime despite the potential increase in deterrence. Similarly, in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), the Court held that indirect purchasers could not use a "pass-on" theory to recover treble damages from an antitrust violator. The Court rejected the argument that the antitrust laws would be more effective were the class of potential plaintiffs widened. On the contrary, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue." *Id.*, at 735. Nor would the Court accept a rule that might permit both indirect and direct purchasers to sue for the same overcharge. Such a rule "would create a serious risk of multiple liability for defendants." *Id.*, at 730. Thus, the Court has adopted a more discerning approach to questions of antitrust liability in the past—an approach that considers the fairness and appropriateness of a rule in addition to its perceived potential for deterrence.

The Court argues that its expanded rule of liability furthers effective antitrust enforcement. One may question whether a rule of liability developed so late in the day and with so little support in precedent can be described as necessary to antitrust enforcement. When one considers further that the jury found ASME liable under traditional principles, the need for an expanded rule becomes even less credible. Nor does the Court explain how its rule of apparent authority serves the purpose of effective antitrust enforcement. The

primary beneficiary in this case was McDonnell & Miller, the manufacturing company that arranged for the fraudulent ruling by the ASME subcommittee chairman. The sole purpose of the fraud was to disadvantage McDonnell & Miller's competitor. The focus of Hydrolevel's attack, however, has been on ASME.[16] It is curious reasoning to argue, as the Court does, that a rule that encourages plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefitted from the violation, will facilitate proper antitrust enforcement.[17]

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[16] Damages were awarded against ASME in an amount of $7.5 million. By contrast, McDonnell & Miller settled the suit for less than a million dollars. See n. 1, *supra*. The majority's contention that "a plaintiff will prefer to bring a corporate defendant like M&M (ITT) before a jury," *ante*, at 574, n. 13, is not borne out by this case. If the Court has some other case in mind, it does not cite to it.

[17] The Court's argument that the imposition of treble damages will advance antitrust enforcement has a hollow ring in the context of a membership, nonprofit organization. Organizations of this kind normally function through committees composed—as in this case—of volunteers who are not employees, serve only at infrequent intervals, and are virtually uncontrollable by what usually is a small headquarters staff.

The Court suggests that voluntary organizations can "take steps to reduce the likelihood that antitrust violations like the one that occurred in this case will take place in the future." *Ibid.* The Court then refers to "new procedures" adopted by ASME, and criticizes my dissent for refusing "to accept that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation."

It would be enlightening if the Court would explain how such an association can protect itself even from "mere tort" liability, see *ante*, at 569, n. 6, much less the treble-damages liability imposed in this case, in light of the Court's adoption of the apparent authority theory of liability. Review procedures well may be helpful to prevent mistakes made in good faith on behalf of an association. But no set of rules and regulations, and no procedures however elaborate, can protect adequately against fraud and disloyalty. In this case, for example, if ASME had required approval by a review committee or even by its governing body before the release of each of the thousands of ruling letters, a member bent on fraud could forge evidence or otherwise circumvent most safeguards. In practice, a rule of ap-

In a more fundamental sense, the Court's assignment of liability to ASME on a theory of apparent authority simply has no relevance to the furtherance of the purposes of the antitrust laws. ASME is not a competitor. The competition here was between McDonnell & Miller, Inc., and Hydrolevel. Of course, if ASME ratifies the fraudulent act of its agent, as the jury found, liability should attach. But the Court has devised what amounts to a rule of strict liability for voluntary associations in antitrust cases. Under the Court's rule ASME would be liable if an ASME building employee pilfered ASME stationery and supplied it to McDonnell & Miller. Similarly, if a private pharmaceutical school—a tax-exempt corporation like ASME—released a study condemning a particular drug, because a competing drug company had suborned the professor who wrote the report, the Court's rule would subject the school to the full brunt of treble damages.

Section 1 of the Sherman Act requires a contract, combination, or conspiracy in restraint of trade. The Court attaches liability in this case on the dubious notion that ASME somehow has "conspired" with McDonnell & Miller. Yet it stretches the concept of vicarious liability beyond its rational limits to conceive of Hardin and James as conspiring on behalf of ASME when they acted solely for the benefit of McDonnell & Miller and against the interests of ASME.[18] The Court simply opens new vistas in the law of conspiracy and vicarious liability, as well as in the imposition of the harsh penalty of treble damages.

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parent authority can be a rule of strict liability as the Court today holds in this case. In the context of a loosely structured, voluntary nonprofit association it may be wholly impractical to adopt any measures that will lessen substantially the likelihood of liability, and if there is liability the Court also would impose punitive damages.

[18] The intersection of the law of agency and vicarious liability with the law of conspiracy makes this a complex case. Yet the Court does not recognize this complexity. It so expands the concept of vicarious liability as to leave little content, in this case, to the requirement in § 1 of the Sherman

Whatever the application of agency law in its traditional setting, application of the most expansive rules of liability in the context of antitrust treble damages and nonprofit, tax-exempt associations threatens serious injustice and overdeterrence. There is no way in which an association adequately can protect itself from this sort of liability. There is no chain of delegated authority, from stockholders through directors and officers, in the typical voluntary association. The members of these associations exercise a far less structured control than the stockholders and directors of a commercial enterprise. Perhaps ASME will attempt to protect itself by ceasing to respond to inquiries concerning its codes. That hardly would contribute either to antitrust enforcement or to the public welfare. And whereas a commercial enterprise may have the resources to bear a treble-damages award, the same cannot be said of most nonprofit organizations.[19]

The Court is so zealous to impose treble-damages liability that it ignores a basic purpose of the Sherman Act: the preservation of *private* action contributing to the public welfare. See *United States* v. *United States Gypsum Co.*, 438 U. S.,

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Act that antitrust plaintiffs demonstrate a contract, combination, or conspiracy. Indeed, the Court never identifies who conspired with whom. Did James—acting for ASME—conspire with Hardin—acting for McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co.? Or was it the other way around? Could it be said, under the Court's theory, that James had conspired with himself—as a double agent—thereby committing both of his "principals" to an antitrust conspiracy? In my view, it makes more sense to view the matter as a conspiracy between the agents of McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co. The Court's theory makes possible ratification by ASME irrelevant. In this light, ASME was as much a victim of this conspiracy as Hydrolevel.

[19] It is relevant to note that a nonprofit organization cannot reduce the burden of a treble-damages award by deducting the award as a business expense. See P. Areeda & D. Turner, Antitrust Law § 311a (1978) ("treble damages are generally a deductible business expense for federal income tax purposes").

379-671 O—83——24

at 438–443. ASME industry standard-setting can have a significant potential for consumer benefit: for example, its boiler safety information can be expensive if consumers are forced to gain it only by their own experience or by the creation of another bureaucracy. The Court's policy discussion takes no account of this potential cost. Rather, it appears to be so concerned with imposing liability that it puts at risk much of the beneficial private activity of the voluntary associations of our country.

How far the Court's holding extends is unclear. The Court emphasizes that ASME is a standard-setting organization. Yet it does not limit its rationale to these particular organizations. One must be concerned whether the new doctrine and the sweep of the Court's language will be read as exposing the array of nonprofit associations—professional, charitable, educational, and even religious—to a new theory of strict liability in treble damages.

UNITED STATES DEPARTMENT OF STATE ET AL. v. WASHINGTON POST CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-535. Argued March 31, 1982—Decided May 17, 1982

Respondent filed a request with petitioner United States Department of State under the Freedom of Information Act for documents indicating whether certain Iranian nationals held valid United States passports. The State Department denied the request on the ground that the requested information was exempt from disclosure under Exemption 6 of the Act, which provides that the Act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Pending an ultimately unsuccessful administrative appeal, respondent brought an action in Federal District Court to enjoin petitioners from withholding the requested documents, and the court granted summary judgment for respondent. The Court of Appeals affirmed, holding that because the citizenship status of the individuals in question was less intimate than information normally contained in personnel and medical files, it was not contained in "similar files" within the meaning of Exemption 6, and that therefore there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.

Held: The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and hence the State Department's denial of the request should have been sustained upon a showing that release of the information would constitute a clearly unwarranted invasion of personal privacy. Although Exemption 6's language sheds little light on what Congress meant by "similar files," the legislative history indicates that Congress did not mean to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information, but that "similar files" was to have a broad, rather than a narrow, meaning. Exemption 6's protection is not determined merely by the nature of the file containing the requested information, and its protection is not lost merely because an agency stores information about an individual in records other than "personnel" or "medical" files. Pp. 599–603.

207 U. S. App. D. C. 372, 647 F. 2d 197, reversed and remanded

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., concurred in the judgment.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Elinor Hadley Stillman, Leonard Schaitman, Bruce G. Forrest*, and *Margaret E. Clark*.

David E. Kendall argued the cause for respondent. With him on the brief were *Edward Bennett Williams* and *Lon S. Babby*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

In September 1979, respondent Washington Post Co. filed a request under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, requesting certain documents from petitioner United States Department of State. The subject of the request was defined as "documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi . . . hold valid U. S. passports." App. 8. The request indicated that respondent would "accept any record held by the Passport Office indicating whether either of these persons is an American citizen." *Ibid.* At the time of the request, both Behzadnia and Yazdi were Iranian nationals living in Iran.

The State Department denied respondent's request the following month, stating that release of the requested information "would be 'a clearly unwarranted invasion of [the] personal privacy' of these persons," *id.*, at 14 (quoting 5 U. S. C. § 552(b)(6)), and therefore was exempt from disclosure under Exemption 6 of the FOIA.[1] Denial of respondent's request

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**Bruce W. Sanford, W. Terry Maguire, Erwin G. Krasnow*, and *Arthur B. Sackler* filed a brief for the American Newspaper Publishers Association et al. as *amici curiae* urging affirmance.

[1] Exemption 6 provides that the disclosure requirements of the Freedom of Information Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U. S. C. § 552(b)(6).

was affirmed on appeal by the Department's Council on Classification Policy, which concluded that "the privacy interests to be protected are not incidental ones, but rather are such that they clearly outweigh any public interests which might be served by release of the requested information." *Id.*, at 22–23.

While pursuing the administrative appeal, respondent brought an action in the United States District Court for the District of Columbia to enjoin petitioners from withholding the requested documents. Both sides filed affidavits and motions for summary judgment. Petitioners' affidavit, from the Assistant Secretary of State for Near Eastern and South Asian Affairs, explained that both Behzadnia and Yazdi were prominent figures in Iran's Revolutionary Government and that compliance with respondent's request would "cause a real threat of physical harm" to both men.[2] The District Court nonetheless granted respondent's motion for summary judgment.

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[2] Petitioners' original affidavit stated:

"There is intense anti-American sentiment in Iran and several Iranian revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust. An official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence.

. . . . .

"It is the position of the Department of State that any statement at this time by the United States Government which could be construed or misconstrued to indicate that any Iranian public official is currently a United States citizen is likely to cause a real threat of physical harm to that person." Affidavit of Harold H. Saunders, Jan. 14, 1980, App. 17.

The affidavit reported that Yazdi, who had previously held the position of Foreign Minister, was currently a member of the Revolutionary Council and was responsible for solving problems in various regions of Iran. It also indicated that Behzadnia had been a senior official in the Ministry of National Guidance, but that the State Department had not received any report of his activities in recent weeks. *Ibid.* A supplemental affidavit, executed three months after the first affidavit, stated that Yazdi had been

Petitioners appealed, and the Court of Appeals for the District of Columbia Circuit affirmed. 207 U. S. App. D. C. 372, 647 F. 2d 197 (1981). As construed by the Court of Appeals, Exemption 6 permits the withholding of information only when two requirements have been met: first, the information must be contained in personnel, medical, or "similar" files, and second, the information must be of such a nature that its disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.*, at 373, 647 F. 2d, at 198. Petitioners argued that the first requirement was satisfied because the information sought by respondent was contained in "similar files." The Court of Appeals disagreed, holding that the phrase "similar files" applies only to those records which contain information "'"of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records."'" *Id.*, at 373–374, 647 F. 2d, at 198–199 (quoting *Simpson* v. *Vance*, 208 U. S. App. D. C. 270, 273, 648 F. 2d 10, 13 (1980), in turn quoting *Board of Trade* v. *Commodity Futures Trading Comm'n*, 200 U. S. App. D. C. 339, 345, 627 F. 2d 392, 398 (1980)). Because it found the citizenship status of Behzadnia and Yazdi to be less intimate than information normally contained in personnel and medical files, the Court of Appeals held that it was not contained in "similar files." Therefore, the Court of Appeals reasoned, there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy; having failed to meet the first requirement of Exemption 6, the information had to be disclosed under the mandate of the FOIA. We granted certiorari, 454 U. S. 1030 (1981), to review the Court of Appeals' construction of the "similar files" language, and we now reverse.

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elected to the Iranian National Assembly, but that the activities of Behzadnia were still unreported. Supplemental Affidavit of Harold H. Saunders, Apr. 22, 1980, App. 41.

The language of Exemption 6 sheds little light on what Congress meant by "similar files." Fortunately, the legislative history is somewhat more illuminating. The House and Senate Reports, although not defining the phrase "similar files," suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. After referring to the "great quantities of [Federal Government] files containing intimate details about millions of citizens," the House Report explains that the exemption is "general" in nature and seeks to protect individuals:

> "A *general exemption* for [this] category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information *by excluding those kinds of files the disclosure of which might harm the individual.*" H. R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966) (emphasis added).

Similarly, the Senate Judiciary Committee reached a "consensus that these [personal] files should not be opened to the public, and . . . decided upon a *general exemption* rather than a number of specific statutory authorizations for various agencies." S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965) (emphasis added). The Committee concluded that the balancing of private against public interests, not the nature of the files in which the information was contained, should limit the scope of the exemption: "It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" *Ibid.* Thus, "the primary concern of Congress in drafting

Exemption 6 was to provide for the confidentiality of personal matters." *Department of Air Force* v. *Rose*, 425 U. S. 352, 375, n. 14 (1976).

Respondent relies upon passing references in the legislative history to argue that the phrase "similar files" does not include all files which contain information about particular individuals, but instead is limited to files containing "intimate details" and "highly personal" information. See H. R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 813, *supra*, at 9. We disagree. Passing references and isolated phrases are not controlling when analyzing a legislative history. Congress' statements that it was creating a "general exemption" for information contained in "great quantities of files," H. R. Rep. No. 1497, *supra*, at 11, suggest that the phrase "similar files" was to have a broad, rather than a narrow, meaning. This impression is confirmed by the frequent characterization of the "clearly unwarranted invasion of personal privacy" language as a "limitation" which holds Exemption 6 "within bounds." S. Rep. No. 813, *supra*, at 9. See also, H. R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 1219, 88th Cong., 2d Sess., 14 (1964). Had the words "similar files" been intended to be only a narrow addition to "personnel and medical files," there would seem to be no reason for concern about the exemption's being "held within bounds," and there surely would be clear suggestions in the legislative history that such a narrow meaning was intended. We have found none.

A proper analysis of the exemption must also take into account the fact that "personnel and medical files," the two benchmarks for measuring the term "similar files," are likely to contain much information about a particular individual that is not intimate. Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet respondent does not disagree that such information, if contained in a "personnel" or "medical" file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy. The passport informa-

tion here requested, if it exists, presumably would be found in files containing much of the same kind of information. Such files would contain at least the information that normally is required from a passport applicant. See 22 U. S. C. § 213. It strains the normal meaning of the word to say that such files are not "similar" to personnel or medical files.

We agree with petitioners' argument that adoption of respondent's limited view of Exemption 6 would produce anomalous results. Under the plain language of the exemption, nonintimate information about a particular individual which happens to be contained in a personnel or medical file can be withheld if its release would constitute a clearly unwarranted invasion of personal privacy. And yet under respondent's view of the exemption, the very same information, being nonintimate and therefore not within the "similar files" language, would be subject to mandatory disclosure if it happened to be contained in records other than personnel or medical files. "[T]he protection of an individual's right of privacy" which Congress sought to achieve by preventing "the disclosure of [information] which might harm the individual," H. R. Rep. No. 1497, *supra*, at 11, surely was not intended to turn upon the label of the file which contains the damaging information. In *Department of Air Force* v. *Rose*, *supra*, at 372, we recognized that the protection of Exemption 6 is not determined merely by the nature of the file in which the requested information is contained:

> "Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files."

By the same reasoning, information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than "personnel" or "medical" files.

In sum, we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." H. R. Rep. No. 1497, *supra*, at 11.[3] When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy.[4]

The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and petitioners' denial of the request should have been sustained upon a showing by the Government that release of the information would constitute a clearly unwarranted invasion of personal privacy.[5] The Court of Appeals expressly declined to con-

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[3] This view of Exemption 6 was adopted by the Attorney General shortly after enactment of the FOIA in a memorandum explaining the meaning of the Act to various federal agencies:

"It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, *and all private or personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (June 1967) (emphasis added).

[4] This construction of Exemption 6 will not render meaningless the threshold requirement that information be contained in personnel, medical, and similar files by reducing it to a test which fails to screen out any information that will not be screened out by the balancing of private against public interests. As petitioners point out, there are undoubtedly many Government files which contain information not personal to any particular individual, the disclosure of which would nonetheless cause embarrassment to certain persons. Information unrelated to any particular person presumably would not satisfy the threshold test.

[5] In holding that "similar files" are limited to those containing intimate details about individuals such as might also be contained in personnel or medical files, the Court of Appeals relied on its decision in *Simpson* v. *Vance*, 208 U. S. App. D. C. 270, 648 F. 2d 10 (1980). In *Simpson*, the

sider the effect of disclosure upon the privacy interests of Behzadnia and Yazdi, and we think that such balancing should be left to the Court of Appeals or to the District Court on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR concurs in the judgment.

Court of Appeals held that portions of the State Department's Biographical Register could not be considered a "similar file" because such information was currently available to the public. *Id.*, at 275, 648 F. 2d, at 15. At the same time, *Simpson* held that release of information pertaining to an individual's marital status and the name of the individual's spouse "would not be appropriate." *Id.*, at 277, 648 F. 2d, at 17. Respondent contends that information concerning the citizenship of Behzadnia and Yazdi likewise cannot be withheld as contained in "similar files" because United States citizenship is a matter of public record.

Even under the Court of Appeals' holding in *Simpson*, however, the fact that citizenship is a matter of public record somewhere in the Nation cannot be decisive, since it would seem almost certain that the information concerning marital status that was withheld in *Simpson* would likewise be contained in public records. In addition, "personnel" files, which expressly come within Exemption 6, are likely to contain much information that is equally a matter of public record. Place of birth, date of birth, marital status, past criminal convictions, and acquisition of citizenship are some examples. The public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a "clearly unwarranted invasion of personal privacy," but it does not militate against a conclusion that files are "similar" to personnel and medical files.

FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS *v.* MURRAY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-2205. Argued April 21, 1982—Decided May 17, 1982

Certiorari dismissed. Reported below: 634 F. 2d 365.

Scott A. Mayer argued the cause for petitioner. With him on the briefs was *Joan S. Cherry*.

John S. Elson, by appointment of the Court, 454 U. S. 1096, argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Sybille Fritzsche* filed a brief for the Chicago Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

Reporter's Note

Orders commencing with April 26, 1982, begin with page 940. The preceding orders in 456 U. S., from March 29 through April 23, 1982, were reported in Part 1, at 901–940. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 80-951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL., 455 U. S. 385. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

APRIL 23, 1982

Miscellaneous Order

No. A-889. BINGAMAN ET AL. *v.* KING, GOVERNOR OF NEW MEXICO, ET AL. It is ordered that the order of the United States District Court for the District of New Mexico, in consolidated cases Nos. 82-67-M, 82-84-C, 82-180-C, 82-219-JB, and 82-246-JB, entered on April 13, 1982, be, and the same is hereby, stayed to the extent that that order applies to primary elections other than for state legislative offices, pending the timely filing and disposition by this Court of an appeal. This order shall have no effect on the orders of the United States District Court for the District of New Mexico in the cases set forth above entered on April 5 and April 8, 1982, enjoining the primary filing deadline for New Mexico state legislative election and adjudging the New Mexico apportionment plan unconstitutional.

APRIL 26, 1982

Appeals Dismissed

No. 81-1310. RAGNO *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of jurisdiction. Reported below: 403 So. 2d 1097.

No. 81-1426. BUCHEIT *v.* LAUDENBERGER ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 496 Pa. 52, 436 A. 2d 147.

No. 81-1609. HELTON ET AL. *v.* CITY OF BURKBURNETT. Appeal from Ct. Civ. App. Tex., 2d Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 619 S. W. 2d 23.

No. 81-1631. SHELDON *v.* SHELDON. Appeal from Ct. App. Cal., 4th App. Dist. Motion of appellee for damages and double costs denied. Appeal dismissed for want of substantial federal question. Reported below: 124 Cal. App. 3d 371, 177 Cal. Rptr. 380.

No. 81-1641. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* BURTON ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 30 Cal. 3d 638, 639 P. 2d 939.

Certiorari Granted—Vacated and Remanded

No. 81-1319. WHITE, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN *v.* THOMPSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Frady, ante,* p. 152. Reported below: 661 F. 2d 103.

Miscellaneous Orders

No. — - ——. WEST VIRGINIA *v.* SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A-773. CRUMPACKER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-861. MIZELL, WARDEN *v.* WELSH. C. A. 7th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. 80-1690. AMERICAN MEDICAL ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION, 455 U. S. 676. Motion of American Dental Association for leave to file a brief as *amicus curiae* in support of petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 81-31. CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.;

No. 81-228. UNITED STATES ET AL. *v.* GRACE BRETHREN CHURCH ET AL.; and

No. 81-455. GRACE BRETHREN CHURCH ET AL. *v.* UNITED STATES ET AL. D. C. C. D. Cal. [Probable jurisdiction postponed, 454 U. S. 961.] Motion of Grace Brethren Church et al. for leave to file a supplemental brief after argument granted.

No. 81-55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motion of American Booksellers Association, Inc., et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 81-1095. MORRIS, WARDEN *v.* SLAPPY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 904.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Michael B. Bassi, Esquire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 81-1222. UNITED STATES *v.* GENERIX DRUG CORP. ET AL. C. A. 11th Cir. [Certiorari granted, 455 U. S. 988.] Motions of Generic Pharmaceutical Industry Association, Medicine in the Public Interest, The Proprietary Association, and Pharmaceutical Manufacturers Association for leave to file briefs as *amici curiae* granted.

No. 81-5873. INNIS *v.* RHODE ISLAND. Sup. Ct. R. I. The order entered April 19, 1982 [*ante*, p. 930], denying the petition for writ of certiorari is amended to read as follows: Certiorari denied. JUSTICE MARSHALL would grant certiorari.

No. 81-6316. IN RE REMBERT. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81-1613. MEMPHIS BANK & TRUST CO. *v.* GARNER, SHELBY COUNTY TRUSTEE, ET AL. Appeal from Sup. Ct. Tenn. Probable jurisdiction noted. Reported below: 624 S. W. 2d 551.

Certiorari Granted

No. 81-1120. UNITED STATES ET AL. *v.* RYLANDER ET AL. C. A. 9th Cir. Motion of respondent Richard W. Rylander, Sr., for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 656 F. 2d 1313.

Certiorari Denied. (See also No. 81-1641, *supra.*)

No. 81-875. ALABAMA HOSPITAL ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, 656 F. 2d 606.

No. 81-905. LAZZARA *v.* UNITED STATES;
No. 81-956. FARINA *v.* UNITED STATES;
No. 81-1458. RUSSELLO *v.* UNITED STATES;
No. 81-5700. MACALUSO *v.* UNITED STATES;
No. 81-5716. SCIONTI *v.* UNITED STATES;
No. 81-5748. MORGADO *v.* UNITED STATES;
No. 81-5820. FISHER *v.* UNITED STATES;
No. 81-5826. YOUNG *v.* UNITED STATES; and
No. 81-5865. PALERMO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 648 F. 2d 367.

No. 81-1185. STEVENSON *v.* GRENTFC, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 20.

No. 81-1281. SANCHEZ *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 966.

No. 81-1308. MCMURTRY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1204, 420 N. E. 2d 1211.

379-671 O—83——25

No. 81-1339. ELLSWORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 957.

No. 81-1379. CEAT S.P.A., PNEUMATICI *v.* BRYANT. Sup. Ct. Ala. Certiorari denied. Reported below: 406 So. 2d 376.

No. 81-1409. RAYMER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 1136.

No. 81-1411. PHELPS *v.* KANSAS SUPREME COURT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 662 F. 2d 649.

No. 81-1425. PUBLIC UTILITIES COMMISSION OF COLORADO *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 1, 660 F. 2d 821.

No. 81-1432. LEVENSON ET AL. *v.* UNITED STATES; and No. 81-1507. FEINBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81-1449. LOGE ET VIR *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 2d 1268.

No. 81-1538. THAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 855.

No. 81-1571. HALL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1073.

No. 81-1593. INCORPORATED TRUSTEES OF THE GOSPEL WORKER SOCIETY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 672 F. 2d 894.

No. 81-1602. WATKINS *v.* PENTZIEN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 604.

No. 81-1604. CHIA *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1051.

No. 81-1606. REGAN *v.* CONROY, CHIEF OF POLICE OF THE VILLAGE OF SCHAUMBURG. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 99 Ill. App. 3d 52, 425 N. E. 2d 37.

No. 81-1607. HUSTED *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 160, 422 N. E. 2d 962.

No. 81-1610. EDWARDS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 406 So. 2d 1331.

No. 81-1612. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* BROTHERHOOD OF RAILROAD SIGNALMEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 665 F. 2d 987.

No. 81-1620. VINEBERG ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 127, 177 Cal. Rptr. 819.

No. 81-1624. BAKER ET AL. *v.* AMSTED INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 2d 1245.

No. 81-1633. THE GAP STORES, INC. *v.* SAILOR MUSIC ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 84.

No. 81-1634. W. B. GIBSON CO. *v.* DUBROOK, INC. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1299.

No. 81-1640. LUBIN ET UX. *v.* EDINBURGH INSURANCE CO., LTD. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1314.

No. 81-1645. ILLINOIS BELL TELEPHONE CO. *v.* GETTO. Sup. Ct. Ill. Certiorari denied. Reported below: 86 Ill. 2d 39, 426 N. E. 2d 844.

No. 81-1646. KITCH *v.* DELANO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 663 F. 2d 990.

No. 81-1650. CITY OF CINCINNATI *v.* JONES ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81-1656. BOWERS *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 369.

No. 81-1676. JERGUSON *v.* BLUE DOT INVESTMENT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 31.

No. 81-1737. MINIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 134.

No. 81-1764. VEATCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 995.

No. 81-1768. BOSS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-1773. CALHOUN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 923.

No. 81-1783. HEBEL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 995.

No. 81-1789. GILBERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 94.

No. 81-1796. COWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 180.

No. 81-6045. SHAFFNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1334.

No. 81-6142. RODRIGUEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1201, 427 N. E. 2d 1052.

No. 81-6145. MUHAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 658 F. 2d 249.

No. 81-6161. AGURS *v.* KELLER, REGIONAL PAROLE COMMISSIONER, U. S. PAROLE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81-6271. BARHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 521.

No. 81-6297. MCCOLPIN *v.* EIKELBLOOM ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6299. SMITH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 1122.

No. 81-6300. OLIVER *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6307. DRAPER ET AL. *v.* PRESCOTT, TOWN CLERK OF GREENFIELD, MASSACHUSETTS, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 425 N. E. 2d 333.

No. 81-6308. THOMAS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6311. ATHERTON *v.* ATHERTON. Sup. Ct. Va. Certiorari denied. Reported below: —— Va. ——.

No. 81-6314. MARTIN *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81-6315. MEDLEY *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 81-6318. ARTWAY *v.* KRAMER, JUDGE, BURLINGTON COUNTY COURT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 684.

No. 81-6320. WHITE *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81-6322. WILSON *v.* JAGO. C. A. 6th Cir. Certiorari denied.

No. 81-6326. LAMOUNTAIN *v.* RAINES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1031.

No. 81-6327. BROWN *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 666 F. 2d 782.

No. 81-6334. LAMANTIA *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 81-6335. JERALD *v.* O'ROURKE. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 940.

No. 81-6336. DENTLY *v.* IRVIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1335.

No. 81-6337. DEWITT *v.* MANSON, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 801.

No. 81-6339. BIRDEN *v.* SMITH. C. A. 2d Cir. Certiorari denied.

No. 81-6341. PLOTKIN *v.* GRUMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 493.

No. 81-6349. MCZEAL *v.* MAGGIO ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6362. SMITH *v.* COHEN. C. A. 11th Cir. Certiorari denied.

No. 81-6142. RODRIGUEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1201, 427 N. E. 2d 1052.

No. 81-6145. MUHAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 658 F. 2d 249.

No. 81-6161. AGURS *v.* KELLER, REGIONAL PAROLE COMMISSIONER, U. S. PAROLE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81-6271. BARHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 521.

No. 81-6297. MCCOLPIN *v.* EIKELBLOOM ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6299. SMITH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 1122.

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No. 81-6307. DRAPER ET AL. *v.* PRESCOTT, TOWN CLERK OF GREENFIELD, MASSACHUSETTS, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 425 N. E. 2d 333.

No. 81-6308. THOMAS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6311. ATHERTON *v.* ATHERTON. Sup. Ct. Va. Certiorari denied. Reported below: —— Va. ——.

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No. 81-6315. MEDLEY *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 81-6318. ARTWAY *v.* KRAMER, JUDGE, BURLINGTON COUNTY COURT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 684.

No. 81-6320. WHITE *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81-6322. WILSON *v.* JAGO. C. A. 6th Cir. Certiorari denied.

No. 81-6326. LAMOUNTAIN *v.* RAINES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1031.

No. 81-6327. BROWN *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 666 F. 2d 782.

No. 81-6334. LAMANTIA *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 81-6335. JERALD *v.* O'ROURKE. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 940.

No. 81-6336. DENTLY *v.* IRVIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1335.

No. 81-6337. DEWITT *v.* MANSON, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 801.

No. 81-6339. BIRDEN *v.* SMITH. C. A. 2d Cir. Certiorari denied.

No. 81-6341. PLOTKIN *v.* GRUMAN ET AL. C. A. 2d Cir Certiorari denied. Reported below: 671 F. 2d 493.

No. 81-6349. MCZEAL *v.* MAGGIO ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6362. SMITH *v.* COHEN. C. A. 11th Cir. Certiorari denied.

No. 81-6390. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 932.

No. 81-6398. GAINES *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6418. WARD *v.* MACDOUGALL ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-6442. STRAGER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-6443. PARCELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-6451. TOLERTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 669 F. 2d 652.

No. 81-6452. MAYO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-6455. FLOWERS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 81-6465. MCBEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1302.

No. 81-907. MARTINO *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to strike brief in opposition denied. Certiorari denied. Reported below: 648 F. 2d 367.

No. 81-1291. MARYLAND *v.* BRYANT. Ct. Sp. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 49 Md. App. 272, 431 A. 2d 714.

No. 81-1659. WATKINS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* WASHINGTON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 655 F. 2d 1346 and 662 F. 2d 1116.

No. 81-6243. JONES *v.* LEIDINGER ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant certiorari. Reported below: 672 F. 2d 910.

No. 81-6301. BALDWIN *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY, ET AL. C. A. 5th Cir.; and

No. 81-6304. COLLINS *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81-6301, 653 F. 2d 942.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 81-1239. STEPHENS ET AL. *v.* BLACK ET UX., 455 U. S. 1008;

No. 81-1329. BOLLOTIN *v.* SCHWARTZ ET AL., 455 U. S. 1001;

No. 81-6055. HERNANDEZ *v.* DEPARTMENT OF LABOR AND HUMAN RESOURCES ET AL., 455 U. S. 996;

No. 81-6083. JURAS *v.* AMAN COLLECTION SERVICE, INC., 455 U. S. 1024;

No. 81-6106. IVEY *v.* ALASKA, 455 U. S. 1010;

No. 81-6147. HALL *v.* THOMAS, 455 U. S. 1026; and

No. 81-6208. STOUTE *v.* UNITED STATES ET AL., 455 U. S. 1027. Petitions for rehearing denied.

No. 80-1681. VILLAGE OF HOFFMAN ESTATES ET AL. *v.* THE FLIPSIDE, HOFFMAN ESTATES, INC., 455 U. S. 489; and

No. 81-415. CASBAH, INC., ET AL. *v.* THONE, GOVERNOR OF NEBRASKA, ET AL., 455 U. S. 1005. Petitions for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

No. 81-1012. INSURANCE COMPANY OF NORTH AMERICA *v.* KEENE CORP. ET AL., 455 U. S. 1007;

No. 81-1197. HARTFORD ACCIDENT & INDEMNITY CO. *v.* KEENE CORP. ET AL., 455 U. S. 1007;

No. 81-1298. AETNA CASUALTY & SURETY CO. *v.* KEENE CORP. ET AL., 455 U. S. 1007; and

No. 81-1328. LIBERTY MUTUAL INSURANCE CO. *v.* KEENE CORP. ET AL., 455 U. S. 1007. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 81-1141. RIBOTSKY *v.* UNITED STATES, 455 U. S. 910. Motion for leave to file petition for rehearing denied.

No. 81-1500. IN RE CHING YEE, 455 U. S. 1015. Petition for rehearing and all other relief denied.

APRIL 28, 1982

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. 1015; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1023; and amendments to the Rules and Forms Governing Proceedings in the United States District Courts under 28 U. S. C. §§ 2254 and 2255, see *post*, p. 1033.)

MAY 3, 1982

Affirmed on Appeal

No. 80-1207. RUSK, MAYOR OF ALBUQUERQUE, ET AL. *v.* ESPINOSA ET AL. Affirmed on appeal from C. A. 10th Cir. JUSTICE REHNQUIST and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 634 F. 2d 477.

Appeals Dismissed

No. 81-1351. SMITH *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of jurisdiction. Reported below: 402 So. 2d 1360.

No. 81-1259. WESTERN MARYLAND RAILWAY CO. *v.* ROSE, TAX COMMISSIONER OF WEST VIRGINIA; and

No. 81-1267. UNION-MECHLING CORP. *v.* ROSE, TAX COMMISSIONER OF WEST VIRGINIA. Appeals from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE POWELL would note probable jurisdiction and set cases for oral argument. Reported below: —— W. Va. ——, 282 S. E. 2d 240.

No. 81-1671. AU *v.* KELLY ET AL., TRUSTEES, DBA FINANCIAL PLAZA OF THE PACIFIC. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Haw. App. ——, 634 P. 2d 619.

No. 81-1753. BALASH *v.* NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 N. Y. 2d 847, 428 N. E. 2d 393.

No. 81-1681. JACOB BROTHERS, INC., ET AL. *v.* DELEON. Appeal from App. Sess., Super. Ct. Conn., dismissed for want of substantial federal question. Reported below: 38 Conn. Supp. 331, 446 A. 2d 831.

Certiorari Granted—Vacated and Remanded

No. 80-2117. LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint, ante,* p. 273. Reported below: 634 F. 2d 929.

No. 81–310. BERGMAN, WARDEN *v.* BURTON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Lundy*, 455 U. S. 509 (1982). Reported below: 649 F. 2d 428.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

In *Rose* v. *Lundy*, 455 U. S. 509, the Court wrote:

> "There is no basis to believe that today's holdings will 'complicate and delay' the resolution of habeas petitions (STEVENS, J., *post*, at 550), or will serve to 'trap the unwary *pro se* prisoner.' (BLACKMUN, J., *post*, at 530.)" *Id.*, at 520.

Today, however, the Court interprets *Rose* as requiring further proceedings that can serve no purpose other than to "complicate and delay" the ultimate termination of this litigation.

In 1975 the respondent was convicted in a Michigan state court of assault with intent to commit murder and was sentenced to life imprisonment. His conviction was affirmed by the Michigan Court of Appeals in 1977 and the Michigan Supreme Court denied leave to appeal.

In 1980 the respondent sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan on two grounds: (1) that the trial court's instructions to the jury deprived him of due process of law; and (2) that he was denied the effective assistance of counsel. The District Court found no merit to the first claim and refused to consider the second because the respondent had not exhausted his state remedies as required by 28 U. S. C. § 2254(b).

The Court of Appeals reversed, holding that the instructions were improper under *Sandstrom* v. *Montana*, 442 U. S.

510, and that even though trial counsel had not objected to the erroneous instruction, *Wainwright* v. *Sykes*, 433 U. S. 72, did not foreclose relief because the Michigan Court of Appeals had reviewed the asserted errors in the trial court's jury charge and rejected the respondent's claims on the merits. The Sixth Circuit did not address the respondent's unexhausted claim of ineffective assistance of counsel.

The Warden's petition for certiorari in this Court raises the *Wainwright* v. *Sykes* issue and three questions concerning *Sandstrom* v. *Montana*.[1] The petition makes no reference to the unexhausted claim. Ignoring the four questions presented by the Warden, the Court grants his petition, vacates the judgment of the Court of Appeals, and remands for reconsideration in the light of *Rose* v. *Lundy*.

Under *Rose* v. *Lundy*—if I read the Court's opinion correctly—after the case gets back to the District Court, that court must dismiss the habeas corpus petition that is now a part of the record.[2] Thereafter, the respondent immediately will be entitled to resubmit a petition eliminating the unexhausted claim and confining his claim to relief to the issue

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[1] The questions presented for review read as follows:

"I. Where no timely objection was made to the state court's jury instructions as required by state law, the state appellate courts arguably relied on the failure to object in affirming the conviction and neither cause for the failure to object nor actual prejudice has been shown, is this state prison inmate barred from challenging the state court's jury instructions in federal habeas corpus proceedings under the doctrine of *Wainwright* v *Sykes*, 4[3]3 US 72 (1977)?

"II. Should *Sandstrom* v *Montana*, 442 US 510 (1979) be applied retroactively to a 1975 state court conviction?

"III. If *Sandstrom* is to be applied retroactively, do the state court's jury instructions in this case violate the *Sandstrom* doctrine?

"IV. If the state court's jury instructions in this case violate *Sandstrom*, is the violation nevertheless harmless beyond a reasonable doubt under the doctrine of *Chapman* v *California*, 386 US 18 (1967)?" Pet. for Cert. i.

[2] "[W]e hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose* v. *Lundy*, 455 U. S., at 522.

that has already been resolved in his favor by the Court of Appeals.[3] It seems reasonable to assume that the District Court will grant the relief mandated by the Court of Appeals, that the District Court order will then be promptly appealed by the Warden, and that the Court of Appeals thereafter will decide both the *Wainwright* v. *Sykes* issue and the three *Sandstrom* questions precisely as it decided them in the opinion that this Court today is vacating. It seems equally likely that the Warden will remain dissatisfied with that ruling and then once again file a petition for certiorari, at which time the Court can then determine whether to review the questions that are now presented.

The predictable consequences of the order the Court enters today illustrate the fact that the rule of *Rose* v. *Lundy* merely complicates and delays the termination of habeas corpus litigation.[4] It disserves the interest of busy federal judges as well as the interest of deserving litigants.

I respectfully dissent.

No. 81-1029. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, ET AL. *v.* TERRELL ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint*, *ante*, p. 273. Reported below: 644 F. 2d 1112.

No. 81-1666. GRANT *v.* WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION ET AL. Sup. Ct. Wash. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Larson* v. *Valente*, *ante*, p. 228. Reported below: 96 Wash. 2d 454, 635 P. 2d 1071.

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[3] "Those prisoners who misunderstand this requirement and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims." *Id.*, at 520.

[4] Nothing in the Court's opinion in *Rose* v. *Lundy*, or in anything the Court has written since, justifies the Court's reaching out on its own initiative to apply its new rule to previously decided cases.

379-671 O—83——26

Miscellaneous Orders

No. A–891. BENJAMIN S. *v.* KURIANSKY, DEPUTY ATTORNEY GENERAL OF NEW YORK. Ct. App. N. Y. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–897. COASTAL PETROLEUM CO. *v.* MOBIL OIL CORP.; and

No. A–913. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA *v.* MOBIL OIL CORP. C. A. 11th Cir. Applications for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–906. ANDERSON ET AL. *v.* FLATEAU ET AL. Application for stay of the order of the United States District Court for the Southern District of New York, entered March 26, 1982, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–265. IN RE DISBARMENT OF GRANT. It is ordered that Arthur H. Grant, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–266. IN RE DISBARMENT OF FELDMAN. It is ordered that Herman Feldman, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–267. IN RE DISBARMENT OF DEFAZIO. It is ordered that Charles DeFazio III, of Newark, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-256. IN RE DISBARMENT OF DEFRANCIS. Disbarment entered. [For earlier order herein, see 455 U. S. 902.]

No. D-268. IN RE DISBARMENT OF CYPHERS. It is ordered that Phillip L. Cyphers, of Pasadena, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-269. IN RE DISBARMENT OF BROWN. It is ordered that Callis N. Brown, of Teaneck, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-270. IN RE DISBARMENT OF MORITZ. It is ordered that Andrew Bruce Moritz, of San Diego, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-271. IN RE DISBARMENT OF WAJERT. It is ordered that John M. Wajert, of Phoenixville, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-272. IN RE DISBARMENT OF LANGKAM. It is ordered that Leonard Langkam, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 27, Orig. OHIO *v.* KENTUCKY; and

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Report of the Special Master on the motion of Dorothy Cole et al. for leave to intervene is received and ordered filed. Motion of Dorothy Cole et al. for leave to intervene denied. [For earlier order herein, see, *e. g.*, 454 U. S. 1076.]

No. 81-202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1030.] Motion of petitioners for leave to file a supplemental brief after argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 81-298. COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA *v.* GOTTFRIED ET AL.; and

No. 81-799. FEDERAL COMMUNICATIONS COMMISSION *v.* GOTTFRIED ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 1141.] Motion of respondents for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Request of respondents for divided argument denied.

No. 81-349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.] Case restored to calendar for reargument. JUSTICE STEVENS took no part in the consideration or decision of this order.

No. 81-680. HERMAN & MACLEAN *v.* HUDDLESTON ET AL.; and

No. 81-1076. HUDDLESTON ET AL. *v.* HERMAN & MACLEAN ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 914.] Motion of Ralph E. Huddleston et al. for leave to enlarge question presented for review denied.

No. 81-1222. UNITED STATES *v.* GENERIX DRUG CORP. ET AL. C. A. 11th Cir. [Certiorari granted, 455 U. S. 988.] Respondents' suggestion of mootness rejected.

No. 81-827. JEFFERSON COUNTY PHARMACEUTICAL ASSN., INC. *v.* ABBOTT LABORATORIES ET AL. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motion of American Pharmaceutical Association for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 81-1320. KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON. C. A. 9th Cir. [Probable jurisdiction noted, 455 U. S. 999.] Motion of the parties to dispense with printing the joint appendix denied. Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as *amicus curiae* granted.

No. 81-1672. PENNZOIL CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81-6323. GAINES *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner to dismiss the petition for writ of certiorari denied. Motion of court-appointed counsel to order a hearing to determine the competency of petitioner to file a motion to dismiss his petition denied.

No. 81-6458. NAJAR *v.* OMAN ET UX. Ct. App. Tex., 3d Sup. Jud. Dist. Motion of Texas for leave to intervene as a party respondent granted.

No. 81-6365. IN RE HOOVER; and
No. 81-6432. IN RE BRISCOE. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 81-1551. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ROSOFSKY. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. Reported below: 523 F. Supp. 1180.

No. 81-523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Appeal from Ct. App. Cal., 1st App. Dist. Probable jurisdiction noted. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 117 Cal. App. 3d 988, 173 Cal. Rptr. 121.

Certiorari Granted

No. 81-1032. UNITED STATES *v.* SELLS ENGINEERING, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 642 F. 2d 1184.

No. 81-1536. COMMISSIONER OF INTERNAL REVENUE *v.* TUFTS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 651 F. 2d 1058.

No. 81-1635. ANDERSON ET AL. *v.* CELEBREZZE, SECRETARY OF STATE OF OHIO. C. A. 6th Cir. Certiorari granted. Reported below: 664 F. 2d 554.

Certiorari Denied. (See also Nos. 81-1671 and 81-1753, *supra.*)

No. 81-160. MISSISSIPPI ET AL. *v.* PHILLIPS ET AL.; and No. 81-181. JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF MISSISSIPPI ET AL. *v.* PHILLIPS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1014.

No. 81-1024. SALAZAR *v.* SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 942.

No. 81-1257. MILLER *v.* WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 623.

No. 81-1427. LEAF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 740.

No. 81-1464. CANN ET AL. *v.* FORD MOTOR CO. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 54.

No. 81-1467. UNVERT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 483.

No. 81-1480. BOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-1501. LACEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 661 F. 2d 1021.

No. 81-1522. PEACHTREE CITY *v.* H & H OPERATIONS, INC. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 500, 283 S. E. 2d 867.

No. 81-1558. COCHRANE & BRESNAHAN *v.* SMITH, GUARDIAN AD LITEM. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 151.

No. 81-1632. HONDA MOTOR CO., LTD. *v.* HAUSCHILD. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81-1639. MOUNT VERNON MEMORIAL PARK ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 1358.

No. 81-1663. KIBLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 452.

No. 81-1668. PINE BELT LAND CO. ET AL. *v.* MISSISSIPPI STATE HIGHWAY COMMISSION ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 406 So. 2d 329.

No. 81-1669. SCHIAVO BROTHERS, INC. *v.* UNITED STATES GYPSUM CO. C. A. 3d Cir. Certiorari denied. Reported below: 668 F. 2d 172.

No. 81-1670. BANKERS TRUST CO. ET AL. *v.* BP OIL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 103.

No. 81-1678. WEAVER ET AL. *v.* MARTIN, ADMINISTRATOR. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1013.

No. 81-1690. GERALDO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 68 Ohio St. 2d 120, 429 N. E. 2d 141.

No. 81-1691. CHEATHAM *v.* FLORIDA; and
No. 81-1693. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 81-1694. GRIFFITH *v.* CLAWSON, FORMERLY KNOWN AS GRIFFITH. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 81-1695. YELLOW FORWARDING CO. *v.* ATLANTIC CONTAINER LINE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 350.

No. 81-1697. EDWARD W. MINTE CO., INC., ET AL. *v.* MURPHY. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 911.

No. 81-1704. HATCH ET UX. *v.* MADSEN, SUPERINTENDENT OF BANKS OF ARIZONA, RECEIVER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1053.

No. 81-1716. VAUGHN *v.* HINCHY, WITTE, WOOD, ANDERSON & HODGES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81-1779. WALGREN *v.* UNITED STATES;
No. 81-1780. BAGNARIOL *v.* UNITED STATES; and
No. 81-1840. GALLAGHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 877.

No. 81-1806. BARNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 426.

No. 81-1837. FREEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-6030. WHITE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 622 S. W. 2d 939.

No. 81-6101. PISANO *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 636 P. 2d 358.

No. 81-6164. RIPPLINGER ET AL. *v.* KIDDER COUNTY SOCIAL SERVICE BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 703.

No. 81-6196. APACHITO ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 664 F. 2d 229.

No. 81-6237. G. B. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 36, 430 N. E. 2d 1096.

No. 81-6291. GLENN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81-6346. BROOKSHER *v.* HARREL ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6358. WALKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 625 S. W. 2d 740.

No. 81-6360. RICHARDSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 400 So. 2d 1375.

No. 81-6364. MEDVED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1045.

No. 81-6366. ABU-BAKR *v.* REED ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-6367. MCCRARY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 81-6369. WILLIAMS *v.* EVERETT, DIRECTOR, ARKANSAS DEPARTMENT OF LABOR. Ct. App. Ark. Certiorari denied. Reported below: 4 Ark. App. xxi.

No. 81-6370. SALMAN *v.* SWANSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 923.

No. 81-6372. WADE *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 81-6376. WEBB *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 81-6377. SEAGLE *v.* NORTH CAROLINA. Super. Ct. N. C., Durham County. Certiorari denied.

No. 81-6421. WESTOVER *v.* RICHENBERGER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81-6469. MILLER *v.* UNITED STATES; and
No. 81-6477. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 991.

No. 81-6476. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1335.

No. 81-6479. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 669 F. 2d 609.

No. 81-6483. PACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-6498. GUERRERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 667 F. 2d 862.

No. 81-221. UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN *v.* SEARS ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 645 F. 2d 1365.

No. 81-1488. ALASKA MARINE TRUCKING, A DIVISION OF LYNDEN TRANSPORT, INC. *v.* CARNATION CO. Ct. App. Wash. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 30 Wash. App. 144, 633 P. 2d 105.

No. 81-1437. NORTHERN STATES POWER CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 663 F. 2d 55.

No. 81-1521. DAVIS *v.* UNITED AIR LINES, INC. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 662 F. 2d 120.

No. 81-1698. BATTAGLIA *v.* UNION COUNTY WELFARE BOARD ET AL. Sup. Ct. N. J. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 88 N. J. 48, 438 A. 2d 530.

No. 81-6110. PORTER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 81-6205. BASS *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 81-6352. HANCE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County. Certiorari denied. Reported below: No. 81-6110, 623 S. W. 2d 374; No. 81-6205, 622 S. W. 2d 101.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80-6680. MCELROY *v.* UNITED STATES, 455 U. S. 642;

No. 81-660. ADDISON SAVMOR, INC. *v.* UNITED STATES, 454 U. S. 1144;

No. 81-1116. O. HOMMEL CO. *v.* FERRO CORP., 455 U. S. 1017;

No. 81-1382. ATKINSON *v.* ATKINSON, AKA GOELZ, *ante*, p. 905; and

No. 81-6151. CUNNINGHAM *v.* GEORGIA, 455 U. S. 1038. Petitions for rehearing denied.

No. 80–1690. AMERICAN MEDICAL ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION, 455 U. S. 676. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

MAY 17, 1982

Dismissals Under Rule 53

No. 81–1733. DREDGE GENERAL G. L. GILLESPIE ET AL. *v.* MERCHANTS NATIONAL BANK OF MOBILE ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 663 F. 2d 1338.

No. 81–1066. BANCO DE CREDITO RURAL ARGENTINO, S.A. *v.* BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed under this Court's Rule 53. Reported below: 81 App. Div. 2d 1047, 440 N. Y. S. 2d 803.

Affirmed on Appeal

No. 81–1731. SCHATZLE *v.* KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 541 F. Supp. 922.

JUSTICE REHNQUIST, concurring.

Appellant in this case requests that we overrule *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969). But here the District Court did not invalidate a reapportionment plan duly adopted by the state legislature; it merely adopted a plan of its own when the legislature was unable to reach agreement. This case, therefore, does not require that we address appellant's suggestion respecting *Kirkpatrick* v. *Preisler*, *supra*.

No. 81–1770. ORWOLL ET AL. *v.* LACOMB ET AL. Affirmed on appeal from D. C. Minn. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 541 F. Supp. 145.

Appeals Dismissed

No. 79-6584. IN RE TRAPP ET AL. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Reported below: 593 S. W. 2d 193.

No. 81-1738. FIRST NATIONAL BANK OF SAINT PAUL *v.* MINNESOTA, BY LORD, ITS TREASURER. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Reported below: 313 N. W. 2d 390.

No. 81-1614. ROSENBERG ET AL. *v.* JOHNS-MANVILLE SALES CORP. ET AL.; and

No. 81-1615. STEINHARDT, EXECUTRIX *v.* JOHNS-MANVILLE CORP. ET AL. Appeals from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of these cases. Reported below: 54 N. Y. 2d 1008, 430 N. E. 2d 1297.

No. 81-1700. GILLILAND *v.* CITY OF PALMDALE; and GILLILAND ET AL. *v.* COUNTY OF LOS ANGELES. Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 126 Cal. App. 3d 610, 179 Cal. Rptr. 73 (second case).

No. 81-6202. ADDISON ET AL. *v.* CITY OF CHESTER. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: —— S. C. ——, 284 S. E. 2d 579.

No. 81-6424. BACIK *v.* PENNSYLVANIA. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 61 Pa. Commw. 552, 434 A. 2d 860.

No. 81-1752. HOWARD *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, COLORADO, ET AL. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 640 P. 2d 1128.

Vacated and Remanded on Appeal

No. 81-1649. CITY OF PARMA, OHIO, ET AL. *v.* RECORD REVOLUTION, No. 6, INC., ET AL. Appeal from C. A. 6th Cir. Judgment vacated and case remanded for further consideration in light of *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489 (1982). JUSTICE STEVENS took no part in the consideration or decision of this case.

Certiorari Granted—Vacated and Remanded

No. 80-1542. RIVERS, EXECUTOR, ET AL. *v.* ROSENTHAL & CO. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran, ante*, p. 353. Reported below: 634 F. 2d 774.

No. 81-1118. INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO, LOCAL 342, ET AL. *v.* TERRELL ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint, ante*, p. 273. Reported below: 644 F. 2d 1112.

No. 81-1750. WASHINGTON *v.* GIBSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Engle* v. *Isaac, ante*, p. 107, and *United States* v. *Frady, ante*, p. 152. Reported below: 665 F. 2d 863.

No. 81-1800. WHITE-WILSON MEDICAL CLINIC, INC. *v.* ROBBINS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint*, *ante*, p. 273. Reported below: 660 F. 2d 1064.

Miscellaneous Orders

No. — - ——. RITTER *v.* BOARD OF COMMISSIONERS OF ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 1. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A-916. IN RE DREFKE. D. C. W. D. Mo. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A-929 (81-1871). MECO, INC. *v.* SINNETTE, JUDGE, BOYD CIRCUIT COURT, DIVISION II, ET AL. Sup. Ct. Ky. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D-264. IN RE DISBARMENT OF EILBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. 81-523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, *ante*, p. 960.] Motions of National Association of Manufacturers, Committee on State Taxation of the Council of State Chambers of Commerce, EMI, Limited, and Canadian Imperial Bank of Commerce et al. for leave to file briefs as *amici curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 81-1784. AMERICAN CYANAMID CO. *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION ET AL. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81-1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

Probable Jurisdiction Noted or Postponed

No. 81-969. WASHINGTON ET AL. *v.* UNITED STATES. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 654 F. 2d 570.

No. 81-1590. BOLGER ET AL. *v.* YOUNGS DRUG PRODUCTS CORP. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 526 F. Supp. 823.

No. 81-1020. EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL.; and

No. 81-1268. EXCHANGE OIL & GAS CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA. Appeals from Sup. Ct. Ala. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 404 So. 2d 1.

No. 81-1756. LEHR *v.* ROBERTSON ET AL. Appeal from Ct. App. N. Y. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 54 N. Y. 2d 417, 430 N. E. 2d 896.

Certiorari Granted

No. 81-1284. EICKE *v.* EICKE. Ct. App. La., 3d Cir. Certiorari granted. Reported below: 399 So. 2d 1231.

No. 81-1627. SHEPARD *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 215 U. S. App. D. C. 373, 669 F. 2d 759.

No. 81-1453. SOUTH DAKOTA *v.* NEVILLE. Sup. Ct. S. D. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 312 N. W. 2d 723.

No. 81-1463. UNITED STATES *v.* HASTING ET AL. C. A. 7th Cir. Motions of respondents Kevin Wendell Anderson, Gable Gibson, Gregory Lamont Williams, Kelvin Hasting, and Napoleon Stewart for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 660 F. 2d 301.

No. 81-1618. WEYERHAEUSER CO. ET AL. *v.* LYMAN LAMB CO. ET AL.; and

No. 81-1619. GEORGIA-PACIFIC CORP. *v.* LYMAN LAMB CO. ET AL. C. A. 5th Cir. Motions of Chamber of Commerce of the United States, Business Roundtable, and National Association of Manufacturers for leave to file briefs as *amici curiae* granted. Motion of Bowie-Sims-Prange, Inc., et al. for leave to file a brief as *amici curiae* in No. 81-1618 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE WHITE and JUSTICE O'CONNOR took no part in the consideration or decision of these motions and these petitions. Reported below: 655 F. 2d 627.

No. 81-1810. NARANJO ET AL. *v.* CORRIZ. C. A. 10th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 667 F. 2d 892.

Certiorari Denied. (See also Nos. 81-1614, 81-1615, and 81-1752, *supra*.)

No. 81-155. BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER EDUCATION ET AL. *v.* MISSISSIPPI COUNCIL ON HUMAN RELATIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1014.

No. 81-510. FLORIDA STATE UNIVERSITY ET AL. *v.* JOSHI. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 981.

No. 81-1050. TAPP *v.* LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 383.

No. 81-1069. TERRELL ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1112.

No. 81-1184. CHATHAM VENTURES, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 651 F. 2d 355.

No. 81-1306. MATHERNE *v.* TERREBONNE PARISH POLICE JURY. Sup. Ct. La. Certiorari denied. Reported below: 405 So. 2d 314.

No. 81-1346. JAFFEE ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 2d 1226.

No. 81-1361. WEST VIRGINIA EX REL. AIR POLLUTION CONTROL COMMISSION *v.* GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.; and

No. 81-1524. PENNSYLVANIA *v.* GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: No. 81-1361, 672 F. 2d 904; No. 81-1524, 672 F. 2d 902.

No. 81-1372. CITY OF ATLANTA *v.* OWEN ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 299, 282 S. E. 2d 906.

No. 81-1393. FLORIDA MARBLE POLISHERS HEALTH & WELFARE TRUST FUND ET AL. *v.* EDWIN M. GREEN, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 972.

No. 81-1439. BLINKEN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 291 Md. 297, 435 A. 2d 86.

No. 81-1498. CAVALIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 426.

No. 81-1533. MERCHANTS REFRIGERATING COMPANY OF CALIFORNIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 116.

No. 81-1543. SOUTHWEST SUNSITES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 711.

No. 81-1544. LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO *v.* CHARMER INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 664 F. 2d 318.

No. 81-1547. CITY OF PLEASANT GROVE ET AL. *v.* WHEELER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 99.

No. 81-1549. MASTRANGELO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 662 F. 2d 946.

No. 81-1553. MONTEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 81-1586. TORRES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 663 F. 2d 1019.

No. 81-1565. VSL CORP. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-1596. MITCHELL ENERGY CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 2d 1111.

No. 81-1684. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 672 F. 2d 894.

No. 81-1706. BALSLEY *v.* GULLEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 2d 325.

No. 81-1707. SKELTON ET AL. *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 311.

No. 81-1710. OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, LOCAL NO. 1787 *v.* PEASE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1044.

No. 81-1711. MCNEW *v.* BANK OF MOUNT VERNON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1329.

No. 81-1719. PETRUSCH, DBA B & L DISTRIBUTION CENTER *v.* TEAMSTERS LOCAL 317, SYRACUSE, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 667 F. 2d 297.

No. 81-1720. SAVASTANO, ADMINISTRATRIX *v.* BOARD OF EDUCATION, KINGS PARK SCHOOL DISTRICT NO. 5, COUNTY OF SUFFOLK, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 1049, 439 N. Y. S. 2d 227.

No. 81-1721. ALFORD ET AL. *v.* CITY OF LUBBOCK, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1263.

No. 81-1723. PANDIL *v.* ILLINOIS CENTRAL GULF RAILROAD CO. Ct. App. Iowa. Certiorari denied. Reported below: 312 N. W. 2d 139.

No. 81-1726. SIGER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 496 Pa. 396, 437 A. 2d 932.

No. 81-1734. MONTAG *v.* OUTBOARD MARINE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1300.

No. 81-1741. COURIER-JOURNAL ET AL. *v.* MCCALL. Sup. Ct. Ky. Certiorari denied. Reported below: 623 S. W. 2d 882.

No. 81-1745. TRIFA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 447.

No. 81-1751. GAY ET AL. *v.* P. K. LINDSAY CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 666 F. 2d 710.

No. 81-1754. OXMAN ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 496 Pa. 534, 437 A. 2d 1169.

No. 81-1758. SHEET METAL WORKERS' INTERNATIONAL ASSN., AFL-CIO *v.* MOBILE MECHANICAL CONTRACTORS ASSN., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 481.

No. 81-1762. WOODS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 408 So. 2d 555.

No. 81-1765. TOWNSHIP OF DOYLESTOWN *v.* AD WORLD, INC. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 1136.

No. 81-1766. UNITED TECHNOLOGIES CORP. *v.* FIACCO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 492.

No. 81-1767. SABET ET AL. *v.* REPUBLIC NATIONAL BANK OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81-1771. CITY OF BEACHWOOD, OHIO *v.* CENTRAL MOTORS, INC., ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81-1775. DOUGLAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 411 So. 2d 393.

No. 81-1786. NORTH RIVER INSURANCE CO. *v.* SCALI, MCCABE, SLOVES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81-1788. OPTION ADVISORY SERVICE, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81-1790. BRIDGEPORT EDUCATION ASSN. *v.* CITY OF BRIDGEPORT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 424.

No. 81-1792. MCINNIS *v.* DISTRICT GRIEVANCE COMMITTEE FOR DISTRICT 12-B OF THE STATE BAR OF TEXAS. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 618 S. W. 2d 389.

No. 81-1795. SMITH INTERNATIONAL, INC. *v.* HUGHES TOOL CO. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 1373.

No. 81-1812. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C., INC. *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 U. S. App. D. C. 339, 670 F. 2d 1158.

No. 81-1816. CANHAM *v.* OBERLIN COLLEGE. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1057.

No. 81-1823. MAECOM S.A., GENEVA, ET AL. *v.* ANGLOMAR BULKCARRIERS, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 423.

No. 81-1825. CROSSMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 607.

No. 81-1841. CONWAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81-1850. KNYFF ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 729.

No. 81-1874. SENTINEL GOVERNMENT SECURITIES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81-1877. BRUMMITT *v.* UNITED STATES; and SCARBOROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 521 (first case); 664 F. 2d 286 (second case).

No. 81-1898. BREWER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-1902. TANAKA *v.* CREDITORS' COMMITTEE #1 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 951.

No. 81-1912. HUBER & ANTILLA CONSTRUCTION *v.* CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1013.

No. 81-1914. PEARSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-1927. FOSTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-1937. BOOTH ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 673 F. 2d 27.

No. 81-1952. ROWE *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 81-1957. PENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 668 F. 2d 625.

No. 81-1981. COTTON BELT INSURANCE CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 20.

No. 81-6078. TAYLOR *v.* MINNEAPOLIS PUBLIC SCHOOLS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81-6090. SMITH *v.* HOUSEWRIGHT, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 667 F. 2d 689.

No. 81-6126. VANCE *v.* HEDRICK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 659 F. 2d 447.

No. 81-6222. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-6249. CULHANE *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 491.

No. 81-6258. CANTRELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-6329. WOOTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81-6344. GIBSON *v.* UNITED STATES;
No. 81-6373. WILLIAMS *v.* UNITED STATES; and
No. 81-6379. HASTING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 301.

No. 81-6348. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81-6374. BOSTON *v.* DIFANIS. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 1049.

No. 81-6387. BARBEE *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1305.

No. 81-6392. ZARCONE *v.* PERRY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 782, 431 N. E. 2d 974.

No. 81-6393. AHMED *v.* EIKERENKOETTER. Ct. App. D. C. Certiorari denied.

No. 81-6397. ARROYO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 567, 431 N. E. 2d 271.

No. 81-6399. KOOP ET AL. *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 314 N. W. 2d 384.

No. 81-6402. HYPPOLITE *v.* ABC ET AL. C. A. 11th Cir. Certiorari denied.

No. 81-6403. CHASE *v.* MAGGIO ET AL. Sup. Ct. La. Certiorari denied. Reported below: 410 So. 2d 1138.

No. 81-6412. MCLAUGHLIN ET AL. *v.* CITY OF LAGRANGE, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 1385.

No. 81-6413. BELASCO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 974, 178 Cal. Rptr. 461.

No. 81-6414. DAVIS *v.* PARRATT, WARDEN, NEBRASKA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 451.

No. 81-6417. REED *v.* WEBSTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1053.

No. 81-6420. CARTER *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 637 F. 2d 449.

No. 81-6427. ROOTS *v.* WAINWRIGHT ET AL. C. A. 11th Cir. Certiorari denied.

No. 81-6428. KINES ET AL. *v.* BUTTERWORTH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 669 F. 2d 6.

No. 81-6429. FORSTON *v.* ORANGE UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81-6430. GROFF *v.* TOWNSHIP OF ELIZABETH, LANCASTER COUNTY, PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 62 Pa. Commw. 46, 434 A. 2d 917.

No. 81-6433. BRIAN LEE W. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 590, 178 Cal. Rptr. 159.

No. 81-6434. LEWIS *v.* ENGLE. C. A. 6th Cir. Certiorari denied.

No. 81-6436. PENN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 232, 439 A. 2d 1154.

No. 81-6438. BEACH *v.* KAPNER, JUDGE, FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1078.

No. 81-6439. RICHARDS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 59 App. Div. 2d 656, 398 N. Y. S. 2d 351.

No. 81-6440. PASCHAL *v.* FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF EMPLOYMENT SECURITY, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 405 So. 2d 1020.

No. 81-6441. WATSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 81-6446. DAVID LYNN C. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-6447. AH LO ET AL. *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 2 Haw. App. 535, 634 P. 2d 421.

No. 81-6449. JOHNSON *v.* ADAMS. Sup. Ct. N. H. Certiorari denied.

No. 81-6450. HOLSEY *v.* MCCAULEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1040.

No. 81-6456. SAYERS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 412 So. 2d 479.

No. 81-6457. SINCLAIR *v.* HUNTER, CHAIRMAN, LOUISIANA BOARD OF PARDONS. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 183.

No. 81-6467. MCDONALD *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 81-6487. MOORE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 81-6501. DUDLEY *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-6504. MAXWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-6507. BOYDEN *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-6508. ZAMBITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-6510. PETERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81-6514. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS. C. A. D. C. Cir. Certiorari denied.

No. 81-6515. NICKERSON *v.* WRIGHT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1314.

No. 81-6523. STRINICH *v.* CLAIRTON SCHOOL DISTRICT. Sup. Ct. Pa. Certiorari denied. Reported below: 494 Pa. 297, 431 A. 2d 267.

No. 81-6526. BOWLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 673 F. 2d 553.

No. 81-6539. FINCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 F. 2d 1356.

No. 81-6541. IN RE BAIRD. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 432.

No. 81-6542. HEGWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1334.

No. 81-6550. AVON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81-6564. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 46.

No. 81-6567. LONDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81-6589. RHODES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 81-6590. BENAVIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 668 F. 2d 533.

No. 81-6596. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 594.

No. 81-1448. RAYMOND INTERNATIONAL, INC. *v.* BAKER. C. A. 5th Cir. Motion of petitioner to strike portions of respondent's brief denied. Certiorari denied. Reported below: 656 F. 2d 173.

No. 81-1479. GULF OIL CORP. ET AL. *v.* PETROL STOPS NORTHWEST ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 81-1746. PUREX CORP. *v.* PROCTER & GAMBLE CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 664 F. 2d 1105.

No. 81-1563. SACRAMENTO BEE, PUBLISHED BY MCCLATCHY NEWSPAPERS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 656 F. 2d 477.

No. 81-1665. DYKEMA ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 666 F. 2d 1096.

No. 81-1730. HALL ET AL. *v.* BLAKE ET AL. C. A. 1st Cir. Motion of respondents Albert Blake, Ralph Hamm, and Patrick Rahilly for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 668 F. 2d 52.

No. 81-1769. FEDERATED PUBLICATIONS, INC. *v.* SWEDBERG. Sup. Ct. Wash. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 96 Wash. 2d 13, 633 P. 2d 74.

No. 81-5379. SIRECI *v.* FLORIDA. Sup. Ct. Fla.;

No. 81-5562. GILREATH *v.* GEORGIA. Sup. Ct. Ga.;

No. 81-5784. COMBS *v.* FLORIDA. Sup. Ct. Fla.;

No. 81-5848. GILBERT ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 81-5944. MESSER *v.* FLORIDA. Sup. Ct. Fla.;

No. 81-6338. FAIR *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81-6385. ORTIZ *v.* ARIZONA. Sup. Ct. Ariz.;

No. 81-6435. MOORE *v.* NEBRASKA. Sup. Ct. Neb.; and

No. 81-6437. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81-5379, 399 So. 2d 964; No. 81-5562, 247 Ga. 814, 279 S. E. 2d 650; No. 81-5784, 403 So. 2d 418; No. 81-5848, 277 S. C. 53, 283 S. E. 2d 179; No. 81-5944, 403 So. 2d 341; No. 81-6385, 131 Ariz. 195, 639 P. 2d 1020; No. 81-6435, 210 Neb. 457, 316 N. W. 2d 33; No. 81-6437, 407 So. 2d 894.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 81-824. JACKS *v.* DUCKWORTH, WARDEN, 454 U. S. 1147; and

No. 81-5418. PAPP *v.* JAGO, 454 U. S. 1035. Motions for leave to file petitions for rehearing denied.

No. 80-2092. SCM CORP. *v.* XEROX CORP., 455 U. S. 1016;

No. 81-363. KARR *v.* KARR, 455 U. S. 1016;

No. 81-417. WAINWRIGHT, CORRECTIONS SECRETARY *v.* PEREZ, *ante*, p. 910;

No. 81-547. DIAZ ET AL. *v.* BEYER ET UX., *ante*, p. 904;

No. 81-1000. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* UNITED STATES, *ante*, p. 901;

No. 81-1343. ROSENBAUM *v.* ROSENBAUM, 455 U. S. 1018;

No. 81-1419. MADISON *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL., 455 U. S. 1020;

No. 81-1471. IMMER *v.* PUERTO RICO MARITIME SHIPPING AUTHORITY ET AL., *ante*, p. 906;

No. 81-1542. MAZALESKI *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 455 U. S. 1022;

No. 81-5897. WILSON *v.* UNITED STATES, *ante*, p. 917;

No. 81-6132. HAMILTON *v.* MAYS ET AL., 455 U. S. 1025; and

No. 81-6395. GOLDBLATT *v.* VOGEL ET AL., *ante*, p. 934.

Petitions for rehearing denied.

U.S. Government Printing Office O 1983—379-671

PRELIMINARY PRINT

VOLUME 457 U.S. - PART 2

PAGES 273-595; 1121-1141

OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 18 THROUGH JUNE 22, 1982

ORIGINAL

COMPLETED

HENRY C. LIND

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[illegible] Printing Office
Washington, [illegible]

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 457 U. S., Part 2)

ABSTENTION. See **Jurisdiction.**

ACCRETION. See **Riparian Rights.**

AFFIRMATIVE-ACTION PLANS. See **Procedure.**

ANTIPSYCHOTIC DRUGS. See **Procedure.**

ANTITRUST ACTS.

Clayton Act—Group Health Plan—Discrimination against psychologists—Standing to sue.—Where petitioner group health plan, pursuant to its practice of reimbursing subscribers for psychiatrists' services but not for psychologists' services unless supervised by and billed through a physician, denied respondent reimbursement for treatment by a clinical psychologist, respondent had standing to maintain action under § 4 of Clayton Act for alleged unlawful conspiracy to exclude psychologists from receiving compensation under group health plans. Blue Shield of Virginia v. McCready, p. 465.

Sherman Act—Agreements between medical care foundations and doctors—Price fixing.—Where respondent medical care foundations—organized by respondent medical society and another medical society to promote fee-for-service medicine and to provide competitive alternative to existing health insurance plans—entered into agreements with member doctors establishing maximum fees doctors could claim in full payment for health services provided to policyholders of specified insurance plans, such maximum-fee agreements, as price-fixing agreements, were *per se* unlawful under Sherman Act. Arizona v. Maricopa County Medical Society, p. 332.

ARRESTS. See **Constitutional Law.**

ATTORNEYS. See **Jurisdiction.**

BODILY RESTRAINT OF MENTAL PATIENTS. See **Constitutional Law.**

CALIFORNIA. See **Jurisdiction; Procedure; Riparian Rights.**

"CATEGORICALLY NEEDY." See **Constitutional Law.**

CHURCHES. See **Jurisdiction.**

CIVIL RIGHTS ACT OF 1871.

Employment discrimination—Federal-court action—Exhaustion of state administrative remedies.—Exhaustion of state administrative remedies is not a prerequisite to an action under 42 U. S. C. § 1983, such as petitioner's Federal District Court action wherein she alleged that respondent employer had denied her employment opportunities solely on basis of her race and sex. Patsy v. Board of Regents of Florida, p. 496.

CIVIL RIGHTS ACT OF 1964.

Employment discrimination—Promotions—Written tests.—In an action under Title VII of Act by respondent black employees of a state agency—wherein it was alleged that petitioners, State and certain of its agencies and officials, had violated Act by requiring, as a condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related, and wherein petitioners asserted as a defense "bottom-line" result that 22.9% of eligible black candidates but only 13.5% of eligible white candidates were promoted—petitioners' nondiscriminatory "bottom line" did not preclude respondents from establishing a prima facie case or provide petitioners with a defense. Connecticut v. Teal, p. 440.

CLAYTON ACT. See **Antitrust Acts.**

CONNECTICUT. See **Civil Rights Act of 1964.**

CONSTITUTIONAL LAW. See also **Jurisdiction; Procedure.**

Due process—Involuntarily committed mental patient—Protection of rights.—Mentally retarded person, involuntarily committed to a Pennsylvania state institution, has constitutionally protected liberty interests under Due Process Clause to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by such interests; whether patient's rights were violated by institution officials must be determined by balancing patient's interests against relevant state interests, and proper standard for determining whether patient's rights were adequately protected is whether professional judgment in fact was exercised. Youngberg v. Romeo, p. 307.

Due Process—Presumption of prosecutorial vindictiveness—Indictment for felony pending trial on misdemeanor charges.—A presumption of prosecutorial vindictiveness, so as to establish a due process violation, is not warranted where—after respondent decided not to plead guilty to federal misdemeanor charges and requested a jury trial—prosecutor, while misdemeanor charges were still pending, obtained an indictment for, and respondent was thereafter convicted of, a felony charge arising from same incident as misdemeanor charges. United States v. Goodwin, p. 368.

Equal protection of the laws—Social Security Act—State distribution of Medicaid benefits.—Section 1903(f) of Social Security Act—which governs

CONSTITUTIONAL LAW—Continued.

federal reimbursement to States electing to provide Medicaid benefits to "medically needy"—as applied in Massachusetts so as to result in a distribution of Medicaid benefits to "categorically needy" that is more generous than distribution of such benefits to some "medically needy"—does not violate constitutional principles of equal treatment, such discrimination being required by Social Security Act. Schweiker v. Hogan, p. 569.

Searches and seizures—Warrantless arrest of felony suspect—Retroactivity of decision.—A Supreme Court decision construing Fourth Amendment is to be applied retroactively to all convictions that were not yet final at time decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents; under this rule, decision in *Payton* v. *New York*, 445 U. S. 573, holding that Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest, was applicable to respondent's case. United States v. Johnson, p. 537.

CRIMINAL LAW. See **Constitutional Law.**

DECLARATORY JUDGMENTS. See **Jurisdiction.**

DISCIPLINARY PROCEEDINGS AGAINST ATTORNEYS. See **Jurisdiction.**

DISCRIMINATION AGAINST BLACKS. See **Civil Rights Act of 1964.**

DISCRIMINATION AGAINST PSYCHOLOGISTS BY HEALTH CARE PLANS. See **Antitrust Acts.**

DISCRIMINATION AGAINST WOMEN. See **Civil Rights Act of 1871.**

DISCRIMINATION AS TO MEDICAID BENEFITS. See **Constitutional Law.**

DISCRIMINATION BASED ON RACE. See **Civil Rights Act of 1871; Civil Rights Act of 1964; Procedure.**

DISCRIMINATION FAVORING MINORITY-OWNED BUSINESSES. See **Procedure.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1871; Civil Rights Act of 1964.**

DISTRICT COURTS. See **Jurisdiction.**

DOCTORS' PRICE-FIXING AGREEMENTS. See **Antitrust Acts.**

DRUG THERAPY. See **Procedure.**

DUE PROCESS. See **Constitutional Law.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1871; Civil Rights Act of 1964.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1871; Civil Rights Act of 1964.**

EQUAL-FOOTING DOCTRINE. See **Riparian Rights.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law.**

ESTABLISHMENT OF RELIGION. See **Jurisdiction.**

EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES. See **Civil Rights Act of 1871.**

FEDERAL-STATE RELATIONS. See **Civil Rights Act of 1871; Jurisdiction; Procedure; Riparian Rights.**

FEDERAL UNEMPLOYMENT TAX ACT. See **Jurisdiction.**

FELONY ARRESTS. See **Constitutional Law.**

FIFTH AMENDMENT. See **Constitutional Law.**

FIRST AMENDMENT. See **Jurisdiction.**

FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC DRUGS TO MENTAL PATIENTS. See **Procedure.**

FOURTEENTH AMENDMENT. See **Constitutional Law.**

FOURTH AMENDMENT. See **Constitutional Law.**

FREEDOM OF RELIGION. See **Jurisdiction.**

GENDER-BASED DISCRIMINATION. See **Civil Rights Act of 1871.**

GOVERNMENT CONTRACTS. See **Procedure.**

GOVERNMENT EMPLOYEES. See **Civil Rights Act of 1964.**

HEALTH CARE PLANS' DISCRIMINATION AGAINST PSYCHOLOGISTS. See **Antitrust Acts.**

HEALTH CARE PRICE-FIXING AGREEMENTS. See **Antitrust Acts.**

HOME ARRESTS. See **Constitutional Law.**

HORIZONTAL PRICE-FIXING AGREEMENTS AS TO MEDICAL CARE. See **Antitrust Acts.**

HOSPITALS. See **Constitutional Law; Procedure.**

INDICTMENT FOR FELONY PENDING TRIAL ON MISDEMEANOR CHARGES. See **Constitutional Law.**

INDIGENTS. See **Constitutional Law.**

INJUNCTIONS. See **Jurisdiction.**

INVOLUNTARY DRUG TREATMENT OF MENTAL PATIENTS. See **Procedure.**

JURISDICTION.

Federal courts—Interference with state attorney-disciplinary proceedings—Abstention.—Federal courts should abstain from interfering with ongoing attorney-disciplinary proceedings within jurisdiction of New Jer-

JURISDICTION—Continued.

sey Supreme Court, since such proceedings, commencing with filing of a complaint with a local District Ethics Committee, are considered by State Supreme Court as "judicial" in nature and afford an adequate opportunity for attorney to raise claims under Federal Constitution. Middlesex County Ethics Committee v. Garden State Bar Assn., p. 423.

Federal District Court—Validity of California unemployment compensation tax—Injunctive and declaratory relief.—Tax Injunction Act deprived Federal District Court of jurisdiction to issue declaratory as well as injunctive relief in an action by churches and religious schools to enjoin California from collecting tax information and its unemployment compensation tax with regard to plaintiffs' employees, and to enjoin Secretary of Labor from conditioning his approval, pursuant to Federal Unemployment Tax Act, of California unemployment insurance program on its coverage of plaintiffs' employees, since under California refund procedures taxpayers could challenge in state court validity of unemployment tax under Establishment Clause of First Amendment. California v. Grace Brethren Church, p. 393.

Supreme Court—Validity of California unemployment compensation tax—Appeal from District Court judgment.—In an action by churches and religious schools to enjoin California from collecting tax information and its unemployment compensation tax with regard to plaintiffs' employees, and to enjoin Secretary of Labor from conditioning his approval, pursuant to Federal Unemployment Tax Act, of California unemployment insurance program on its coverage of plaintiffs' employees, wherein effect of Federal District Court's various opinions and orders was to make United States or its officers bound by a holding of unconstitutionality as to California's unemployment taxes as applied to employees of religious schools unaffiliated with churches, Supreme Court had jurisdiction to hear appeals under 28 U. S. C. § 1252, even though District Court did not expressly hold pertinent provision of Federal Unemployment Tax Act unconstitutional. California v. Grace Brethren Church, p. 393.

MASSACHUSETTS. See **Constitutional Law; Procedure.**

MEDICAID. See **Constitutional Law.**

MEDICAL CARE PRICE-FIXING AGREEMENTS. See **Antitrust Acts.**

"MEDICALLY NEEDY." See **Constitutional Law.**

MENTAL PATIENTS. See **Constitutional Law; Procedure.**

MINORITY-OWNED BUSINESSES. See **Procedure.**

NEEDY PERSONS. See **Constitutional Law.**

NEW JERSEY. See **Jurisdiction.**

OCEANFRONT LAND. See **Riparian Rights.**

PENNSYLVANIA. See **Constitutional Law.**

PER SE ANTITRUST VIOLATIONS. See **Antitrust Acts.**

PHYSICIANS' PRICE-FIXING AGREEMENTS. See **Antitrust Acts.**

PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS. See **Constitutional Law.**

PRICE-FIXING AGREEMENTS AS TO MEDICAL CARE. See **Antitrust Acts.**

PROCEDURE.

Constitutionality of affirmative-action plan—Determination of pendent state-law claim.—In affirming Federal District Court's judgment upholding constitutionality of respondent School District's affirmative-action plan, which required that general contractors, to be eligible for certain School District contracts, must use minority-owned businesses for at least 25% of total bid, Court of Appeals abused its discretion in deciding federal constitutional claim instead of first resolving pendent state-law claim that plan violated California law. Schmidt v. Oakland Unified School Dist., p. 594.

Mental patients' constitutional rights—Federal Court of Appeals' judgment—Remand for consideration of intervening state-court decision.—In an action involving alleged violation of federal constitutional rights of involuntarily committed mental patients, institutionalized at a Massachusetts state hospital, by forcible administration of antipsychotic drugs, Federal Court of Appeals' judgment—holding that patients had constitutionally protected interests and remanding to District Court for consideration of appropriate procedural mechanisms for determining when State's interests might override patient's interests—was vacated and case was remanded for consideration of whether case's disposition was affected by Massachusetts Supreme Judicial Court's intervening decision as to rights under both Massachusetts law and Federal Constitution of a *noninstitutionalized* incompetent mental patient as to involuntary treatment with antipsychotic drugs. Mills v. Rogers, p. 291.

PROMOTION PRACTICES OF EMPLOYERS. See **Civil Rights Act of 1964.**

PROSECUTORIAL VINDICTIVENESS. See **Constitutional Law.**

PSYCHIATRISTS AND PSYCHOLOGISTS. See **Antitrust Acts.**

PUBLIC CONTRACTS. See **Procedure.**

PUBLIC EMPLOYEES. See **Civil Rights Act of 1964.**

RACIAL DISCRIMINATION. See **Civil Rights Act of 1871; Civil Rights Act of 1964; Procedure.**

RELIGIOUS FREEDOM. See **Jurisdiction.**

RELIGIOUS SCHOOLS. See **Jurisdiction.**

REMAND FOR CONSIDERATION OF INTERVENING DECISION. See **Procedure.**

RESIDENTIAL ARRESTS. See **Constitutional Law.**

RETROACTIVITY OF DECISIONS. See **Constitutional Law.**

RIPARIAN RIGHTS.

Oceanfront land—Accretion—Title dispute.—Under federal law, United States, not California, has title to oceanfront land created through accretion, resulting from jetty construction, to land owned by United States on California's coast. California ex rel. State Lands Comm'n v. United States, p. 273.

SCHOOL DISTRICT CONTRACTS. See **Procedure.**

SEARCHES AND SEIZURES. See **Constitutional Law.**

SEX DISCRIMINATION. See **Civil Rights Act of 1871.**

SHERMAN ACT. See **Antitrust Acts.**

SOCIAL SECURITY ACT. See **Constitutional Law.**

STANDING TO SUE. See **Antitrust Acts.**

STATE'S RIGHT TO OCEANFRONT ACCRETIONS. See **Riparian Rights.**

STATE UNEMPLOYMENT COMPENSATION TAXES. See **Jurisdiction.**

SUBMERGED LANDS ACT. See **Riparian Rights.**

SUPREME COURT. See **Jurisdiction.**

TAXES. See **Jurisdiction.**

TAX INJUNCTION ACT. See **Jurisdiction.**

TRAINING OF MENTAL PATIENTS. See **Constitutional Law.**

UNEMPLOYMENT COMPENSATION TAXES. See **Jurisdiction.**

UNITED STATES' RIGHT TO OCEANFRONT ACCRETIONS. See **Riparian Rights.**

UPLAND OWNER'S RIGHT TO ACCRETIONS. See **Riparian Rights.**

WARRANTLESS ARRESTS. See **Constitutional Law.**

WATERS. See **Riparian Rights.**

WELFARE BENEFITS. See **Constitutional Law.**

WORDS AND PHRASES.

1. *"Enjoin, suspend or restrain."* Tax Injunction Act, 28 U. S. C. § 1341. California v. Grace Brethren Church, p. 393.

2. *"Plain, speedy and efficient remedy."* Tax Injunction Act, 28 U. S. C. § 1341. California v. Grace Brethren Church, p. 393.

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CUMULATIVE TABLE OF CASES REPORTED

(Vol. 457 U. S., Parts 1 and 2)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Adams; Bullock *v.*	1134
Adams *v.* Estelle	1136
Aikens; U. S. Postal Service Bd. of Governors *v.*	1129
Alabama; Bennett *v.*	1134,1137
Alabama *v.* Bracewell	1114
Alabama *v.* Bryars	1114
Alabama *v.* Daniels	1114
Alabama *v.* Davis	1114
Alabama *v.* Hill	1114
Alabama *v.* Horsley	1114
Alabama *v.* Ritter	1114
Alabama *v.* Wright	1114
Albano; Eatough *v.*	1119
Allen; Rudolph *v.*	1122
Amalgamated. For labor union, see name of trade.	
Anderson *v.* Anderson	1106
Anguiano *v.* California	1109
Anthony *v.* United States	1133
Anthony *v.* West	1133
Appleby *v.* WTIC–FM Radio Station	1141
Arango *v.* Florida	1140
Archer *v.* Rushen	1107
Arizona *v.* Maricopa County Medical Society	332

Page
Arkansas; Baxter *v.* 1118
Arkansas; Dodson *v.* 1136
Arkansas Electric Cooperative Corp. *v.* Arkansas Pub. Serv. Comm'n 1130
Arkansas Public Service Comm'n; Arkansas Elec. Coop. Corp. *v.* 1130
Arkansas Public Service Comm'n; Williams *v.* 1123
Armento *v.* Scurr 1138
Army and Air Force Exchange Service *v.* Gorman 1102
Arthur Phillips & Co.; Chamberlain *v.* 1118
Assarsson *v.* United States 1127
Atkins *v.* Greer 1123
Atlanta & West Point R. Co.; Thornton *v.* 1118
Attorney General; Hernandez *v.* 1110
Attorney General of Tex.; Cory *v.* 85
Attorney Registration & Discip. Comm'n, Ill. Sup. Ct.; Zisook *v.* 1134
Avagliano *v.* Sumitomo Shoji America, Inc. 176
Avagliano; Sumitomo Shoji America, Inc. *v.* 176
Bacon; Blum *v.* 132
Baggot; United States *v.* 1131
Bainter *v.* Wyrick 1122
Baker *v.* Washington 1108
Baldwin *v.* Blackburn 1112
Ball *v.* Engle 1121
Bantim; Escobar *v.* 1102
Barksdale *v.* Blackburn 1109
Barnes; Jones *v.* 1104
Barney *v.* United States 1139
Baxter *v.* Arkansas 1118
Beach *v.* Florida Bar 1101
Becker *v.* Ross 1108
Belknap, Inc. *v.* Hale 1131
Bell; Perini *v.* 1141
Beltempo *v.* United States 1135
Benavidez *v.* United States 1135
Bennett *v.* Alabama 1134,1137
Bentley *v.* Rushen 1138
Berger *v.* United States 1120
Bevens; Stacy *v.* 1107
Bezak *v.* Ohio 1122
Bigley *v.* United States 1135
Big Sky Toyota *v.* Toyota Motor Distributors, Inc. 1106
Billingsley *v.* Vann 1109
Binder *v.* Immigration and Naturalization Service 1132
Birden *v.* New York 1123
Black *v.* East Ohio Gas Co. 1109

Page

Blackburn; Baldwin *v.* 1112
Blackburn; Barksdale *v.* 1109
Blaubergs; Dinnan *v.* 1106
Bliss Dairy, Inc.; United States *v.* 1103
Blue Shield of Virginia *v.* McCready 465
Blum *v.* Bacon 132
Boag *v.* Raines 1123
Board of Ed. of Chicago; Johnson *v.* 52
Board of Governors, FRS; Wilshire Oil Co. of Texas *v.* 1132
Board of Regents of Fla.; Patsy *v.* 496
Bobbitt, *In re* 1103
Boehm, *In re* 1103
Boise Southern Co. of DeRidder, La.; Brand *v.* 1120
Bolyea *v.* Florida 1118
Bond; Joseph *v.* 1102
Bonkowsky *v.* Bonkowsky 1135
Borg Warner Corp. *v.* National Labor Relations Bd. 1105
Bracewell; Alabama *v.* 1114
Bragg *v.* Leverette 1123
Brand *v.* Boise Southern Co. of DeRidder, La. 1120
Briggs; Bullock *v.* 1135
Brockette; Martinez *v.* 1131
Brooks *v.* United States 1124
Brooks *v.* Winter 1129
Brown *v.* Bryant 1109
Brown; Eckerd Drugs, Inc. *v.* 1128
Brown *v.* Federal Election Comm'n 1111
Brown; Porcher *v.* 1104
Brown; Texas *v.* 1116
Brown *v.* United States 1108
Bryant; Brown *v.* 1109
Bryars; Alabama *v.* 1114
Buckhana *v.* Illinois 1122
Bullard; Estelle *v.* 1116
Bullock *v.* Adams 1134
Bullock *v.* Briggs 1153
Burlington Northern Inc. *v.* Henry 1101
Burlington Northern Inc. *v.* United States 1104
Burlington Northern Inc. *v.* Wilson 1120
Butler *v.* Rose 1107
Bussey *v.* United States 1139
BVA Credit Corp.; Consolidated Motor Inns *v.* 1140
Caballery *v.* U. S. Parole Comm'n 1136
California; Anguiano *v.* 1109

Page
California; Forrester *v.* 1107
California *v.* Grace Brethren Church 393
California; Harris *v.* 1111
California; Hopper *v.* 1126
California; Johnson *v.* 1108
California; Rivera *v.* 1123
California; Rudman *v.* 1138
California *v.* Texas 164
California; Wilburn *v.* 1138
California *ex rel.* State Lands Comm'n *v.* United States 273
Calzarano *v.* U. S. Postal Service 1124
Camoscio *v.* Massachusetts Bd. of Registration in Podiatry 1139
Campbell, *In re* 1116
Campbell *v.* Civiletti 1110
Campbell; Schweiker *v.* 1131
Canale; Cardenas *v.* 1139
Cannon *v.* Consolidated Rail Corp. 1133
Cardenas *v.* Canale 1139
Carlson; John *v.* 1124
Carpenters; Swanson-Dean Corp. *v.* 1105
Carrier *v.* United States 1139
Cassel *v.* United States 1132
Castro *v.* Texas Dept. of Human Resources 1119
Caterpillar Tractor Co.; Chicago Bridge & Iron Co. *v.* 1103
CBS Inc. *v.* Columbia Pictures Industries, Inc. 1118
Certain Named & Unnamed Undocumented Alien Children; Texas *v.* 202
Chamberlain *v.* Arthur Phillips & Co. 1118
Chatlos Systems, Inc.; National Cash Register Corp. *v.* 1112
Cheetwood & Davies; Williams *v.* 1101
Chevron Chemical Co.; Voluntary Purchasing Groups, Inc. *v.* 1126
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 1103
Chino Valley *v.* Prescott 1101
Circuit Court for Washington County; Holsey *v.* 1137
Cities Service Gas Co. *v.* Mobil Oil Corp. 1126
C. Itoh & Co. (America); Spiess *v.* 1128
City. See name of city.
Civiletti; Campbell *v.* 1110
Clayton *v.* Douglas 1109
Cleary; United States *v.* 1113
Click *v.* Idaho *ex rel.* Evans 1116
Cobb *v.* Wainwright 1107
Collins; Hunt *v.* 1127
Collins *v.* Zant 1126
Colorado *v.* New Mexico 1103,1115

Page
Columbia Pictures Industries, Inc.; CBS Inc. *v.* 1118
Commissioner; Diedrich *v.* 191
Commissioner; Hillsboro National Bank *v.* 1103
Commissioner; Kalita *v.* 1121
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Revenue of Alaska; Zobel *v.* 55
Commonwealth. See name of Commonwealth.
Community Television of Southern California *v.* Gottfried 1115
Compagnie des Bauxites de Guinee v. Insurance Corp. of Ireland 1105
Comptroller of Public Accounts for Tex. *v.* Briggs 1135
Connecticut *v.* Teal 440
Consolidated Motor Inns *v.* BVA Credit Corp. 1140
Consolidated Rail Corp.; Cannon *v.* 1133
Consolidated Rail Corp.; Transportation Union *v.* 1133
Controller of California *v.* White 85
Conway *v.* United States 1121
Cook County; Starview Drive In Theatre, Inc. *v.* 1113
Cory *v.* White 85
Council of Public Utility Mailers *v.* U. S. Postal Service 1133
Country-Wide Ins. Co. *v.* Rodriguez 1118
County. See name of county.
Crawford *v.* Little 1137
Cross *v.* Tulsa 1139
Crow Tribe of Indians; Montana *v.* 1116
Cummins; Heritage Publishing Co. *v.* 1106
Currie; United States *v.* 1128
Daggett; Karcher *v.* 1131
Daniels; Alabama *v.* 1114
Daniels *v.* United States 1110
Darks *v.* United States 1125
Darroch *v.* North Carolina 1138
Davis; Alabama *v.* 1114
Davis *v.* Mississippi 1113
DeLucia *v.* United States 1107
Department of Justice; Kondrat *v.* 1120
Department of State; Kondrat *v.* 1121
DeVincent *v.* Putnam 1125
Diedrich *v.* Commissioner 191
Dinnan *v.* Blaubergs 1106
Director of penal or correctional institution. See name or title of director.
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
Dodson *v.* Arkansas 1136

Page
Doe *v.* New Mexico 1136
Doe; Plyler *v.* 202
Donald Schriver, Inc. *v.* National Labor Relations Bd. 1111
Donovan *v.* San Antonio Metropolitan Transit Authority 1102
Douglas; Clayton *v.* 1109
Douglas *v.* United States 1108
Drake *v.* Georgia 1111
Early *v.* United States 1132
Eason *v.* Illinois 1137
East Ohio Gas Co.; Black *v.* 1109
Eatough *v.* Albano 1119
Eckerd Drugs, Inc. *v.* Brown 1128
Ellis; Holsey *v.* 1123
Engle; Ball *v.* 1121
Engle *v.* Hughes 1141
Engle *v.* Isaac 1141
Escobar *v.* Bantim 1102
Estelle; Adams *v.* 1136
Estelle *v.* Bullard 1116
Estelle; Jorden *v.* 1137
Estelle; Pietrowski *v.* 1123
Estelle; Rodgers *v.* 1138
Evans; Click *v.* 1116
Evans *v.* United States 1119
Everett; Williams *v.* 1126
Exxon Corp.; Matthews *v.* 1124
Falcon; General Telephone Co. of Southwest *v.* 147
Federal Communications Comm'n; Fidelity Television, Inc. *v.* 1119
Federal Communications Comm'n *v.* Gottfried 1115
Federal Communications Comm'n; Multi-State Communications *v.* 1119
Federal Election Comm'n; Brown *v.* 1111
Federal Energy Regulatory Comm'n; Harvey *v.* 1105
Federal Energy Regulatory Comm'n; New England Power Co. *v.* 1117
Federal Energy Regulatory Comm'n; Texas *v.* 1105
Feliciano, *In re* 1115
Fernandez-Uriarte *v.* United States 1121
Fidelity Television, Inc. *v.* Federal Communications Comm'n 1119
Finlay; Washington *v.* 1120
First National Bank of South Central Michigan; Van Orman *v.* 1139
First National Corp.; Ma *v.* 1138
Fisher *v.* Washington 1137
Fletcher; Stallings *v.* 1134
Florida; Arango *v.* 1140
Florida; Bolyea *v.* 1118

Page
Florida; Jent *v.* 1111
Florida; Moore *v.* 1138
Florida; Speed *v.* 1118
Florida; Tibbs *v.* 31
Florida Bar; Beach *v.* 1101
Florida Businessmen for Free Enterprise *v.* Hollywood 1128
Florida Public Employees Relations Comm'n; Paschal *v.* 1109
Fogg; Olivo *v.* 1122
Forrester *v.* California 1107
Fowler; Gorrell *v.* 1113
Gabbey; Raysor *v.* 1127
Garcia *v.* San Antonio Metropolitan Transit Authority 1102
Garden State Bar Assn.; Middlesex County Ethics Committee *v.* .. 393
Garrison; Johnson *v.* 1137
General Telephone Co. of Southwest *v.* Falcon 147
Genson *v.* Ripley 1140
George *v.* United States 1110
Georgia; Drake *v.* 1111
Georgia; Krier *v.* 1140
Gerald *v.* United States 1107
Gill *v.* Oklahoma 1109
Gillette Co. *v.* Miner 1116
Goodwin *v.* United States 1125
Goodwin; United States *v.* 368
Gopman *v.* United States 1123
Gordonsville Industries, Inc. *v.* National Labor Relations Bd. 1117
Gorman; Army and Air Force Exchange Service *v.* 1102
Gorrell *v.* Fowler 1113
Gotkin, *In re* 1102
Gottfried; Community Television of Southern California *v.* 1115
Gottfried; Federal Communications Comm'n *v.* 1115
Governor of Idaho; Click *v.* 1116
Governor of Miss.; Brooks *v.* 1129
Governor of Neb.; Pope *v.* 1140
Grace; United States *v.* 1131
Grace Brethren Church; California *v.* 393
Grace Brethren Church *v.* United States 393
Grace Brethren Church; United States *v.* 393
Granholm; Johnson *v.* 1120
Green *v.* United States 1135
Green *v.* U. S. Probation Office 1136
Greer; Atkins *v.* 1123
Griffith Co. *v.* National Labor Relations Bd. 1105
Grounds *v.* Mobil Oil Corp. 1126

379-674 O—83-2

Page
Group Life & Health Ins. Co. *v.* United States 1132
Guide Publishing Co. *v.* Thomas 1140
Gulf Trading & Transportation Co.; Vessel Hoegh Shield *v.* 1119
Haig; Thomas *v.* 1110
Halderman; Pennhurst State School and Hospital *v.* 1131
Hale; Belknap, Inc. *v.* 1131
Haley *v.* United States 1117
Halikas *v.* River Region Mental Health-Mental Retardation Bd. ... 1106
Harrington *v.* Tennessee 1110
Harris *v.* California 1111
Harris; Hudgins *v.* 1122
Harris County; Xerox Corp. *v.* 1130
Harrison *v.* United States 1121
Harvey *v.* Federal Energy Regulatory Comm'n 1105
Hatch *v.* Madsen 1112
Hathorn *v.* Lovorn 255
Helms; Joseph *v.* 1117
Henry; Burlington Northern Inc. *v.* 1101
Henry; Wainwright *v.* 1114
Hensel *v.* United States 1107
Hensley; Washington Metropolitan Area Transit Authority *v.* 1130
Heritage Homes of Attleboro, Inc. *v.* Seekonk Water Dist. 1120
Heritage Publishing Co. *v.* Cummins 1106
Hernandez *v.* Attorney General 1110
Hernandez *v.* United States 1125
Hill; Alabama *v.* 1114
Hillis *v.* Stephen F. Austin Univ. 1106
Hillsboro National Bank *v.* Commissioner 1103
Hilton; United States *ex rel.* Simmons *v.* 1110
Hishaw *v.* Oklahoma 1137
Hogan; Schweiker *v.* 569
Hollywood; Florida Businessmen for Free Enterprise *v.* 1128
Holsey *v.* Circuit Court for Washington County 1137
Holsey *v.* Ellis 1123
Hoover *v.* Mississippi 1137
Hopper *v.* California 1126
Horsley; Alabama *v.* 1114
Howell & Howell, Inc. *v.* Painters 1129
Hubbard, *In re* 1103
Hudgins *v.* Harris 1122
Hughes; Engle *v.* 1141
Hunt *v.* Collins 1127
Idaho *ex rel.* Evans; Click *v.* 1116
Illinois; Buckhana *v.* 1122

Page
Illinois; Eason *v.* 1137
Illinois; Woods *v.* 1137
Illinois *ex rel.* Myers *v.* Mews 1117
Immigration and Naturalization Service; Binder *v.* 1132
Immigration and Naturalization Service; Quitiquit *v.* 1139
Indiana; Kentucky *v.* 1141
Indiana; Lewis *v.* 1118
Indiana; Seymour National Bank *v.* 1127
Industrial Comm'n of Ill.; Kozmel *v.* 1119
Ingram *v.* United States 1125
Inland Steel Co.; Smith *v.* 1138
In re. See name of party.
Insurance Corp. of Ireland; Compagnie des Bauxites de Guinee *v.* 1105
International Medication Systems, Ltd. *v.* NLRB 1118
Isaac; Engle *v.* 1141
Itoh & Co. (America); Spiess *v.* 1128
Jackson Transit Authority *v.* Transit Union 15
Jannotti *v.* United States 1106
Jeffers *v.* United States 1139
Jenkins *v.* Maggio 1136
Jennings *v.* United States 1135
Jent *v.* Florida 1111
John *v.* Carlson 1124
Johnson *v.* Board of Ed. of Chicago 52
Johnson *v.* California 1108
Johnson *v.* Garrison 1137
Johnson *v.* Granholm 1120
Johnson *v.* United States 1109
Johnson; United States *v.* 537
Johnston *v.* United States 1139
Johnstone *v.* Wolff 1122
Joint Legis. Comm. for Performance Review of Miss. *v.* Phillips . 1140
Jones, *In re* 1130
Jones *v.* Barnes 1104
Jorden *v.* Estelle 1137
Joseph *v.* Bond 1102
Joseph *v.* Helms 1117
Journal and Guide *v.* Thomas 1140
Judge, Circuit Court of St. Louis City; Wilson *v.* 1136
Judge, Court of Common Pleas, Pike County, Ohio; Stacy *v.* 1107
Kalita *v.* Commissioner 1121
Kansas Supreme Court; Phelps *v.* 1112
Karcher *v.* Daggett 1131
Keating *v.* Keating 1119

Page
Kelly *v.* United States 1138
Kentucky *v.* Indiana 1141
Kentucky; Ohio *v.* 1141
Kimberlin *v.* United States 1126
King *v.* United States 1124
Kirshenbaum *v.* Pennsylvania Bd. of Law Examiners 1105
Kite *v.* Marshall 1120
Klippel; Mid-Carolina Oil, Inc. *v.* 1107
Knotts; United States *v.* 1131
Kolender *v.* Lawson 1104
Kondrat *v.* Department of Justice 1120
Kondrat *v.* Department of State 1121
Kourkene *v.* State Bar of California 1110
Kozmel *v.* Industrial Comm'n of Ill. 1119
Krier *v.* Georgia 1140
Labor Union. See name of trade.
Lagasse *v.* Vestal 1122
Lam *v.* United States 1121
Lambert *v.* Wattigny 1132
Lane *v.* Smith 1102
Laney *v.* United States 1108
Larson *v.* Valente 1111
Lawson; Kolender *v.* 1104
Lebedun *v.* Young 1109
Lee *v.* United States 1122
Leverette; Bragg *v.* 1123
Lewis *v.* Indiana 1118
Lewis *v.* United States 1121,1133
Liberatore *v.* United States 1134
Little; Crawford *v.* 1137
Little, Brown & Co.; Martin *v.* 1108
Local. For labor union, see name of trade.
Lockhart *v.* United States 1125
Loften *v.* United States 1120
Los Angeles *v.* Lyons 1115
Louisiana; Naas *v.* 1119
Louisiana; United States *v.* 1115
Louisville & Jefferson County Transit Authority *v.* Transit Union 1113
Lovorn; Hathorn *v.* 255
Lozada *v.* United States 1125
Lucas, *In re* 1104
Lupo *v.* United States 1135
Lyons; Los Angeles *v.* 1115
Lyons *v.* United States 1136

Page
Ma *v.* First National Corp. 1138
Madsen; Hatch *v.* 1112
Maggio; Jenkins *v.* 1136
Maine *v.* Patten 1114
Mallory *v.* United States 1125
Mandrachio *v.* New York 1122
Mansion House Center South Redevelopment Co. *v.* United States .. 1117
Maricopa County Medical Society; Arizona *v.* 332
Mark *v.* Seattle Times 1124
Marks *v.* Marks 1110
Marshall; Kite *v.* 1120
Martin *v.* Little, Brown & Co. 1108
Martinez *v.* Brockette 1131
Maryland; Wantland *v.* 1121
Maselli *v.* State Bd. of Equalization of Cal. 1108
Massachusetts; Tavares *v.* 1137
Massachusetts; Transit Union *v.* 1117
Massachusetts Bd. of Registration in Podiatry; Camoscio *v.* 1139
Mathis *v.* United States 1120
Matthews *v.* Exxon Corp. 1124
Mayor of Columbia, S. C.; Washington *v.* 1120
Mazzio *v.* United States 1134
McCarthy *v.* O'Connor 1109
McCrary *v.* Smith 1126
McCready; Blue Shield of Virginia *v.* 465
McDonald *v.* Thompson 1126
McKinstry *v.* Ohio 1138
Medved *v.* United States 1126
Meinster *v.* United States 1136
Memorial Park Cemetery Assn. *v.* Rosebrough Monument Co. 1111
Mengarelli *v.* United States 1117
Metropolitan Edison Co. *v.* National Labor Relations Bd. 1116
Mews; Illinois *ex rel.* Myers *v.* 1117
Michigan; Yeo *v.* 1134
Mid-Carolina Oil, Inc. *v.* Klippel 1107
Middlesex County Ethics Committee *v.* Garden State Bar Assn. . 423
Mills *v.* Rogers 291
Miner; Gillette Co. *v.* 1116
Minneapolis Star & Tribune Co. *v.* Minnesota Comm'r of Revenue 1130
Minnesota Comm'r of Revenue; Minneapolis Star & Tribune Co. *v.* . 1130
Mississippi; Davis *v.* 1113
Mississippi; Hoover *v.* 1137
Mississippi *v.* Phillips 1140
Mitchell *v.* United States 1124

Page
Mitchell; United States *v.* 1104
Mobil Oil Corp.; Cities Service Gas Co. *v.* 1126
Mobil Oil Corp.; Grounds *v.* 1126
Mobil Oil Corp.; Northern Natural Gas Co. *v.* 1126
Mobil Oil Corp.; Panhandle Eastern Pipe Line Co. *v.* 1126
Mobley *v.* Tabor 1123
Monk *v.* Schweiker 1122
Montana *v.* Crow Tribe of Indians 1116
Moore *v.* Florida 1138
Moore *v.* United States 1106
Moran *v.* Schweiker 1125
Moritz, *In re* 1129
Multi-State Communications, Inc. *v.* FCC 1119
Murphy *v.* United States 1121
Murphy; Wright *v.* 1107
Murray *v.* Toyota Motor Distributors, Inc. 1106
Myers *v.* Mews 1117
Myers *v.* United States 1136
Naas *v.* Louisiana 1119
Najar *v.* Oman 1108
National Cash Register Corp. *v.* Chatlos Systems, Inc. 1112
National Labor Relations Bd.; Borg Warner Corp. *v.* 1105
National Labor Relations Bd.; Donald Schriver, Inc. *v.* 1111
National Labor Relations Bd.; Gordonsville Industries, Inc. *v.* 1117
National Labor Relations Bd.; Griffith Co. *v.* 1105
National Labor Relations Bd.; International Medication Systems *v.* 1118
National Labor Relations Bd.; Metropolitan Edison Co. *v.* 1116
National Labor Relations Bd.; Rockingham Machine-Lunex Co. *v.* 1107
Neustein *v.* United States 1124
New England Power Co. *v.* Federal Energy Regulatory Comm'n 1117
New Mexico; Colorado *v.* 1103,1115
New Mexico; Doe *v.* 1136
New York; Birden *v.* 1123
New York; Mandrachio *v.* 1122
Nicoll *v.* United States 1118
Nieves *v.* United States 1117
North Carolina; Darroch *v.* 1138
Northern Natural Gas Co. *v.* Mobil Oil Corp. 1126
Northwestern Bell Telephone Co.; Occhino *v.* 1139
Northwest Sports Enterprises *v.* Seattle Totems Hockey Club 1105
Nzongola *v.* Nzongola 1112
Oakland Unified School Dist.; Schmidt *v.* 594
Oakland Unified School Dist.; Schmidt & Pollard *v.* 594
Occhino *v.* Northwestern Bell Telephone Co. 1139

Page
Occupational Safety & Health Rev. Comm'n; Super Excavators *v.* 1133
O'Connor; McCarthy *v.* 1109
Odom *v.* United States 1125
Officers for Justice; Police Officers *v.* 1115
Ohio; Bezak *v.* 1122
Ohio *v.* Kentucky 1141
Ohio; McKinstry *v.* 1138
Ohio; Puente *v.* 1109
Ohio; Washington *v.* 1109
Oil Transport Co. *v.* Transportation Employees 1135
Oklahoma; Gill *v.* 1109
Oklahoma; Hishaw *v.* 1137
Oklahoma; Slayton *v.* 1124
Oklahoma; Texas *v.* 172
Olivo *v.* Fogg 1122
Oman; Najar *v.* 1108
Oregon *v.* Newman 1111
Pacific Gas & Elec. Co. *v.* State Energy Res. Cons. & Dev. Comm'n 1132
Pacific Legal Found. *v.* State Energy Res. Cons. & Dev. Comm'n 1133
Painters; Howell & Howell, Inc. *v.* 1129
Pak Shing Lam *v.* United States 1121
Panhandle Eastern Pipe Line Co. *v.* Mobil Oil Corp. 1126
Paschal *v.* Florida Public Employees Relations Comm'n 1109
Passaro *v.* United States 1121
Patsy *v.* Board of Regents of Fla. 496
Patten; Maine *v.* 1114
Pennhurst State School and Hospital *v.* Halderman 1131
Pennsylvania; Robinson *v.* 1101
Pennsylvania; Sawyer *v.* 1136
Pennsylvania Bd. of Law Examiners; Kirshenbaum *v.* 1105
Pepsi-Cola Bottling Co. of St. Louis; Williams *v.* 1139
Perini *v.* Bell 1141
Perkins *v.* United States 1125
Petschen *v.* United States 1135
Pettee *v.* United States 1124,1125
Phelps *v.* Kansas Supreme Court 1112
Philadelphia National Bank *v.* United States 1105
Phillips; Joint Legis. Comm. for Performance Review of Miss. *v.* . . 1140
Phillips; Mississippi *v.* 1140
Phillips & Co.; Chamberlain *v.* 1118
Pietrowski *v.* Estelle 1123
Place *v.* United States 1106
Place; United States *v.* 1104
Plyler *v.* Doe 202

Page
Police Officers *v.* U. S. District Court 1115
Ponte; Smallwood *v.* 1124
Pope *v.* Thone 1140
Popular Democratic Party; Rodriguez *v.* 1
Porcher *v.* Brown 1104
Prescott; Chino Valley *v.* 1101
President of United States; Romieh *v.* 1126
Puente *v.* Ohio 1109
Pullman-Standard *v.* Swint 1130
Putnam; DeVincent *v.* 1125
Quintana *v.* United States 1135
Quitiquit *v.* Immigration and Naturalization Service 1139
Ragusa *v.* United States 1133
Raines; Boag *v.* 1123
Rawls *v.* United States 1137
Raysor *v.* Gabbey 1127
Raysor *v.* Stern 1127
RCA Corp. *v.* United States 1133
Reagan; Romieh *v.* 1126
Reed *v.* United States 1125
Regan *v.* Taxation with Representation of Washington 1129
Regilio *v.* United States 1133
Reiter *v.* Thomas 1123
Remsing *v.* United States 1121
Rice, *In re* 1115
Richenberger; Westover *v.* 1140
Ripley; Genson *v.* 1140
Ritter; Alabama *v.* 1114
Ritter *v.* Ritter 1138
Rivera *v.* California 1123
Rivera *v.* United States 1122
River Region Mental Health-Mental Retardation Bd.; Halikas *v.* 1106
Robinson *v.* Pennsylvania 1101
Rockingham Machine-Lunex Co. *v.* National Labor Relations Bd. 1107
Rockwell International Corp.; Thomas Merton Center *v.* 1134
Rodgers *v.* Estelle 1138
Rodriguez; Country-Wide Ins. Co. *v.* 1118
Rodriguez *v.* Popular Democratic Party 1
Rogers; Mills *v.* 291
Rogers *v.* White 1126
Romeo; Youngberg *v.* 307
Romieh *v.* Reagan 1126
Rose; Butler *v.* 1107
Rose; Turner *v.* 1123

Page
Rosebrough Monument Co.; Memorial Park Cemetery Assn. *v.* .. 1111
Rosofsky; Schweiker *v.* 1141
Ross; Becker *v.* 1108
Roy *v.* Watson 1108
Rudman *v.* California 1138
Rudolph *v.* Allen 1122
Rushen; Archer *v.* 1107
Rushen; Bentley *v.* 1138
Russell *v.* United States 1108
Sadlowski; Steelworkers *v.* 102
Salisbury *v.* United States 1107
San Antonio Metropolitan Transit Authority; Donovan *v.* 1102
San Antonio Metropolitan Transit Authority; Garcia *v.* 1102
Sandini *v.* United States 1118
Sawyer *v.* Pennsylvania 1136
Scacchetti *v.* United States 1132
Scherer *v.* United States 1120
Schmidt *v.* Oakland Unified School Dist. 594
Schmidt & Pollard *v.* Oakland Unified School Dist. 594
Schriver, Inc. *v.* National Labor Relations Bd. 1111
Schweiker *v.* Campbell 1131
Schweiker *v.* Hogan 569
Schweiker; Monk *v.* 1122
Schweiker; Moran *v.* 1125
Schweiker *v.* Rosofsky 1141
Schweiker; Tucker *v.* 1124
Scott, *In re* 1130
Scott *v.* United States 1110
Scurr; Armento *v.* 1138
Seattle Times; Mark *v.* 1124
Seattle Totems Hockey Club; Northwest Sports Enterprises *v.* 1105
Secretary of Health and Human Services *v.* Campbell 1131
Secretary of Health and Human Services *v.* Hogan 569
Secretary of Health and Human Services; Monk *v.* 1122
Secretary of Health and Human Services; Moran *v.* 1125
Secretary of Health and Human Services *v.* Rosofsky 1141
Secretary of Health and Human Services; Tucker *v.* 1124
Secretary of Labor *v.* San Antonio Metropolitan Transit Authority 1102
Secretary of State; Thomas *v.* 1110
Secretary of Treasury *v.* Taxation with Representation of Wash. 1129
Seekonk Water Dist.; Heritage Homes of Attleboro, Inc. *v.* 1120
Semble *v.* United States 1120
Seymour National Bank *v.* Indiana 1127
Shanahan *v.* United States 1106

Page
Sharpe; United States *v.* 1127
Shing Lam *v.* United States 1121
Short *v.* United States 1119
Simmons *v.* Hilton 1110
Skaines; Uniroyal, Inc. *v.* 1119
Slater *v.* United States 1133
Slayton *v.* Oklahoma 1124
Sliwoo *v.* United States 1134
Smallwood *v.* Ponte 1124
Smiley, *In re* 1130
Smith *v.* Inland Steel Co. 1138
Smith; Lane *v.* 1102
Smith; McCrary *v.* 1126
Smith *v.* United States 1110
Sony Corp. of America *v.* Universal City Studios, Inc. 1116
South Carolina; Thompson *v.* 1112
Speaker, N. J. Assembly *v.* Daggett 1131
Speed *v.* Florida 1118
Spieler; United States *v.* 1113
Spiess *v.* C. Itoh & Co. (America) 1128
Stacy *v.* Bevens 1107
Stallings *v.* Fletcher 1134
Standard Drywall, Inc. *v.* United States 1112
Starview Drive In Theatre, Inc. *v.* Cook County 1113
State. See name of State.
State Bar of California; Kourkene *v.* 1110
State Bd. of Equalization of Cal.; Maselli *v.* 1108
State Energy Res. Cons. & Dev. Comm'n; Pacific Gas & Elec. Co. *v.* 1132
State Energy Res. Cons. & Dev. Comm'n; Pacific Legal Found. *v.* 1133
State Lands Comm'n *v.* United States 273
Steedman *v.* United States 1136
Steelworkers *v.* Sadlowski 102
Steelworkers *v.* Swint 1130
Stephen F. Austin Univ.; Hillis *v.* 1106
Stern; Raysor *v.* 1127
Sumitomo Shoji America, Inc. *v.* Avagliano 176
Sumitomo Shoji America, Inc.; Avagliano *v.* 176
Super Excavators, Inc. *v.* Occupational Safety & Health Rev. Comm'n 1133
Superintendent of penal or correctional institution. See name or title of superintendent.
Supervisor of Assessments; Trustees of First Baptist Church *v.* 1134
Swanson-Dean Corp. *v.* Carpenters 1105
Swint; Pullman-Standard *v.* 1130
Swint; Steelworkers *v.* 1130

Page
Swoboda *v.* United States 1134
Tabor; Mobley *v.* 1123
Tavares *v.* Massachusetts 1137
Tavarez *v.* United States 1121
Taxation with Representation of Washington; Regan *v.* 1129
Taylor *v.* Wyrick 1124
Teal; Connecticut *v.* 440
Tennessee; Harrington *v.* 1110
Texas *v.* Brown 1116
Texas; California *v.* 164
Texas *v.* Certain Named & Unnamed Undocumented Alien Children 202
Texas *v.* Federal Energy Regulatory Comm'n 1105
Texas *v.* Oklahoma 172
Texas; Wade *v.* 1112
Texas; Walker *v.* 1126
Texas Dept. of Human Resources; Castro *v.* 1119
Thomas; Guide Publishing Co. *v.* 1140
Thomas *v.* Haig 1110
Thomas; Journal and Guide *v.* 1140
Thomas; Reiter *v.* 1123
Thomas Merton Center *v.* Rockwell International Corp. 1134
Thompson; McDonald *v.* 1126
Thompson *v.* South Carolina 1112
Thone; Pope *v.* 1140
Thornton *v.* Atlanta & West Point R. Co. 1118
Tibbs *v.* Florida 31
Tillman; Wilson *v.* 1136
Tobias *v.* United States 1108
Town. See name of town.
Toyota Motor Distributors, Inc.; Big Sky Toyota *v.* 1106
Toyota Motor Distributors, Inc.; Murray *v.* 1106
Transit Authority of River City *v.* Transit Union 1113
Transit Union; Jackson Transit Authority *v.* 15
Transit Union; Louisville & Jefferson County Transit Authority *v.* 1113
Transit Union *v.* Massachusetts 1117
Transit Union; Transit Authority of River City *v.* 1113
Transportation Employees; Oil Transport Co. *v.* 1135
Transportation Union *v.* Consolidated Rail Corp. 1133
Trustees of First Baptist Church *v.* Supervisor of Assessments 1134
Tucker *v.* Schweiker 1124
Tulsa; Cross *v.* 1139
Turner *v.* Rose 1123
Udziela *v.* United States 1135
Union. For labor union, see name of trade.

Page
Uniroyal, Inc. *v.* Skaines 1119
Uniroyal, Inc. *v.* Wyatt Tire Distributors 1119
United. For labor union, see name of trade.
United States. See name of other party.
U. S. District Court; Police Officers *v.* 1115
U. S. District Judge; Anthony *v.* 1133
United States *ex rel.* Simmons *v.* Hilton 1110
U. S. Parole Comm'n; Caballery *v.* 1136
U. S. Postal Service; Calzarano *v.* 1124
U. S. Postal Service; Council of Public Utility Mailers *v.* 1133
U. S. Postal Service Bd. of Governors *v.* Aikens 1129
U. S. Probation Office; Green *v.* 1136
Universal City Studios, Inc.; Sony Corp. of America *v.* 1116
Valente; Larson *v.* 1111
Vann; Billingsley *v.* 1109
Van Orman *v.* First National Bank of South Central Michigan ... 1139
Van Sickle *v.* Van Sickle 1119
Vessel Hoegh Shield *v.* Gulf Trading & Transportation Co. 1119
Vestal; Lagasse *v.* 1122
Villamonte-Marquez; United States *v.* 1104
Vlasic *v.* United States 1125
Voluntary Purchasing Groups, Inc. *v.* Chevron Chemical Co. 1126
Wade *v.* Texas 1112
Wainwright; Cobb *v.* 1107
Wainwright *v.* Henry 1114
Walker *v.* Texas 1126
Wantland, *In re* 1115
Wantland *v.* Maryland 1121
Ward *v.* United States 1110
Warden. See name of warden.
Washington; Baker *v.* 1108
Washington *v.* Finlay 1120
Washington; Fisher *v.* 1137
Washington *v.* Ohio 1109
Washington Metropolitan Area Transit Authority *v.* Hensley 1130
Watson; Roy *v.* 1108
Watson *v.* United States 1106
Wattigny; Lambert *v.* 1132
Weber *v.* United States 1105
Weil *v.* United States 1117
Weingartner *v.* United States 1135
Weser, *In re* 1116
West; Anthony *v.* 1133
Westover *v.* Richenberger 1140

Page
White; Cory *v.* 85
White; Rogers *v.* 1126
Wilburn *v.* California 1138
Williams *v.* Arkansas Public Service Comm'n 1123
Williams *v.* Cheetwood & Davies 1101
Williams *v.* Everett 1126
Williams *v.* Pepsi-Cola Bottling Co. of St. Louis, Mo. 1139
Williams; Zobel *v.* 55
Wilshire Oil Co. of Texas *v.* Board of Governors, FRS 1132
Wilson; Burlington Northern Inc. *v.* 1120
Wilson *v.* Tillman 1136
Winter; Brooks *v.* 1129
Wolff; Johnstone *v.* 1122
Wooden *v.* United States 1137
Woods *v.* Illinois 1137
Wright; Alabama *v.* 1114
Wright *v.* Murphy 1107
WTIC–FM Radio Station; Appleby *v.* 1141
Wyatt Tire Distributors; Uniroyal, Inc. *v.* 1119
Wyrick; Bainter *v.* 1122
Wyrick; Taylor *v.* 1124
Xerox Corp. *v.* Harris County 1130
Yeo *v.* Michigan 1134
Young; Lebedun *v.* 1109
Youngberg *v.* Romeo 307
Zant; Collins *v.* 1126
Zisook *v.* Attorney Registration & Discip. Comm'n, Ill. Sup Ct. 1134
Zobel *v.* Williams 55

CALIFORNIA EX REL. STATE LANDS COMMISSION v. UNITED STATES

ON CROSS-MOTIONS FOR JUDGMENT

No. 89, Orig. Argued March 29, 1982—Decided June 18, 1982

Held: The United States, not California, has title to oceanfront land created through accretion, resulting from construction of a jetty, to land owned by the United States on the coast of California. Pp. 278–288.

(a) A dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law. *Hughes* v. *Washington*, 389 U. S. 290; *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653. Under federal law, accretion, whatever its cause, belongs to the upland owner. Pp. 278–283.

(b) This is not a case where, as a matter of choice of law, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue. Congress addressed the issue of accretions to federal land in the Submerged Lands Act, which vested title in the States to the lands underlying the territorial sea and confirmed the title of the States to the tidelands up to the line of mean high tide, but which in § 5 withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States. In light of this latter provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. Moreover, this is not a case in which federal common law must be created, since it has long been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. Pp. 283–285.

(c) Only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine, *United States* v. *California*, 332 U. S. 19, and hence California cannot properly claim that title to the land in question here was vested in the State by that doctrine and confirmed by the Submerged Lands Act. The latter Act was a constitutional exercise of Congress' power to dispose of federal property and "did not impair the validity" of the *United States* v. *California* decision, *United States* v. *Louisiana*, 363 U. S. 1, 7, 20. To accept California's argument would require rejecting not only *Hughes*, *supra*, but also the established federal rule that accretions belong to the upland owner. Pp. 285–286.

(d) Section 2(a)(3) of the Submerged Lands Act, defining "lands beneath navigable waters" that fall within the Act's general grant to the

States as including all "made" lands that formerly were lands beneath navigable water, does not apply to the gradual process by which sand accumulated along the shore, although caused by a jetty. To the extent that accretions are to be considered "made" land, they would fall within the reservation by the United States in the Act of "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." In any event, § 5(a) of the Act expressly withholds from the grant to the States all "accretions" to lands reserved by the United States. Pp. 286–288.

(e) Section 3(a) of the Submerged Lands Act, confirming the title of persons who, on June 5, 1950, were entitled to lands beneath navigable water "under the law of the respective states in which the land is located," means nothing more than that state law determines the proper beneficiary of the grant of land under the Act. Federal law determines the scope of the grant under the Act in the first instance. P. 288.

The United States' motion for judgment on the pleadings granted.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 288.

Bruce S. Flushman, Deputy Attorney General of California, argued the cause for plaintiff. With him on the briefs were *George Deukmejian*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Dennis M. Eagan* and *Patricia Sheehan Peterson*, Deputy Attorneys General.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, and *Michael W. Reed*.*

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*A brief of *amici curiae* was filed for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Malachy R. Murphy*, Deputy Attorney General, and *Robert C. Hargreaves*, Assistant Attorney General; *Charles A. Graddick*, Attorney General of Alabama, and *Sarah M. Spratling*, Assistant Attorney General; *Wilson L. Condon*, Attorney General of Alaska, and *G. Thomas Koester*, Assistant Attorney General; *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General; *Tany S. Hong*, Attorney General of Hawaii, and *Johnson H. Wong*, Deputy Attorney General; *Jeff Bingaman*, Attorney

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JUSTICE WHITE delivered the opinion of the Court.

The issue before the Court is the ownership of oceanfront land created through accretion to land owned by the United States on the coast of California. The decision turns on whether federal or state law governs the issue.

I

From the time of California's admission to the Union in 1850, the United States owned the upland on the north side of the entrance channel to Humboldt Bay, Cal. In 1859 and 1871, the Secretary of the Interior ordered that certain of these lands, which fronted on the Pacific Ocean, the channel, and Humboldt Bay be reserved from public sale.[1] Since that time the land has been continuously possessed by the United States and used as a Coast Guard Reservation. The Pacific shoreline along the Coast Guard site remained substantially unchanged until the turn of the century when the United States began construction of two jetties at the entrance to Humboldt Bay.[2] The jetty constructed on the north side of the entrance resulted in fairly rapid accretion on the ocean side of the Coast Guard Reservation, so that formerly submerged lands became uplands.[3] One hundred and eighty-

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General of New Mexico, and *J. Scott Hall*, Special Assistant Attorney General; and *Dave Frohnmayer*, Attorney General of Oregon, and *Peter Herman*, Senior Assistant Attorney General.

[1] Secretarial Order, December 27, 1859; Secretarial Order, August 19, 1871. See Exhibit C to Exhibits in Support of California's Motion for Leave to File Complaint.

[2] Construction of the jetties commenced on the South Spit in 1889 and on the North Spit in 1891. U. S. Army Corps of Engineers, San Francisco District, Survey Report on Humboldt Bay, California, App. I, Shoreline Changes 2–3, 8–9 (Feb. 10, 1950), Exhibit D, (hereafter cited as Corps Report). The north jetty was a massive work, having a total length of 7,500 feet.

[3] The United States and California agree that the seaward shift of the shoreline was caused by the construction of the jetties. A study by the Army Corps of Engineers found:

four acres of upland were created by the seaward movement of the ordinary high-water mark. This land, which remains barren save for a watchtower, is the subject of the dispute in this case.

The controversy arose in 1977 when the Coast Guard applied for permission from California to use this land to construct the watchtower.[4] At this time it became evident that both California and the United States asserted ownership of the land. The United States eventually built the watchtower without obtaining California's permission.[5] Invoking our original jurisdiction, California then filed this suit to

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"With the inauguration of jetty construction in 1890, there began a series of interruptions in normal littoral transport [of sand]. With each increment in length of the jetties the [Humboldt] bar was pushed seaward. Consequent decrease in offshore depths caused the shore to advance on each side of the inlet." *Id.*, at 8, ¶21.

After jetty construction,

". . . the Humboldt bar . . . shifted and reformed seaward of its 1870 position, and the ocean high-water shore line along the north spit . . . shifted seaward. The seaward advance of the north spit shore line was most pronounced upon reconstruction of the north jetty in 1917." *Id.*, at 9, ¶25.

[4] California does not contend that, having applied for a state permit, the United States is estopped from asserting its claim to ownership of the disputed land. Tr. of Oral Arg. 5–6. Such an argument is foreclosed by *United States* v. *California*, 332 U. S. 19, 39–40 (1947) (footnote omitted): "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." See also *United States* v. *City and County of San Francisco*, 310 U. S. 16, 31–32 (1940); *Utah* v. *United States*, 284 U. S. 534, 545–546 (1932).

[5] In May 1978, California transmitted a proposed permit to the United States to allow construction of the watchtower. See Corps Report, Exhibit F. A few days later, the Bureau of Land Management of the Department of the Interior formally advised the Coast Guard and the California Commission that the United States claimed the disputed acreage as accretion. Letter of June 5, 1978, attached to Corps Report, Exhibit G. The proposed permit was never executed.

quiet title to the subject land.[6] We granted leave for California to file a bill of complaint. 454 U. S. 809 (1981).

California alleges that upon its admission to the Union on September 9, 1850, Act of Sept. 9, 1850, 9 Stat. 452, and by confirmation in the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, California became vested with absolute title to the tidelands and the submerged lands upon which, after construction of the jetties, alluvion was deposited, resulting in formation of the subject land. Because the accretion formed on sovereign state land, California maintains that its law should govern ownership. Under California law, a distinction is drawn between accretive changes to a boundary caused by natural forces and boundary changes caused by the construction of artificial objects. For natural accretive changes, the upland boundary moves seaward as the alluvion is deposited, resulting in a benefit to the upland owner. *Los Angeles* v. *Anderson*, 206 Cal. 662, 667, 275 P. 789, 791 (1929). When accretion is caused by construction of artificial works, however, the boundary does not move but becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced. *Carpenter* v. *Santa Monica*, 63 Cal. App. 2d 772, 794, 147 P. 2d 964, 975 (1944). It is not disputed that the newly formed land in controversy was created by the construction of the jetty. Therefore, if state law governs, California would prevail.

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[6] Disputes between a State and the United States over ownership of property are fully within our original jurisdiction over cases in "which a State shall be Party," Art. III, § 2, cl. 2. Although our jurisdiction over this matter is concurrent with that of the district courts, *California* v. *Arizona*, 440 U. S. 59, 65 (1979); 28 U. S. C. § 1251(b)(2), we have previously indicated that coastal boundary disputes are appropriately brought as original actions in this Court. *United States* v. *Alaska*, 422 U. S. 184, 186, n. 2 (1975).

The United States has waived its immunity to suit in actions brought against it to quiet title to land. 28 U. S. C. § 1346(f). See *California* v. *Arizona*, *supra*, at 65–68.

By its answer, and supporting memoranda, the United States contends that the formerly submerged lands were never owned by California before passage of the Submerged Lands Act in 1953, and that the disputed land was not granted to California by the Act. The United States also submits that the case is governed by federal rather than state law and that under long-established federal law, accretion, whatever its cause, belongs to the upland owner. *Jones* v. *Johnston*, 18 How. 150, 156 (1856); *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66 (1874); *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 189–193 (1890); *Beaver* v. *United States*, 350 F. 2d 4, 10–11 (CA9 1965).[7] If such federal law controls, title to the deposited land vested in the United States as the accretions formed.

Recognizing that the choice-of-law issue was clearly drawn, California moved for summary judgment and the United States moved for judgment on the pleadings. No essential facts being in dispute, a special master was not appointed and the case was briefed and argued. We conclude that federal law governs the decision in this case and that the land in dispute is owned by the United States.

II

In *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935), the city filed suit to quiet its title to land claimed to be tideland and to belong to the city by virtue of a grant from the State. The defendant claimed by virtue of a patent from the United States issued after California entered the Union. In an opinion by Chief Justice Hughes, and with a single dis-

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[7] California's claim that *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 672 (1979), determined that there was no "federal common law" of accretion and avulsion, is a misunderstanding of that decision. We said only that "[t]he federal law applied in boundary cases . . . does not necessarily furnish the appropriate rules to govern" a case not involving a boundary dispute. Too much is also read into dictum in *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 380–381, n. 8 (1977), taking issue with the dissent's meaning of the term "federal common law."

sent, the Court held that if land in question was tideland, the title passed to California at the time of her admission to the Union in 1850; that it remained to be determined whether the land at issue was tideland; and that this issue was "necessarily a federal question" controlled by federal law. The Court said:

> "Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird*, 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States*, 260 U. S. 77, 87; *United States* v. *Holt Bank*, 270 U. S. 49, 55, 56; *United States* v. *Utah*, 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Shively* v. *Bowlby*, [152 U. S. 1,] 40; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63." *Borax Consolidated, Ltd.* v. *Los Angeles, supra*, at 22.

The Court went on to hold that tidelands extend to the mean high-water line, which the Court then defined as a matter of federal law.

There was no question of accretions to the shoreline of the property involved in *Borax*. But some 30 years later, Mrs. Stella Hughes, the successor in interest to the owner of oceanfront property patented by the United States prior to

the entry of the State of Washington into the Union, sued the State seeking to quiet her title to accretions that had become attached to her land and that had caused a seaward movement of the shoreline. Under Washington law, the accretions belonged to the State, the owner of the tidelands, and Mrs. Hughes would no longer own property fronting on the ocean. Under federal law accretions are the property of the upland owner. The trial court found that federal law applied. The Washington Supreme Court reversed, holding that Washington law applied and that the State owned any land that accreted after statehood. *Hughes* v. *State*, 67 Wash. 2d. 799, 410 P. 2d 20 (1966).

We in turn reversed, reaffirming the decision in *Borax* that federal law determined the boundary between state-owned tidelands and property granted under a federal patent and holding that the same law applied to determine the boundary between state-owned tidelands and oceanfront property where accretions had extended the shoreline seaward. *Hughes* v. *Washington*, 389 U. S. 290 (1967).[8] The justification for employing federal law was the special nature of the coastal boundary question: "The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land.'" *Id.*, at 293. We went on to decide that under federal law, the federal grantee of the uplands had the right to the accumulated accretions.

Except for the fact that in the present case the upland to which the accretions attached has always been owned by the United States, this case and *Hughes* are similarly situated.

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[8] All participating Justices joined except Justice Stewart who concurred on grounds that the State's claim to the property constituted a taking without compensation. He rejected the majority's application of federal law to the question. JUSTICE MARSHALL took no part in the case.

Unless *Hughes* is to be overruled, judgment must be entered for the United States.

California urges that for all intents and purposes *Hughes* has already been eviscerated by *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977). *Corvallis* involved a dispute between the State of Oregon and an Oregon corporation over the ownership of land that became part of a riverbed because of avulsive changes in the river's course. The Oregon Court of Appeals affirmed the trial court's award of the land to the corporation because that was the result dictated by federal common law, which, under *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313 (1973), was the proper source of law. A majority of this Court reversed, overruling *Bonelli* and holding that the disputed ownership of the riverbed should be decided solely as a matter of Oregon law. *Bonelli*'s error was said to have been reliance on the equal-footing doctrine as a source of federal common law.[9] Once the equal-footing doctrine had vested title to the riverbed in Arizona, "it did not operate after that date to determine what effect on titles the movement of the river might have." 429 U. S., at 371. State, rather than federal law, should have been applied.

California urges that in rejecting *Bonelli* and holding that disputes about the title to lands granted by the United States are to be settled by state law, the Court also rejected *Hughes* since that case involved land that had been patented by the United States to private owners. We do not agree. *Corvallis* itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced." 429 U. S., at 371. For example, the effects of accretive and avulsive changes in the

[9] The equal-footing principle holds that all States admitted to the Union possess the same rights and sovereignty as the original 13 States. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229 (1845); *Shively* v. *Bowlby*, 152 U. S. 1, 26, 30 (1894).

course of a navigable stream forming an interstate boundary is determined by federal law. *Id.*, at 375. The *Corvallis* opinion also recognized that *Bonelli* did not rest upon *Hughes* and that the *Hughes* Court considered oceanfront property "sufficiently different . . . so as to justify a 'federal common law' rule of riparian proprietorship." 429 U. S., at 377, n. 6. The *Corvallis* decision did not purport to disturb *Hughes*.

Wilson v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), made clear that *Corvallis* also does not apply "where the [United States] Government has never parted with title and its interest in the property continues." 442 U. S., at 670.[10] The dispute in *Corvallis* was between the State and a private owner of land previously in federal possession. In contrast, the riparian owner in *Wilson* was the United States, holding reservation land in trust for the Omaha Indian Tribe. The issue was the effect of accretive or avulsive changes in the course of a navigable stream. State boundaries were not involved. What we said in *Wilson* is at least equally applicable here where the United States has held title to, occupied, and utilized the littoral land for over 100 years: "[T]he general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest." 442 U. S., at 670.

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[10] The majority opinion in *Corvallis* appears to recognize that its rule does not extend to land remaining in federal hands:

"'We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to these laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.'" 429 U. S., at 377 (quoting *Wilcox* v. *Jackson*, 13 Pet. 498, 517 (1839); emphasis added by *Corvallis* Court).

We conclude, based on *Hughes* v. *Washington* and *Wilson* v. *Omaha Indian Tribe*, that a dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law.

III

Controversies governed by federal law do not inevitably require resort to uniform federal rules. *Wilson* v. *Omaha Indian Tribe*, *supra*, at 672. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand. *Board of Commissioners of Jackson County* v. *United States*, 308 U. S. 343 (1939); *Royal Indemnity Co.* v. *United States*, 313 U. S. 289 (1941). This is not such a case. First, and dispositive in itself, is the fact that Congress has addressed the issue of accretions to federal land. The Submerged Lands Act, 43 U. S. C. § 1301 *et seq.*, vested title in the States to the lands underlying the territorial sea, which, in California's case, extended three miles seaward from the ordinary low-water line. The Act also confirmed the title of the States to the tidelands up to the line of mean high tide. Section 5(a) of the Act, however, withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States.[11] 43 U. S. C. § 1313(a). In

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[11] In relevant part, § 5(a) of the Act, 62 Stat. 32, 43 U. S. C. § 1313(a), excepts from the grant to the States

"all tracts or parcels of land together with all accretions thereto, . . . title to which has been lawfully and expressly acquired by the United States . . . and . . . all lands expressly retained by or ceded to the United States when the State entered the Union . . . ."

Although "accretions" are expressly mentioned only in connection with federal "acquired lands," accretions to retained lands should be similarly excepted from the grant to the States. Former Solicitor General Cox, *in an* opinion approved by the Attorney General, explained:

"There can be no doubt that Congress intended each of the various categories of lands excepted by section 5(a) to include accretions. The terms

light of this provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson*, where we did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common-law rule.

Moreover, this is not a case in which federal common law must be *created*. For over 100 years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. *New Orleans* v. *United States*, 10 Pet. 662, 717 (1836); *County of St. Clair* v. *Lovingston*, 23 Wall., at 68. "'Almost all jurists and legislators, . . . both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions.'" *Jefferis* v. *East Omaha Land Co.*, 134 U. S., at 189, quoting *Banks* v. *Ogden*, 2 Wall. 57, 67 (1865). We rejected the invitation to rely on state law in *Hughes*, which California readily admits is a case "in which the facts and issues are essentially identical," Statement in Support of Motion for Leave to File Complaint 16, and we see no reason at this juncture to adopt California's minority rule on artificial accretions,[12] even if we were free to do so.

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of section 5(a) make this clear. The customary rights of landowners are set forth in full in the first of the several exceptions listed in section 5(a). Thus, it speaks of 'all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon . . . .' Each of the other exceptions speaks simply of 'all lands.' Obviously, the more comprehensive word 'lands' was used instead of 'tracts or parcels of land' and the explicit reference to accretions, resources and improvements was omitted in order to avoid repetition. There is no reasonable basis for any other conclusion. Congress would not have limited its exceptions of 'all accretions thereto, resources therein, or improvements thereon' to lands 'lawfully and expressly acquired by the United States' from any State *or its grantees and then denied them* where the lands were 'expressly retained' or 'acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity. . . .'" 42 Op. Atty. Gen. 241, 264 (1963).

[12] In *United States* v. *California*, O. T. 1951, No. 6, Orig., California argued that the "Court should adopt the federal rule that accretions formed

Applying the federal rule that accretions, regardless of cause, accrue to the upland owner, we conclude that title to the entire disputed land in issue is vested in the United States.

IV

Despite *Hughes* and *Wilson*, California claims ownership of the disputed lands because all of the accretions were deposited on tidelands and submerged lands, title to which, California submits, was vested in the State by the equal-footing doctrine and confirmed by the Submerged Lands Act. But California's claim to the land underlying the territorial sea was firmly rejected in *United States* v. *California*, 332 U. S. 19 (1947), which held that only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine. Furthermore, the Submerged Lands Act was a constitutional exercise of Congress' power to dispose of federal property, *Alabama* v. *Texas*, 347 U. S. 272, 273–274 (1954), and "did not impair the validity" of the *California* decision, *United States* v. *Louisiana*, 363 U. S. 1, 7, 20 (1960).[13] In any event, whatever the ownership of the submerged lands, this approach, based as it is on the equal-footing doctrine and the federal statute, is not a claim that state law should govern but a claim that the historic rule that accretions belong to the upland owner is wrong and should be

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by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land." Brief in Relation to Report of Special Master 90. California suggested "ample reasons why [the] exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California." *Id.*, at 91. Those reasons included the fact that the California rule is contrary to that adopted by courts of most other States, that the application of state law would lead to varying results in different States, and that the California rule was devised for wholly inapplicable reasons.

[13] See also *Alabama* v. *Texas*, 347 U. S., at 273–274; *United States* v. *California*, 381 U. S. 139, 145–148 (1965); *United States* v. *Louisiana*, 389 U. S. 155, 156–157 (1967); *Texas Boundary Case*, 394 U. S. 1, 2 (1969); *United States* v. *Maine*, 420 U. S. 515, 524–526 (1975); *United States* v. *Louisiana*, 446 U. S. 253, 256, 268 (1980).

replaced with a rule awarding title to the owner of the land on which the accretions took place. To accept this submission, however, would require rejecting not only *Hughes*, but also the long-established federal rule that accretions belong to the upland owner—a doctrine consistent with the majority rule prevailing in the States. See Part III, *supra*. Indeed, the proposed rule is also inconsistent with California's own law that accretions attributable to natural causes belong to the upland owner. For all these reasons, we refuse the invitation to depart from the long-settled rule.[14]

Independent of the above analysis, California claims that the United States expressly surrendered title to the disputed land through the Submerged Lands Act. California argues the subject land falls within the general grant to the States of "lands beneath navigable waters." Section 2(a)(3) of the Act defines "lands beneath navigable waters" to include "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters." 43 U. S. C. § 1301(a)(3). Because the jetty construction caused fairly rapid accretion, and, but for the construction of the jetties, the subject land would have remained submerged, California submits the accretion-formed land is "made" land, whose title rests in California by virtue of the Submerged Lands Act.

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[14] For the same reasons, we reject California's alternative theory that the equal-footing doctrine vests title in the State to all lands that ever were tidelands. California argues that as deposition occurred on submerged land, these areas went to a tideland phase—vesting title in the State—before eventually emerging as uplands. Federal law governs the scope of title initially vested by the equal-footing doctrine; at most, this argument suggests a different federal rule should apply to former tidelands. The suggestion has little to recommend it. Even leaving aside the concerns expressed in text, we see no reason for an exceptional rule to apply to land that once was, but no longer is, tideland. Moreover, implementation of the rule would require plotting the high- and low-water lines at all intervening times between statehood and the present.

We do not read this provision of the Act as applying to the gradual process by which sand accumulated along the shore, although caused by a jetty affecting the action of the sea.[15] Moreover, to the extent that the accretions are to be considered "made" land, they would fall within the reservation by the United States of "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." This follows from the congressional object to assure each sovereign the continuing benefit of landfill and like work performed by each.[16] In any event, § 5(a) of the Act expressly withholds from the grant to the States all "accretions" to lands reserved by the United States, and both California and the United States agree that the exposure of the formerly submerged lands in dispute constitutes "accretion." This reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States. *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 235 (1960);

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[15] The word "made" was inserted into the provision in a bill introduced by Congressman Walter. H. R. 8137, 81st Cong., 2d Sess., § 2(a)(2) (1950). The Report on that measure describes it as "in substance, the same" as earlier proposals omitting the term. H. R. Rep. No. 2078, 81st Cong., 2d Sess., 3 (1950). Throughout Congress' consideration of the bill there was no comment on the "made" land provision. No Member of either House ever suggested that § 1301(a)(3) covered accretions that were attributable to artificial works. Against this background, we find no significance in the two casual references by Robert Moses and Senator Daniel to naturally formed accretions as "made." Hearings on S. J. Res. 13 et al. before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 158 (1953) (remarks of Robert Moses); *id.*, at 193–194 (remarks of Sen. Daniel).

[16] The Interpretive Opinion rendered by former Solicitor General Cox, while including naturally formed islands within the "made" language of § 2(a)(3), rejects the suggestion that accretion to the mainland, whether or not directly attributable to artificial causes, is included in the Submerged Lands Act grant to the States. 42 Op. Atty. Gen., at 259–265, 266–267. We express no opinion on the Act's treatment of naturally formed islands in the marginal sea.

United States v. *Union Pacific R. Co.*, 353 U. S. 112, 116 (1957).

Finally, California submits that the Act granted title to the State by confirming the title of persons who, on June 5, 1950, were entitled to such lands "under the law of the respective States in which the land is located . . . ." 43 U. S. C. § 1311(a). This provision means nothing more than that state law determines the proper beneficiary of the grant of land under the Act; it is clear that federal law determines the scope of the grant under the Act in the first instance.

V

We reaffirm today that federal law determines the boundary of oceanfront lands owned or patented by the United States. Applying the federal rule that accretions of whatever cause belong to the upland owner, we find that title to the disputed parcel rests with the United States. Accordingly, California's motion for summary judgment is denied, and the United States' motion for judgment on the pleadings is granted. The parties, or either of them, may, before September 27, 1982, submit a proposed decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in the judgment.

I concur in the judgment. I believe that our decision in *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), requires the application of federal common law to resolve this title dispute between the United States and California, and that § 5(a) of the Submerged Lands Act indicates the source of that law.

The dispute in this case concerns the ownership of artificially caused accretions on oceanfront property belonging to

the United States. The dispute centers on the legal effect of the movement of the "mean high-water mark." That mark separates the fastlands continuously owned by the United States from the "tidelands"—the area of partially submerged lands between the mean high- and low-water marks. California's claim of title to the tidelands is based upon the equal-footing doctrine. Because the tidelands belong to it and because the accretions formed on the tidelands, California contends that state law applies to resolve this title dispute between it and the United States. The rule adopted by the California courts regarding artificially caused accretions holds that title to accreted land vests with the State rather than the riparian or littoral owner. The United States contends that federal common law applies and argues that the federal common-law rule holds that title to land formed by accretion vests in the owner of the riparian land.

The dispute in this case is similar to that in *Wilson* v. *Omaha Indian Tribe*. We held in *Wilson* that federal common law and not state law governs title disputes resulting from changes in the course of a navigable stream where an instrumentality of the Federal Government is the riparian owner. *Id.*, at 669–671. The rule of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), was distinguished. The *Corvallis* rule—that state law governs—applies where the dispute over the legal effect of a shifting riverbed does not involve claims of title by a federal instrumentality.

I agree with the Court that the *Wilson* rule applies to oceanfront property as well as riverfront property where the Federal Government is the littoral owner. *Wilson* should apply to the movement of the high-water mark along the ocean in a fashion similar to the way it applies to changes in the bed of a navigable stream. In the instant case, as in *Wilson*, it is irrelevant that the accretion, as a geographical "fact," formed on land within the State's dominion, be it a riverbottom or the ocean tidelands. The fact is that both

Wilson and the instant case concern title disputes over changes in the shoreline where the Federal Government owns land along the shoreline.

In *Wilson*, we held that state law supplied the applicable rule of decision even though federal common law applied to resolve the title dispute. We found no need for a uniform national rule and no reason why federal interests should not be treated under the same rules of property that would apply to private persons. In contrast to *Wilson*, however, I agree with the Court that Congress in § 5(a) of the Submerged Lands Act has supplied the rule of decision. Section 5(a) withholds from the grant to the States all accretions to coastal lands acquired or reserved by the United States. I also agree with the Court that California did not acquire the disputed lands pursuant to the "made lands" provisions in § 2(a)(3).

Consequently, the Court's discussion regarding the continuing vitality of *Hughes* v. *Washington*, 389 U. S. 290 (1967), is dicta. *Hughes* is unnecessary to the resolution of choice-of-law issues in title disputes between the Federal Government and a State or private person. Reliance on *Hughes* would be necessary only if we were to hold that federal common law, rather than state law, applied in a title dispute between a federal patentee and a State or private persons as to lands fronting an ocean. The instant case does not present that issue. It is difficult to reconcile *Hughes* with *Corvallis* and we should postpone that endeavor until required to undertake it.

In summary, I think this case can be easily resolved as a title dispute between the United States and California concerning the legal effect of movement of the Pacific Ocean's high-water mark. *Wilson* and the Submerged Lands Act resolve the dispute. The continuing vitality of *Hughes* should be left to another day.

MILLS ET AL. v. ROGERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-1417. Argued January 13, 1982—Decided June 18, 1982

Respondents, present or former mental patients at a Massachusetts state hospital, instituted a class action against petitioner officials and staff of the hospital in Federal District Court, alleging that forcible administration of antipsychotic drugs to patients violated rights protected by the Federal Constitution. The court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy; that under state law an involuntary commitment provides no basis for an inference of legal "incompetency" to make such decision; and that without consent either by the patient or the guardian of a patient who has been adjudicated incompetent, the patient's liberty interests may be overridden only in an emergency. The Court of Appeals affirmed in part and reversed in part. It agreed with the District Court's first two holdings above, but reached different conclusions as to the circumstances under which state interests might override the patient's liberty interests. The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure adequate procedural protection of the patient's interests. This Court granted certiorari to determine whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs. Shortly, thereafter the Massachusetts Supreme Judicial Court ruled on the rights—under both Massachusetts common law and the Federal Constitution—of a *noninstitutionalized* incompetent mental patient as to involuntary treatment with antipsychotic drugs.

Held: The Court of Appeals' judgment is vacated, and the case is remanded for that court's consideration, in the first instance, of whether the correct disposition of this case is affected by the Massachusetts Supreme Judicial Court's intervening decision. Pp. 298-306.

(a) Assuming (as the parties agree) that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs, a substantive issue remains as to the definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. There is also a procedural issue concerning the minimum procedures required by the Con-

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stitution for determining that an individual's liberty interest actually is outweighed in a particular instance. As a practical matter both issues are intertwined with questions of state law, which may create liberty interests and procedural protections broader than those protected by the Federal Constitution. If so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within the State. Pp. 298–300.

(b) While the record is unclear as to respondents' position in the District Court concerning the effect of state law on their asserted federal rights, in their brief in this Court they clearly assert state-law arguments as alternative grounds for affirming both the "substantive" and "procedural" decisions of the Court of Appeals. In applying the policy of avoiding unnecessary decisions of constitutional issues, it is not clear which, if any, constitutional issues now must be decided to resolve the controversy between the parties. Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than this Court to determine how the intervening state-court decision may have changed the law of Massachusetts and how any changes may affect this case. Pp. 304–306.

634 F. 2d 650, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Stephen Schultz argued the cause for petitioners. With him on the briefs was *Francis X. Bellotti*, Attorney General of Massachusetts.

Richard Cole argued the cause for respondents. With him on the brief was *Robert Burdick*.*

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*Briefs of *amici curiae* urging reversal were filed by *Paul L. Perito* and *C. Frederick Ryland* for the American College of Neuropsychopharmacology; by *Joel I. Klein* and *H. Bartow Farr III* for the American Psychiatric Association; and by *Robert H. Weber* and *Jonathan Brant* for the Mental Health Legal Advisors Committee.

Briefs of *amici curiae* urging affirmance were filed by *Joseph R. Tafelski* for Advocates for Basic Legal Equality, Inc.; by *Paul R. Friedman*, *Jane Bloom Yohalem*, *John Townsend Rich*, and *Donald N. Bersoff* for the American Psychological Association et al.; and by *William Alsup* for Barbara Jamison et al.

Louis M. Aucoin III filed a brief for Patients' Rights Advocacy Services, Inc., as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

The Court granted certiorari in this case to determine whether involuntarily committed mental patients have a constitutional right to refuse treatment with antipsychotic drugs.

I

This litigation began on April 27, 1975, when respondent Rubie Rogers and six other persons filed suit against various officials and staff of the May and Austin Units of the Boston State Hospital. The plaintiffs all were present or former mental patients at the institution. During their period of institutionalization all had been forced to accept unwanted treatment with antipsychotic drugs.[1] Alleging that forcible

[1] As used in this litigation, the term "antipsychotic drugs" refers to medications such as Thorazine, Mellaril, Prolixin, and Haldol that are used in treating psychoses, especially schizophrenia. See *Rogers* v. *Okin*, 478 F. Supp. 1342, 1359–1360 (Mass. 1979), aff'd in part and rev'd in part, 634 F. 2d 650, 653 (CA1 1980). Sometimes called "major tranquilizers," these compounds were introduced into psychiatry in the early 1950's. See Cole & Davis, Antipsychotic Drugs, in 2 A. Freedman, H. Kaplan, & B. Sadock, Comprehensive Textbook of Psychiatry II, pp. 1921–1922 (2d ed. 1975). It is not disputed that such drugs are "mind-altering." Their effectiveness resides in their capacity to achieve such effects. Citing authorities, petitioners assert that such drugs are essential not only to the treatment of individual disorders, but also to the preservation of institutional order generally needed for effective therapy. See Brief for Petitioners 17–41, 54–100. Respondents dispute this claim, also with support from medical authorities. Respondents also emphasize that antipsychotic drugs carry a significant risk of adverse side effects. These include such neurological syndromes as parkinsonisms, characterized by a mask-like face, retarded volitional movements, and tremors; akathisia, a clinical term for restlessness; dystonic reactions, including grimacing and muscle spasms; and tardive dyskinesia, a disease characterized in its mild form by involuntary muscle movements, especially around the mouth. Tardive dyskinesia can be even more disabling in its most severe forms. See *Rogers* v. *Okin*, 478 F. Supp., at 1360; Byck, Drugs and the Treatment of Psychiatric Disorders, in L. Goodman & A. Gilman, The Pharmalogical Basis of Therapeutics 152, 169 (5th ed. 1975).

administration of these drugs violated rights protected by the Constitution of the United States, the plaintiffs—respondents here—sought compensatory and punitive damages and injunctive relief.[2]

The District Court certified the case as a class action. See *Rogers* v. *Okin*, 478 F. Supp. 1342, 1352, n. 1 (Mass. 1979). Although denying relief in damages, the court held that mental patients enjoy constitutionally protected liberty and privacy interests in deciding for themselves whether to submit to drug therapy.[3] The District Court found that an involuntary "commitment" provides no basis for an inference of legal "incompetency" to make this decision under Massachusetts law. *Id.*, at 1361–1362.[4] Until a judicial finding of

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[2] The respondents also presented constitutional and statutory challenges to a hospital policy of secluding patients against their will. 478 F. Supp., at 1352. Their complaint additionally asserted claims for damages under state tort law. *Id.*, at 1352, 1383. The District Court held that state law prevented seclusion except where necessary to prevent violence. See *id.*, at 1371, 1374. Neither this decision, nor the denial of relief on the damages claims, is in issue before this Court.

[3] The District Court characterized liberty to make "the intimate decision as to whether to accept or refuse [antipsychotic] medication" as "basic to any right of privacy" and therefore protected by the Constitution. See *id.*, at 1366. The court did not derive this right from any particular constitutional provision, although it did observe that the "concept of a right of privacy . . . embodies First Amendment concerns." *Ibid.* In relying on the First Amendment the court reasoned that "the power to produce ideas is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." *Id.*, at 1367.

[4] Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician. See, *e. g.*, *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 738–739, 370 N. E. 2d 417, 424 (1977); W. Prosser, Law of Torts § 18 (4th ed. 1971). In this case the petitioners had argued—as they continue to argue—that the judicial commitment proceedings conducted under Massachusetts law, Mass. Gen. Laws Ann., ch. 123 (West Supp. 1982–1983), provide a determination of incompetency sufficient to warrant the State in providing treatment over the objections of the patient. In rejecting this argument

incompetency has been made, the court concluded, the wishes of the patients generally must be respected. *Id.*, at 1365–1368. Even when a state court has rendered a determination of incompetency, the District Court found that the patient's right to make treatment decisions is not forfeited, but must be exercised on his behalf by a court-appointed guardian. *Id.*, at 1364. Without consent either by the patient or his guardian, the court held, the patient's liberty interests may be overridden only in an emergency.[5]

The Court of Appeals for the First Circuit affirmed in part and reversed in part. *Rogers* v. *Okin*, 634 F. 2d 650 (1980). It agreed that mental patients have a constitutionally protected interest in deciding for themselves whether to undergo treatment with antipsychotic drugs. *Id.*, at 653.[6] It

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as a matter of state law, the District Court relied principally on the language of the relevant Massachusetts statutes and on the regulations of the Department of Mental Health. See 478 F. Supp., at 1359, 1361 (citing Department of Mental Health Regulation § 221.02 ("No person shall be deprived of the right to manage his affairs . . . solely by reason of his admission or commitment to a facility except where there has been an adjudication that such person is incompetent"), and Mass. Gen. Laws Ann., ch. 123, § 25 (West Supp. 1982–1983) ("No person shall be deemed to be incompetent to manage his affairs . . . solely by reason of his admission or commitment in any capacity . . ."). The court also appears to have engaged in independent factfinding leading to the same conclusion: "The weight of the evidence persuades this court that, although committed mental patients do suffer at least some impairment of their relationship to reality, most are able to appreciate the benefits, risks, and discomfort that may reasonably be expected from receiving psychotropic medication." 478 F. Supp., at 1361.

[5] The District Court defined an emergency as a situation in which failure to medicate "would result in a substantial likelihood of physical harm to th[e] patient, other patients, or to staff members of the institution." *Id.*, at 1365.

[6] The Court of Appeals termed it "intuitively obvious" that "a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." 634 F. 2d, at 653. Although the Court of Appeals found that the "precise textual source in the Constitution for the protection of this inter-

also accepted the trial court's conclusion that Massachusetts law recognizes involuntarily committed persons as presumptively competent to assert this interest on their own behalf. See *id.*, at 657–659. The Court of Appeals reached different conclusions, however, as to the circumstances under which state interests might override the liberty interests of the patient.

The Court of Appeals found that the State has two interests that must be weighed against the liberty interests asserted by the patient: a police power interest in maintaining order within the institution and in preventing violence, see *id.*, at 655, and a *parens patriae* interest in alleviating the sufferings of mental illness and in providing effective treatment, see *id.*, at 657. The court held that the State, under its police powers, may administer medication forcibly only upon a determination that "the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual" and that "reasonable alternatives to the administration of antipsychotics [have been] ruled out." *Id.*, at 656. Criticizing the District Court for imposing what it regarded as a more rigid standard, the Court of Appeals held that a hospital's professional staff must have substantial discretion in deciding when an impending emergency requires involuntary medication.[7] The Court of Appeals reserved to the District Court, on remand, the task of developing mechanisms to ensure that staff decisions under the

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est is unclear," *ibid.*, it concluded that "a source in the Due Process Clause of the Fourteenth Amendment for the protection of this interest exists, most likely as part of the penumbral right to privacy, bodily integrity, or personal security." *Ibid.* The Court of Appeals found it unnecessary to examine the conclusion of the District Court that First Amendment interests also were implicated.

[7] The Court of Appeals held that the District Court had erred in requiring what it construed as an overly simplistic mathematical calculation of the "quantitative" likelihood of harm. See *id.*, at 656.

"police power" standard accord adequate procedural protection to "the interests of the patients."[8]

With respect to the State's *parens patriae* powers, the Court of Appeals accepted the District Court's state-law distinction between patients who have and patients who have not been adjudicated incompetent. Where a patient has not been found judicially to be "incompetent" to make treatment decisions under Massachusetts law,[9] the court ruled that the *parens patriae* interest will justify involuntary medication only when necessary to prevent further deterioration in the patient's mental health. See *id.*, at 660. The Court of Appeals reversed the District Court's conclusion that a guardian must be appointed to make nonemergency treatment decisions on behalf of incompetent patients. Even for incompetent patients, however, it ruled that the State's *parens patriae* interest would justify prescription only of such treatment as would be accepted voluntarily by "the individual himself . . . were he competent" to decide. *Id.*, at 661.[10]

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[8] It asserted, apparently as a minimum, that "the determination that medication is necessary must be made by a qualified physician as to each individual patient to be medicated." *Ibid.*

[9] A number of other States also distinguish between the standards governing involuntary commitment and those applying to determinations of incompetency to make treatment decisions. For a survey as of December 1, 1977, see Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 Nw. U. L. Rev. 461, 504–525 (1977). The Court of Appeals for the Second Circuit has held that civil commitment does not raise even a presumption of incompetence. See *Winters* v. *Miller*, 446 F. 2d 65 (1971).

[10] In imposing this "substituted judgment" standard the Court of Appeals appears to have viewed its holding as mandated by the Federal Constitution. See 634 F. 2d, at 661 ("In so holding, we do not imply that the Constitution . . ."). But it followed its ultimate substantive conclusion with a citation to a Massachusetts case: "*cf. Superintendent of Belchertown* v. *Saikewicz*," 373 Mass. 728, 370 N. E. 2d 417 (1977). *Saikewicz* held that a court must apply the "substituted judgment" standard in determining whether to approve painful medical treatment for a profoundly retarded

The Court of Appeals held that the patient's interest in avoiding undesired drug treatment generally must be protected procedurally by a judicial determination of "incompetency."[11] If such a determination were made, further on-the-scene procedures still would be required before antipsychotic drugs could be administered forcibly in a particular instance. *Ibid.*[12]

Because the judgment of the Court of Appeals involved constitutional issues of potentially broad significance,[13] we granted certiorari. *Orkin* v. *Rogers*, 451 U. S. 906 (1981).

II

A

The principal question on which we granted certiorari is whether an involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic

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man incapable of giving informed consent. In *Saikewicz* the Massachusetts Supreme Judicial Court appears to have relied on both the Federal Constitution and the law of Massachusetts to support its decision. See *id.*, at 738–741, 370 N. E. 2d, at 424–425. But the Massachusetts court characterized its analysis as having identified a "constitutional right of privacy," *id.*, at 739, 370 N. E. 2d, at 424, thus creating some doubt as to the extent that the decision had an independent state-law basis.

[11] The Court of Appeals appears to have agreed with the District Court that this determination, under Massachusetts law, would require a decision by the probate court under Mass. Gen. Laws Ann., ch. 123, § 25 (West Supp. 1982–1983); see ch. 201, §§ 1, 6, 12 (West Supp. 1982–1983) (appointment and powers of guardians). It suggested, however, that nonjudicial procedures would satisfy the federal constitutional requirements of due process. See 634 F. 2d, at 659–660.

[12] The Court of Appeals again instructed the District Court to develop procedural safeguards adequate to protect the patient's substantive interests. See *id.*, at 661.

[13] Constitutional questions involving the rights of committed mental patients to refuse antipsychotic drugs have been presented in other recent cases, including *Rennie* v. *Klein*, 653 F. 2d 836 (CA3 1981), and *Davis* v. *Hubbard*, 506 F. Supp. 915 (ND Ohio 1980). On the issues raised, see generally Plotkin, *supra;* Shapiro, Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies, 47 S. Cal. L. Rev. 237 (1974).

drugs.[14] This question has both substantive and procedural aspects. See 634 F. 2d, at 656, 661; *Rennie* v. *Klein*, 653 F. 2d 836, 841 (CA3 1981). The parties agree that the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs.[15] Assuming that they are correct in this respect, the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. See *Youngberg* v. *Romeo*, *post*, at 319–320; *Bell* v. *Wolfish*, 441 U. S. 520, 560 (1979); *Roe* v. *Wade*, 410 U. S. 113, 147–154 (1973); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25–27 (1905). The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See *Parham* v. *J. R.*, 442 U. S. 584, 606 (1979); *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

As a practical matter both the substantive and procedural issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's federally protected liberty interest without reference to state law.[16] Having done so, it then might proceed to adjudicate the procedural protection required by the Due Process Clause for the federal interest alone. Cf. *Vitek* v. *Jones*, 445

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[14] Pet. for Cert. 1.

[15] In this Court petitioners appear to concede that involuntarily committed mental patients have a constitutional interest in freedom from bodily invasion, see Brief for Petitioners 43–47, but they deny that this interest is "fundamental." They also assert that it is outweighed in an appropriate balancing test by compelling state interests in administering antipsychotic drugs. *Id.*, at 54–68.

[16] As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution, cf. *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only "assuming" the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests.

U. S. 480, 491–494 (1980). For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7, 12 (1979); *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975); see also Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). If so, the broader state protections would define the actual substantive rights possessed by a person living within that State.

Where a State creates liberty interests broader than those protected directly by the Federal Constitution, the procedures mandated to protect the federal substantive interests also might fail to determine the actual procedural rights and duties of persons within the State. Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, see, *e. g.*, *Vitek* v. *Jones*, *supra*, at 488; *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, at 7, the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law. Moreover, a State may confer *procedural* protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. If a State does so, the minimal requirements of the Federal Constitution would not be controlling, and would not need to be identified in order to determine the legal rights and duties of persons within that State.

B

Roughly five months after the Court of Appeals decided this case, and shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts announced its deci-

sion in *Guardianship of Roe*, 383 Mass. ——, 421 N. E. 2d 40 (1981) *(Roe)*. *Roe* involved the right of a noninstitutionalized but mentally incompetent person to refuse treatment with antipsychotic drugs. Expressly resting its decision on the common law of Massachusetts as well as on the Federal Constitution,[17] Massachusetts' highest court held in *Roe* that a person has a protected liberty interest in "'decid[ing] for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs.'" *Id.*, at ——, n. 9, 421 N. E. 2d, at 51, n. 9.[18] The court found—again apparently on the basis of the common law of Massachusetts as well as the Constitution of the United States—that this interest of the individual is of such importance that it can be overcome only by "an overwhelming State interest." *Id.*, at ——, 421 N. E. 2d, at 51. *Roe* further held that a person does not forfeit his protected liberty interest by virtue of becoming incompetent, but rather remains entitled to have his "substituted judgment" exercised on his behalf. *Ibid.* Defining this "substituted judgment" as one for which "[n]o medical expertise is required," *id.*, at ——, 421 N. E. 2d, at 52, the Massachusetts Supreme Judicial Court required a *judicial* determination of substituted judgment before drugs

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[17] See 383 Mass., at ——, and n. 1, ——, n. 9, 421 N. E. 2d, at 42, and n. 1, 51, n. 9.

[18] Although the Massachusetts court quoted this formulation from the decision of the Court of Appeals in *Rogers* v. *Okin*, 634 F. 2d, at 653, the quotation is used to define the right, rather than to identify its legal source. *Roe* noted that *Rogers* v. *Okin* found the source of this right in the Due Process Clause of the Fourteenth Amendment. The court continued its discussion by stating its reliance on three bases, two of them not cited in *Rogers* v. *Okin:* the "inherent power of the court to prevent mistakes or abuses by guardians, whose authority comes from the Commonwealth," and the "common law" right of persons to decide what will be done with their bodies. 383 Mass., at ——, n. 9, 421 N. E. 2d, at 51, n. 9.

could be administered in a particular instance,[19] except possibly in cases of medical emergency.[20]

C

The Massachusetts Supreme Court stated that its decision was limited to cases involving *noninstitutionalized* mental patients. See *id.*, at ——, ——, ————, 421 N. E. 2d, at 42, 55, 61–62.[21] Nonetheless, respondents have argued in

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[19] See *id.*, at ——, 421 N. E. 2d, at 52:

"The determination of what the incompetent individual would do if competent will probe the incompetent individual's values and preferences, and such an inquiry, in a case involving antipsychotic drugs [and a noninstitutionalized but incompetent patient], is best made in courts of competent jurisdiction."

Having held that a "ward possesses but is incapable of exercising personally" the right to refuse antipsychotic drugs, the Massachusetts Supreme Court viewed the "primary dispute" as over "who ought to exercise this right on behalf of the ward." *Id.*, at ——, 421 N. E. 2d, at 51. The Supreme Judicial Court in *Roe* identified six "relevant" but "not exclusive" factors that should guide the decisions of the lower courts: "(1) the ward's expressed preferences regarding treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." *Id.*, at ——, 421 N. E. 2d, at 57. It emphasized that the determination "must 'give the fullest possible expression to the character and circumstances'" of the individual patient and that "this is a subjective rather than an objective determination." *Id.*, at ——, 421 N. E. 2d, at 56 (citation and footnote omitted).

[20] See *id.*, at ————, 421 N. E. 2d, at 54–55.

[21] But cf. *id.*, at ——, 421 N. E. 2d, at 50 ("because of the likelihood of . . . the necessity of making similar determinations in other cases, we establish guidelines regarding the criteria to be used and the procedures to be followed in making a substituted judgment determination"), and *id.*, at ——, 421 N. E. 2d, at 62 ("We do not mean to imply that these [involuntarily committed] patients' rights are wholly unprotected or that their circumstances are entirely dissimilar to those we have discussed. We do suggest, however, that it would be imprudent to establish prematurely the relative importance of adverse interests . . .").

this Court that *Roe* may influence the correct disposition of the case at hand.[22] We agree.

Especially in the wake of *Roe*, it is distinctly possible that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States. Compare *Roe, supra*, at ——, 421 N. E. 2d, at 51 (protected liberty interest in avoiding unwanted treatment continues even when a person becomes incompetent and creates a right of incompetents to have their "substituted judgment" determined), with *Addington* v. *Texas*, 441 U. S. 418, 429–430 (1979) (because a person "who is suffering from a debilitating mental illness" is not "wholly at liberty," and because the complexities of psychiatric diagnosis "render certainties virtually beyond reach," "practical considerations" may require "a compromise between what it is possible to prove and what protects the rights of the individual"). If the state interest is broader, the *substantive* protection that the Constitution affords against the involuntary administration of antipsychotic drugs would not determine the actual substantive rights and duties of persons in the State of Massachusetts.

Procedurally, it also is quite possible that a Massachusetts court, as a matter of state law, would require greater protection of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause. Compare *Roe, supra*, at ——, 421 N. E. 2d, at 51 ("We have . . . stated our preference for judicial resolution of certain legal issues arising from proposed extraordinary medical treatment . . ."), with *Youngberg* v. *Romeo, post*, at 322–323 ("[T]here certainly is no reason to think judges or juries are better

[22] Respondents first presented this argument in a motion to dismiss or in the alternative to certify certain questions to the Supreme Judicial Court of Massachusetts, filed in this Court on October 1, 1981. In their brief on the merits, respondents argue that *Roe* provides an alternative basis on which this Court could affirm the judgment of the Court of Appeals.

qualified than appropriate professionals in making [treatment] decisions"), and with *Parham* v. *J. R.*, 442 U. S., at 608, n. 16 (Courts must not "unduly burde[n] the legitimate efforts of the states to deal with difficult social problems. The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise").[23] Again on this hypothesis state law would be dispositive of the procedural rights and duties of the parties to this case.

Finally, even if state procedural law itself remains unchanged by *Roe*, the federally mandated procedures will depend on the nature and weight of the *state* interests, as well as the individual interests, that are asserted. To identify the nature and scope of state interests that are to be balanced against an individual's liberty interests, this Court may look to state law. See, *e. g.*, *Roe* v. *Wade*, 410 U. S., at 148, and n. 42, 151, and nn. 48–50; *Ingraham* v. *Wright*, 430 U. S. 651, 661–663 (1977). Here we view the underlying state-law predicate for weighing asserted state interests as being put into doubt, if not altered, by *Roe*.[24]

D

It is unclear on the record presented whether respondents, in the District Court, did or did not argue the existence of "substantive" state-law liberty interests as a basis for their

[23] Even prior to *Roe*, the Court of Appeals concluded that Massachusetts state law, which it construed as requiring *judicial* determinations of incompetency separate from involuntary commitment proceedings, see 634 F. 2d, at 658–659, "in many respects . . . goes well beyond the minimum requirements mandated by the Fourteenth Amendment," *id.*, at 659 (footnote omitted). *Roe* now has taken the further step of requiring *judicial* procedure in every instance in which a guardian believes drug therapy necessary for a noninstitutionalized incompetent.

[24] In *Roe* the Massachusetts court explicitly considered the implicated state interests, see 383 Mass., at ——, 421 N. E. 2d, at 59, and concluded that the trial judge had erred in finding that the State had a "vital" *parens patriae* interest in "seeing that its residents function at the maximum level of their capacity," *ibid.* The Court of Appeals in this case had found and weighed a *parens patriae* interest. 634 F. 2d, at 657–661.

claim to procedural protection under the federal Due Process Clause, or whether they may have claimed state-law procedural protections for substantive federal interests.[25] In their brief in this Court, however, respondents clearly assert state-law arguments as alternative grounds for affirming both the "substantive" and "procedural" decisions of the Court of Appeals. See Brief for Respondents, especially at 61, 71–72, 92–95.

Until certain questions have been answered, we think it would be inappropriate for us to attempt to weigh or even to identify relevant liberty interests that might be derived directly from the Constitution, independently of state law. It is this Court's settled policy to avoid unnecessary decisions of constitutional issues. See, *e. g.*, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294 (1982); *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 582–583, n. 22 (1979); *Poe* v. *Ullman*, 367 U. S. 497, 502–509 (1961); *Ashwander* v. *TVA*, 297 U. S. 288, 341, 347–348 (1936) (Brandeis, J., concurring). This policy is supported, although not always required, by the prohibition against advisory opinions. Cf. *United States* v. *Hastings*, 296 U. S. 188, 193 (1935) (review of one basis for a decision supported by another basis not subject to examination would represent "an expression of an abstract opinion").

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[25] Although relying primarily on federal constitutional grounds, the respondents' original complaint in the District Court could be construed as raising state-law guarantees either as alternative or as interrelated bases for relief. See Complaint in No. 75–1610–T (D. Mass.) (filed Apr. 27, 1975). In their briefs in the Court of Appeals, respondents relied unambiguously on state law in support of both the "substantive" and "procedural" rights that they now claim in this Court. See Brief for Plaintiff-Appellants in No. 79–1649, p. 44 ("Massachusetts law created a legal entitlement to be free from forced medications except in emergencies . . ."); Brief for Plaintiff-Appellees in No. 79–1648, p. 54 ("[T]he lower court's requirement that a guardian must decide whether an incompetent patient will receive psychotropic medication in a non-emergency was the correct application of state law and was not based upon constitutional authority") (emphasis omitted).

In applying this policy of restraint, we are uncertain here which if any constitutional issues now must be decided to resolve the controversy between the parties. In the wake of *Roe*, we cannot say with confidence that adjudication based solely on identification of federal constitutional interests would determine the actual rights and duties of the parties before us. And, as an additional cause for hesitation, our reading of the opinion of the Court of Appeals has left us in doubt as to the extent to which state issues were argued below and the degree to which the court's holdings may rest on subsequently altered state-law foundations.

Because of its greater familiarity both with the record and with Massachusetts law, the Court of Appeals is better situated than we to determine how *Roe* may have changed the law of Massachusetts and how any changes may affect this case. Accordingly, we think it appropriate for the Court of Appeals to determine in the first instance whether *Roe* requires revision of its holdings or whether it may call for the certification of potentially dispositive state-law questions to the Supreme Judicial Court of Massachusetts, see *Bellotti* v. *Baird*, 428 U. S. 132, 150–151 (1976).[26] The Court of Appeals also may consider whether this is a case in which abstention now is appropriate. See generally *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813–819 (1976).

The judgment of the Court of Appeals is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[26] A certification procedure is provided by Mass. Rules of Court, Sup. Jud. Ct. Rule 1:03.

YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. v. ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1429. Argued January 11, 1982—Decided June 18, 1982

Respondent, who is mentally retarded, was involuntarily committed to a Pennsylvania state institution. Subsequently, after becoming concerned about injuries which respondent had suffered at the institution, his mother filed an action as his next friend in Federal District Court for damages under 42 U. S. C. § 1983 against petitioner institution officials. She claimed that respondent had constitutional rights to safe conditions of confinement, freedom from bodily restraint, and training or "habilitation" and that petitioners knew, or should have known, about his injuries but failed to take appropriate preventive procedures, thus violating his rights under the Eighth and Fourteenth Amendments. In the ensuing jury trial, the District Court instructed the jury on the assumption that the Eighth Amendment was the proper standard of liability, and a verdict was returned for petitioners, on which judgment was entered. The Court of Appeals reversed and remanded for a new trial, holding that the Fourteenth, rather than the Eighth, Amendment provided the proper constitutional basis for the asserted rights.

Held: Respondent has constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by these interests. Whether respondent's constitutional rights have been violated must be determined by balancing these liberty interests against the relevant state interests. The proper standard for determining whether the State has adequately protected such rights is whether professional judgment in fact was exercised. And in determining what is "reasonable," courts must show deference to the judgment exercised by a qualified professional, whose decision is presumptively valid. Pp. 314-325.

644 F. 2d 147, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN and O'CONNOR, JJ., joined, *post*, p. 325. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 329.

David H. Allshouse, Deputy Attorney General of Pennsylvania, argued the cause for petitioners. With him on the briefs were *Leroy S. Zimmerman*, Attorney General, and *Robert B. Hoffman* and *Allen C. Warshaw*, Deputy Attorneys General.

Edmond A. Tiryak argued the cause for respondent. With him on the brief were *Ralph J. Moore, Jr.*, and *William F. Sheehan.**

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*A brief for the State of Connecticut et al. as *amici curiae* urging reversal was filed by *Carl R. Ajello*, Attorney General of Connecticut, and *Hugh Barber*, *Richard T. Couture*, and *Francis J. Mac Gregor*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, and *R. Emmett Poundstone III*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Assistant Attorney General, *Steve Clark*, Attorney General of Arkansas, and *Robert R. Ross*, Deputy Attorney General, *Jim Smith*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Paul L. Douglas*, Attorney General of Nebraska, *Gregory H. Smith*, Attorney General of New Hampshire, *James R. Zazzali*, Attorney General of New Jersey, *Robert O. Wefald*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *David B. Frohnmayer*, Attorney General of Oregon, *Dennis J. Roberts II*, Attorney General of Rhode Island, *Daniel R. McLeod*, Attorney General of South Carolina, *Marshall Coleman*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Chauncey H. Browning, Jr.*, Attorney General of West Virginia.

Briefs of *amici curiae* urging affirmance were filed by *Margaret F. Ewing*, *Paul R. Friedman*, and *Jane Bloom Yohalem* for the American Orthopsychiatric Association et al.; and by *Dan Stormer* and *Mary Burdick* for Mental Health Advocacy Services et al.

H. Bartow Farr III filed a brief for the American Psychiatric Association as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether respondent, involuntarily committed to a state institution for the mentally retarded, has substantive rights under the Due Process Clause of the Fourteenth Amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation."[1] Respondent sued under 42 U. S. C. § 1983 three administrators of the institution, claiming damages for the alleged breach of his constitutional rights.

I

Respondent Nicholas Romeo is profoundly retarded. Although 33 years old, he has the mental capacity of an 18-month-old child, with an I. Q. between 8 and 10. He cannot talk and lacks the most basic self-care skills. Until he was 26, respondent lived with his parents in Philadelphia. But after the death of his father in May 1974, his mother was unable to care for him. Within two weeks of the father's death, respondent's mother sought his temporary admission to a nearby Pennsylvania hospital.

Shortly thereafter, she asked the Philadelphia County Court of Common Pleas to admit Romeo to a state facility on a permanent basis. Her petition to the court explained that she was unable to care for Romeo or control his violence.[2] As part of the commitment process, Romeo was examined by a physician and a psychologist. They both certified that re-

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[1] The American Psychiatric Association explains: "The word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." Brief for American Psychiatric Association as *Amicus Curiae* 4, n. 1.

[2] Mrs. Romeo's petition to the Court of Common Pleas stated: "Since my husband's death I am unable to handle him. He becomes violent—Kicks, punches, breaks glass; He can't speak—wants to express himself but can't. He is [a] constant 24 hr. care. [W]ithout my husband I am unable to care for him." App. 18a.

spondent was severely retarded and unable to care for himself. App. 21a–22a and 28a–29a. On June 11, 1974, the Court of Common Pleas committed respondent to the Pennhurst State School and Hospital, pursuant to the applicable involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act, Pa. Stat. Ann., Tit. 50, § 4406(b) (Purdon 1969).

At Pennhurst, Romeo was injured on numerous occasions, both by his own violence and by the reactions of other residents to him. Respondent's mother became concerned about these injuries. After objecting to respondent's treatment several times, she filed this complaint on November 4, 1976, in the United States District Court for the Eastern District of Pennsylvania as his next friend. The complaint alleged that "[d]uring the period July, 1974 to the present, plaintiff has suffered injuries on at least sixty-three occasions." The complaint originally sought damages and injunctive relief from Pennhurst's director and two supervisors;[3] it alleged that these officials knew, or should have known, that Romeo was suffering injuries and that they failed to institute appropriate preventive procedures, thus violating his rights under the Eighth and Fourteenth Amendments.

Thereafter, in late 1976, Romeo was transferred from his ward to the hospital for treatment of a broken arm. While in the infirmary, and by order of a doctor, he was physically restrained during portions of each day.[4] These restraints were ordered by Dr. Gabroy, not a defendant here, to protect

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[3] Petitioner Duane Youngberg was the Superintendent of Pennhurst; he had supervisory authority over the entire facility. Petitioner Richard Matthews was the Director of Resident Life at Pennhurst. Petitioner Marguerite Conley was Unit Director for the unit in which respondent lived. According to respondent, petitioners are administrators, not medical doctors. See Brief for Respondent 2. Youngberg and Matthews are no longer at Pennhurst.

[4] Although the Court of Appeals described these restraints as "shackles," "soft" restraints, for the arms only, were generally used. 7 Tr. 53–55.

Romeo and others in the hospital, some of whom were in traction or were being treated intravenously. 7 Tr. 40, 49, 76–78. Although respondent normally would have returned to his ward when his arm healed, the parties to this litigation agreed that he should remain in the hospital due to the pending lawsuit. 5 *id.*, at 248; 6 *id.*, at 57–58 and 137. Nevertheless, in December 1977, a second amended complaint was filed alleging that the defendants were restraining respondent for prolonged periods on a routine basis. The second amended complaint also added a claim for damages to compensate Romeo for the defendants' failure to provide him with appropriate "treatment or programs for his mental retardation."[5] All claims for injunctive relief were dropped prior to trial because respondent is a member of the class seeking such relief in another action.[6]

An 8-day jury trial was held in April 1978. Petitioners introduced evidence that respondent participated in several programs teaching basic self-care skills.[7] A comprehensive behavior-modification program was designed by staff members to reduce Romeo's aggressive behavior,[8] but that program was never implemented because of his mother's objec-

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[5] Respondent uses "treatment" as synonymous with "habilitation" or "training." See Brief for Respondent 21–23.

[6] *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981) (remanded for further proceedings).

[7] Prior to his transfer to Pennhurst's hospital ward, Romeo participated in programs dealing with feeding, showering, drying, dressing, self-control, and toilet training, as well as a program providing interaction with staff members. Defendants' Exhibit 10; 3 Tr. 69–70; 5 *id.*, at 44–56, 242–250; 6 *id.*, at 162–166; 7 *id.*, at 41–48.

Some programs continued while respondent was in the hospital, 5 *id.*, at 227, 248, 256; 6 *id.*, at 50, 162–166; 6 *id.*, at 32, 34, 41–48, and they reduced respondent's aggressive behavior to some extent, 7 *id.*, at 45.

[8] 2 *id.*, at 7; 5 *id.*, at 88–90; 6 *id.*, at 88, 200–203; Defendants' Exhibit 1, p. 9. The program called for short periods of separation from other residents and for use of "muffs" on plaintiff's hands for short periods of time, *i. e.*, five minutes, to prevent him from harming himself or others.

tions.[9] Respondent introduced evidence of his injuries and of conditions in his unit.[10]

At the close of the trial, the court instructed the jury that "if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo," such failure deprived him of constitutional rights. App. 73a. The jury also was instructed that if the defendants shackled Romeo or denied him treatment "as a punishment for filing this lawsuit," his constitutional rights were violated under the Eighth Amendment. *Id.*, at 73a–75a. Finally, the jury was instructed that only if they found the defendants "deliberate[ly] indifferen[t] to the serious medical [and psychological] needs" of Romeo could they find that his Eighth and Fourteenth Amendment rights had been violated. *Id.*, at 74a–75a.[11] The jury returned a verdict for the defendants, on which judgment was entered.

The Court of Appeals for the Third Circuit, sitting en banc, reversed and remanded for a new trial. 644 F. 2d 147 (1980). The court held that the Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed. Rather, the Fourteenth Amendment and the liberty interest protected by that Amendment provided the proper constitutional basis for these rights. In ap-

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[9] 1 Tr. 53; 4 *id.*, at 25; 6 *id.*, at 204.

[10] The District Judge refused to allow testimony by two of Romeo's witnesses—trained professionals—indicating that Romeo would have benefitted from more or different training programs. The trial judge explained that evidence of the advantages of alternative forms of treatment might be relevant to a malpractice suit, but was not relevant to a constitutional claim under § 1983. App. to Pet. for Cert. 101.

[11] The "deliberate indifference" standard was adopted by this Court in *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976), a case dealing with prisoners' rights to punishment that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to *Estelle* v. *Gamble* in charging the jury, it erroneously used the deliberate-indifference standard articulated in that case. See App. 45a, 75a.

plying the Fourteenth Amendment, the court found that the involuntarily committed retain liberty interests in freedom of movement and in personal security. These were "fundamental liberties" that can be limited only by an "overriding, non-punitive" state interest. *Id.*, at 157–158 (footnote omitted). It further found that the involuntarily committed have a liberty interest in habilitation designed to "treat" their mental retardation. *Id.*, at 164–170.[12]

The en banc court did not, however, agree on the relevant standard to be used in determining whether Romeo's rights had been violated.[13] Because physical restraint "raises a presumption of a punitive sanction," the majority of the Court of Appeals concluded that it can be justified only by "compelling necessity." *Id.*, at 159–160 (footnote omitted). A somewhat different standard was appropriate for the failure to provide for a resident's safety. The majority considered that such a failure must be justified by a showing of "substantial necessity." *Id.*, at 164. Finally, the majority held that when treatment has been administered, those responsible are liable only if the treatment is not "acceptable in the light of present medical or other scientific knowledge." *Id.*, at 166–167 and 173.[14]

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[12] The Court of Appeals used "habilitation" and "treatment" as synonymous, though it regarded "habilitation" as more accurate in describing treatment needed by the mentally retarded. See 644 F. 2d, at 165, and n. 40.

[13] The existence of a qualified immunity defense was not at issue on appeal. The defendants had received instructions on this defense, App. 76a, and it was not challenged by respondent. 644 F. 2d, at 173, n. 1. After citing *Pierson* v. *Ray*, 386 U. S. 547 (1967), and *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the majority of the Court of Appeals noted that such instructions should be given again on the remand. 644 F. 2d, at 171–172.

[14] Actually, the court divided the right-to-treatment claim into three categories and adopted three standards, but only the standard described in text is at issue before this Court. The Court of Appeals also stated that if a jury finds that *no* treatment has been administered, it may hold the institution's administrators liable unless they can provide a compelling explana-

Chief Judge Seitz, concurring in the judgment, considered the standards articulated by the majority as indistinguishable from those applicable to medical malpractice claims. In Chief Judge Seitz' view, the Constitution "only requires that the courts make certain that professional judgment in fact was exercised." *Id.*, at 178. He concluded that the appropriate standard was whether the defendants' conduct was "such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment." *Ibid.*[15]

We granted the petition for certiorari because of the importance of the question presented to the administration of state institutions for the mentally retarded. 451 U. S. 982 (1981).

II

We consider here for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution.[16] In this

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tion for the lack of treatment, *id.*, at 165, 173, but respondent does not discuss this precise standard in his brief and it does not appear to be relevant to the facts of this case. In addition, the court considered "least intrusive" analysis appropriate to justify severe intrusions on individual dignity, such as permanent physical alteration or surgical intervention, *id.*, at 165–166 and 173, but respondent concedes that this issue is not present in this case.

[15] Judge Aldisert joined Chief Judge Seitz' opinion, but wrote separately to emphasize the nature of the difference between the majority opinion and that of the Chief Judge. On a conceptual level, Judge Aldisert thought that the court erred in abandoning the common-law method of deciding the case at bar rather than articulating broad principles unconnected with the facts of the case and of uncertain meaning. *Id.*, at 182–183. And, on a pragmatic level, Judge Aldisert warned that neither juries nor those administering state institutions would receive guidance from the "amorphous constitutional law tenets" articulated in the majority opinion. *Id.*, at 184. See *id.*, at 183–185.

Judge Garth also joined Chief Judge Seitz' opinion, and wrote separately to criticize the majority for addressing issues not raised by the facts of this case. *Id.*, at 186.

[16] In pertinent part, that Amendment provides that a State cannot de-

case, respondent has been committed under the laws of Pennsylvania, and he does not challenge the commitment. Rather, he argues that he has a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights by failing to provide constitutionally required conditions of confinement.

The mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment. See, *e. g.*, *Vitek* v. *Jones*, 445 U. S. 480, 491–494 (1980). Indeed, the State concedes that respondent has a right to adequate food, shelter, clothing, and medical care.[17] We must decide whether liberty interests also exist in safety, freedom of movement, and training. If such interests do exist, we must further decide whether they have been infringed in this case.

A

Respondent's first two claims involve liberty interests recognized by prior decisions of this Court, interests that involuntary commitment proceedings do not extinguish.[18] The first is a claim to safe conditions. In the past, this Court has noted that the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977). And that right is not extinguished by lawful confinement, even for penal purposes. See *Hutto* v. *Finney*, 437 U. S. 678 (1978). If it is cruel and unusual punishment to

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prive "any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

Respondent no longer relies on the Eighth Amendment as a direct source of constitutional rights. See Brief for Respondent 13, n. 12.

[17] Brief for Petitioners 8, 11, 12, and n. 10; Brief for Respondent 15–16. See also Brief for State of Connecticut et al. as *Amici Curiae* 8. Petitioners argue that they have fully protected these interests.

[18] Petitioners do not appear to argue to the contrary. See Brief for Petitioners 27–31.

hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.

Next, respondent claims a right to freedom from bodily restraint. In other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 18 (1979) (POWELL, J., concurring in part and dissenting in part). This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment.

B

Respondent's remaining claim is more troubling. In his words, he asserts a "constitutional right to minimally adequate habilitation." Brief for Respondent 8, 23, 45. This is a substantive due process claim that is said to be grounded in the liberty component of the Due Process Clause of the Fourteenth Amendment.[19] The term "habilitation," used in psychiatry, is not defined precisely or consistently in the opinions below or in the briefs of the parties or the *amici*.[20] As

[19] Respondent also argues that because he was committed for care and treatment under state law he has a state substantive right to habilitation, which is entitled to substantive, not procedural, protection under the Due Process Clause of the Fourteenth Amendment. But this argument is made for the first time in respondent's brief to this Court. It was not advanced in the courts below, and was not argued to the Court of Appeals as a ground for reversing the trial court. Given the uncertainty of Pennsylvania law and the lack of any guidance on this issue from the lower federal courts, we decline to consider it now. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 323, n. 1 (1977); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *Old Jordan Milling Co.* v. *Société Anonyme des Mines*, 164 U. S. 261, 264–265 (1896).

[20] Professionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible. See, *e. g.*, Favell, Risley,

noted previously, at n. 1, *supra*, the term refers to "training and development of needed skills." Respondent emphasizes that the right he asserts is for "minimal" training, see Brief for Respondent 34, and he would leave the type and extent of training to be determined on a case-by-case basis "in light of present medical or other scientific knowledge," *id.*, at 45.

In addressing the asserted right to training, we start from established principles. As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. See *Harris* v. *McRae*, 448 U. S. 297, 318 (1980) (publicly funded abortions); *Maher* v. *Roe*, 432 U. S. 464, 469 (1977) (medical treatment). When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities. See *Richardson* v. *Belcher*, 404 U. S. 78, 83–84 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 478 (1970). Nor must a State "choose between attacking every aspect of a problem or not attacking the problem at all." *Id.*, at 486–487.

Respondent, in light of the severe character of his retardation, concedes that no amount of training will make possible his release. And he does not argue that if he were still at home, the State would have an obligation to provide training at its expense. See Tr. of Oral Arg. 33. The record reveals that respondent's primary needs are bodily safety and a minimum of physical restraint, and respondent clearly claims

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Wolfe, Riddle, & Rasmussen, The Limits of Habilitation: How Can We Identify Them and How Can We Change Them?, 1 Analysis and Intervention in Developmental Disabilities 37 (1981); Bailey, Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded, 1 Analysis and Intervention in Developmental Disabilities 45 (1981); Kauffman & Krouse, The Cult of Educability: Searching for the Substance of Things Hoped for; The Evidence of Things Not Seen, 1 Analysis and Intervention in Developmental Disabilities 53 (1981).

training related to these needs.[21] As we have recognized that there is a constitutionally protected liberty interest in safety and freedom from restraint, *supra*, at 315–316, training may be necessary to avoid unconstitutional infringement of those rights. On the basis of the record before us, it is quite uncertain whether respondent seeks any "habilitation" or training unrelated to safety and freedom from bodily restraints. In his brief to this Court, Romeo indicates that even the self-care programs he seeks are needed to reduce his aggressive behavior. See Brief for Respondent 21–22, 50. And in his offer of proof to the trial court, respondent repeatedly indicated that, if allowed to testify, his experts would show that additional training programs, including self-care programs, were needed to reduce his aggressive behavior. App. to Pet. for Cert. 98a–104a.[22] If, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom.[23]

Chief Judge Seitz, in language apparently adopted by respondent, observed:

> "I believe that the plaintiff has a constitutional right to minimally adequate care and treatment. The existence

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[21] See, *e. g.*, description of complaint, *supra*, at 310.

[22] See also Brief for Appellant in No. 78–1982, pp. 11–14, 20–21, and 24 (CA3).

[23] In the trial court, respondent asserted that "state officials at a state mental hospital have a duty to provide residents . . . with such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit." App. to Pet. for Cert. 94a–95a. But this claim to a sweeping *per se* right was dropped thereafter. In his brief to this Court, respondent does not repeat it and, at oral argument, respondent's counsel explicitly disavowed any claim that respondent is constitutionally entitled to such treatment as would enable him "to achieve his maximum potential." Tr. of Oral Arg. 46–48.

> of a constitutional right to care and treatment is no longer a novel legal proposition." 644 F. 2d, at 176.

Chief Judge Seitz did not identify or otherwise define—beyond the right to reasonable safety and freedom from physical restraint—the "minimally adequate care and treatment" that appropriately may be required for this respondent.[24] In the circumstances presented by this case, and on the basis of the record developed to date, we agree with his view and conclude that respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint. In view of the kinds of treatment sought by respondent and the evidence of record, we need go no further in this case.[25]

III

A

We have established that Romeo retains liberty interests in safety and freedom from bodily restraint. Yet these in-

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[24] Chief Judge Seitz used the term "treatment" as synonymous with training or habilitation. See 644 F. 2d, at 181.

[25] It is not feasible, as is evident from the variety of language and formulations in the opinions below and the various briefs here, to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a State.

Because the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before a court. Judge Aldisert, in his concurring opinion in the court below, was critical of the "majority's abandonment of incremental decision-making in favor of promulgation of broad standards . . . [that] lac[k] utility for the groups most affected by this decision." *Id.*, at 183–184. Judge Garth agreed that reaching issues not presented by the case requires a court to articulate principles and rules of law in "the absence of an appropriate record . . . and without the benefit of analysis, argument, or briefing" on such issues. *Id.*, at 186.

terests are not absolute; indeed to some extent they are in conflict. In operating an institution such as Pennhurst, there are occasions in which it is necessary for the State to restrain the movement of residents—for example, to protect them as well as others from violence.[26] Similar restraints may also be appropriate in a training program. And an institution cannot protect its residents from all danger of violence if it is to permit them to have any freedom of movement. The question then is not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process.

In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and "the demands of an organized society." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty. In *Bell* v. *Wolfish*, 441 U. S. 520 (1979), for example, we considered a challenge to pretrial detainees' confinement conditions. We agreed that the detainees, not yet convicted of the crime charged, could not be punished. But we upheld those restrictions on liberty that were reasonably related to legitimate government objectives and not tantamount to punishment.[27] See *id.*, at 539. We have taken a

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[26] In Romeo's case, there can be no question that physical restraint was necessary at times. See n. 2, *supra*.

[27] See also *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972) (holding that an incompetent pretrial detainee cannot, after a competency hearing, be held indefinitely without either criminal process or civil commitment; due process requires, at a minimum, some rational relation between the nature and duration of commitment and its purpose). This case differs in critical respects from *Jackson*, a procedural due process case involving the validity of an involuntary commitment. Here, respondent was committed by a court on petition of his mother who averred that in view of his condition she could neither care for him nor control his violence. N. 2, *supra*. Thus,

similar approach in deciding procedural due process challenges to civil commitment proceedings. In *Parham* v. *J. R.*, 442 U. S. 584 (1979), for example, we considered a challenge to state procedures for commitment of a minor with parental consent. In determining that *procedural* due process did not mandate an adversarial hearing, we weighed the liberty interest of the individual against the legitimate interests of the State, including the fiscal and administrative burdens additional procedures would entail.[28] *Id.*, at 599–600.

Accordingly, whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests. If there is to be any uniformity in protecting these interests, this balancing cannot be left to the unguided discretion of a judge or jury. We therefore turn to consider the proper standard for determining whether a State adequately has protected the rights of the involuntarily committed mentally retarded.

B

We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." 644 F. 2d, at 178. Persons who have been involun-

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the purpose of respondent's commitment was to provide reasonable care and safety, conditions not available to him outside of an institution.

[28] See also *Addington* v. *Texas*, 441 U. S. 418 (1979). In that case, we held that the State must prove the need for commitment by "clear and convincing" evidence. See *id.*, at 431–432. We reached this decision by weighing the individual's liberty interest against the State's legitimate interests in confinement.

tarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976). At the same time, this standard is lower than the "compelling" or "substantial" necessity tests the Court of Appeals would require a State to meet to justify use of restraints or conditions of less than absolute safety. We think this requirement would place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents.

Moreover, we agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is "reasonable"—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.[29] Moreover, there certainly

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[29] See *Parham* v. *J. R.*, 442 U. S. 584, 608, n. 16 (1979) (In limiting judicial review of medical decisions made by professionals, "it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems"). See also *Rhodes* v. *Chapman*, 452 U. S. 337, 352 (1981) ("[C]ourts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system . . ."); *Bell* v. *Wolfish*, 441 U. S. 520, 539 (1979) (In the context of conditions of confinement of pretrial detainees, "[c]ourts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility"); *Wolff* v. *McDonnell*, 418 U. S. 539, 556 (1974) (In considering a pro-

is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. See *Parham* v. *J. R.*, *supra*, at 607; *Bell* v. *Wolfish*, *supra*, at 544 (Courts should not "'second-guess the expert administrators on matters on which they are better informed'"). For these reasons, the decision, if made by a professional,[30] is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.[31] In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability. See n. 13, *supra*.

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cedural due process claim in the context of prison, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application"). See also Townsend & Mattson, The Interaction of Law and Special Education: Observing the Emperor's New Clothes, 1 Analysis and Intervention in Developmental Disabilities 75 (1981) (judicial resolution of rights of the handicapped can have adverse as well as positive effects on social change).

[30] By "professional" decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.

[31] All members of the Court of Appeals agreed that respondent's expert testimony should have been admitted. This issue was not included in the questions presented for certiorari, and we have no reason to disagree with the view that the evidence was admissible. It may be relevant to whether petitioners' decisions were a substantial departure from the requisite professional judgment. See *supra*, this page.

IV

In deciding this case, we have weighed those postcommitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate. We repeat that the State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide. The State also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.

Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. Such conditions of confinement would comport fully with the purpose of respondent's commitment. Cf. *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972); see n. 27, *supra*. In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and par-

ticularly professional personnel, should not be required to make each decision in the shadow of an action for damages.

In this case, we conclude that the jury was erroneously instructed on the assumption that the proper standard of liability was that of the Eighth Amendment. We vacate the decision of the Court of Appeals and remand for further proceedings consistent with this decision.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion. I write separately, however, to make clear why I believe that opinion properly leaves unresolved two difficult and important issues.

The first is whether the Commonwealth of Pennsylvania could accept respondent for "care and treatment," as it did under the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, § 4406(b) (Purdon 1969), and then constitutionally refuse to provide him any "treatment," as that term is defined by state law. Were that question properly before us, in my view there would be a serious issue whether, as a matter of due process, the State could so refuse. I therefore do not find that issue to be a "frivolous" one, as THE CHIEF JUSTICE does, *post*, at 330, n. [1]

In *Jackson* v. *Indiana*, 406 U. S. 715 (1972), this Court, by a unanimous vote of all participating Justices, suggested a constitutional standard for evaluating the conditions of a civilly committed person's confinement: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*, at 738. Under this standard,

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[1] See also Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756, 1787–1791 (1981); *Welsch* v. *Likins*, 550 F. 2d 1122, 1126, and n. 6 (CA8 1977); *Wyatt* v. *Aderholt*, 503 F. 2d 1305 (CA5 1974), aff'g *Wyatt* v. *Stickney*, 325 F. Supp. 781, 785 (MD Ala. 1971).

a State could accept a person for "safekeeping," then constitutionally refuse to provide him treatment. In such a case, commitment without treatment would bear a reasonable relation to the goal for which the person was confined. If a state court orders a mentally retarded person committed for "care *and* treatment," however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement.

In respondent's case, the majority and principal concurring opinions in the Court of Appeals agreed that "[b]y basing [respondent's] deprivation of liberty at least partially upon a promise of treatment, the state ineluctably has committed the community's resources to providing minimal treatment." 644 F. 2d 147, 168 (CA3 1980).[2] Neither opinion clarified, however, whether respondent in fact had been totally denied "treatment," as that term is defined under Pennsylvania law. To the extent that the majority addressed the question, it found that "the evidence in the record, although somewhat contradictory, suggests not so much a total failure to treat as an inadequacy of treatment." *Ibid.*

This Court's reading of the record, *ante*, at 311–312, and n. 7, supports that conclusion. Moreover, the Court today finds that respondent's entitlement to "treatment" under Pennsylvania law was not properly raised below. See *ante*,

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[2] In the principal concurring opinion, Chief Judge Seitz, for himself and three other judges, stated:

"The state does not contest that it has placed the [respondent] in Pennhurst to provide basic care and treatment. Indeed, he has a right to treatment under state law, . . . and the fact that Pennhurst has programs and staff to treat patients is indicative of such a purpose. I believe that when the purpose of confining a mentally retarded person is to provide care and treatment, as is undoubtedly the case here, it violates the due process clause to fail to fulfill that purpose." 644 F. 2d, at 176.

at 316, n. 19. Given this uncertainty in the record, I am in accord with the Court's decision not to address the constitutionality of a State's total failure to provide "treatment" to an individual committed under state law for "care and treatment."

The second difficult question left open today is whether respondent has an independent constitutional claim, grounded in the Due Process Clause of the Fourteenth Amendment, to that "habilitation" or training necessary to *preserve* those basic self-care skills he possessed when he first entered Pennhurst—for example, the ability to dress himself and care for his personal hygiene. In my view, it would be consistent with the Court's reasoning today to include within the "minimally adequate training required by the Constitution," *ante*, at 322, such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment.

The Court makes clear, *ante*, at 315–316 and 324, that even after a person is committed to a state institution, he is entitled to such training as is necessary to prevent unreasonable losses of additional liberty as a result of his confinement—for example, unreasonable bodily restraints or unsafe institutional conditions. If a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the State's unreasonable refusal to provide him training, then, it seems to me, he has alleged a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraints. For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.

Although respondent asserts a claim of this kind, I agree with the Court that "[o]n the basis of the record before us, it is quite uncertain whether respondent [in fact] seeks any

'habilitation' or training unrelated to safety and freedom from bodily restraints."[3] *Ante*, at 318. Since the Court finds respondent constitutionally entitled at least to "such training as may be reasonable in light of [his] liberty interests in safety and freedom from unreasonable restraints," *ante*, at 322, I accept its decision not to address respondent's additional claim.

If respondent actually seeks habilitation in self-care skills not merely to reduce his aggressive tendencies, but also to maintain those basic self-care skills necessary to his personal autonomy within Pennhurst, I believe he is free on remand to assert that claim. Like the Court, I would be willing to defer to the judgment of professionals as to whether or not, and to what extent, institutional training would preserve re-

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[3] At trial, respondent's attorney requested a jury instruction that "[u]nder the Eighth and Fourteenth Amendments, state officials at a state mental hospital have a duty to provide residents of such institutions with such treatment as will afford them a reasonable opportunity to acquire *and maintain* those life skills necessary to cope as effectively as their capacities permit." App. to Pet. for Cert. 94a–95a (emphasis added).

In this Court, respondent again argued that

"without minimal habilitative efforts—basic training in fundamental life skills—institutionalized retarded persons not only will fail to develop such skills independently *but also will lose the skills they may have brought with them into the institution*. . . . Indeed, putting aside increased risks of physical harm, if a retarded individual loses all of his previously acquired skills through prolonged institutional neglect, then the State has worked positive injury . . . . Once [retarded persons] have been confined they have no one but the State to turn to for help in gaining additional skills or, *at least, preserving whatever skills and abilities they have*." Brief for Respondent 22–23 (emphasis added).

Respondent's description of the expert testimony to be offered on remand, however, suggests that he seeks training in self-care skills primarily to ensure his personal safety and the safety of others. See, *e. g.*, App. to Pet. for Cert. 100a (respondent's offer of proof that "when mentally retarded individuals learn alternative behavior, such as toilet training and dressing and so forth, [their] aggression decreases"); Brief for Respondent 22 (training in self-care skills is necessary to prevent development of "a variety of inappropriate, aggressive and self-destructive behaviors").

spondent's pre-existing skills. Cf. *ante*, at 321–323. As the Court properly notes, "[p]rofessionals in the habilitation of the mentally retarded disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible." *Ante*, at 316, n. 20.

If expert testimony reveals that respondent was so retarded when he entered the institution that he had no basic self-care skills to preserve, or that institutional training would not have preserved whatever skills he did have, then I would agree that he suffered no additional loss of liberty even if petitioners failed to provide him training. But if the testimony establishes that respondent possessed certain basic self-care skills when he entered the institution, and was sufficiently educable that he could have maintained those skills with a certain degree of training, then I would be prepared to listen seriously to an argument that petitioners were constitutionally required to provide that training, even if respondent's safety and mobility were not imminently threatened by their failure to do so.

The Court finds it premature to resolve this constitutional question on this less than fully developed record. Because I agree with that conclusion, I concur in the Court's opinion.

CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with much of the Court's opinion. However, I would hold flatly that respondent has no constitutional right to training, or "habilitation," *per se*. The parties, and the Court, acknowledge that respondent cannot function outside the state institution, even with the assistance of relatives. Indeed, even now neither respondent nor his family seeks his discharge from state care. Under these circumstances, the State's provision of food, shelter, medical care, and living conditions as safe as the inherent nature of the institutional environment reasonably allows, serves to justify the State's custody of respondent. The State did not seek custody of respondent; his family understandably sought the State's aid to meet a serious need.

I agree with the Court that some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interests in safety and freedom from restraint; but it seems clear to me that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation—even such as might be encompassed under the essentially standardless rubric "minimally adequate training," to which the Court refers. See *ante*, at 319, and n. 24. Cf. 644 F. 2d 147, 176 (CA3 1980) (Seitz, C. J., concurring in judgment). Since respondent asserts a right to "mininally adequate" habilitation "[q]uite apart from its relationship to decent care," Brief for Respondent 23, unlike the Court I see no way to avoid the issue.* Cf. *ante*, at 318.

I also point out that, under the Court's own standards, it is largely irrelevant whether respondent's experts were of the opinion that "additional training programs, including self-care programs, were needed to reduce [respondent's] aggressive behavior," *ibid.*—a prescription far easier for "spectators" to give than for an institution to implement. The training program devised for respondent by petitioners and other professionals at Pennhurst was, according to the Court's opinion, "presumptively valid"; and "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judg-

*Indeed, in the trial court respondent asserted a broad claim to such "treatment as [would] afford [him] a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit." App. to Pet. for Cert. 94a.

Respondent also maintains that, because state law purportedly creates a right to "care and treatment," he has a *federal substantive* right under the Due Process Clause to enforcement of this state right. See *ante*, at 316, n. 19. This contention is obviously frivolous; were every substantive right created by state law enforceable under the Due Process Clause, the distinction between state and federal law would quickly be obliterated.

ment." *Ante*, at 323. Thus, even if respondent could demonstrate that the training programs at Pennhurst were inconsistent with generally accepted or prevailing professional practice—if indeed there be such—this would not avail him so long as his training regimen was actually prescribed by the institution's professional staff.

Finally, it is worth noting that the District Court's instructions in this case were on the whole consistent with the Court's opinion today; indeed, some instructions may have been overly generous to respondent. Although the District Court erred in giving an instruction incorporating an Eighth Amendment "deliberate indifference" standard, the court also instructed, for example, that petitioners could be held liable if they "were aware of and failed to take all reasonable steps to prevent repeated attacks upon" respondent. See *ante*, at 312. Certainly if petitioners took "*all* reasonable steps" to prevent attacks on respondent, they cannot be said to have deprived him either of reasonably safe conditions or of training necessary to achieve reasonable safety.

ARIZONA *v.* MARICOPA COUNTY MEDICAL SOCIETY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-419. Argued November 4, 1981—Decided June 18, 1982

Respondent foundations for medical care were organized by respondent Maricopa County Medical Society and another medical society to promote fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans. The foundations, by agreement of their member doctors, established the maximum fees the doctors may claim in full payment for health services provided to policyholders of specified insurance plans. Petitioner State of Arizona filed a complaint against respondents in Federal District Court, alleging that they were engaged in an illegal price-fixing conspiracy in violation of § 1 of the Sherman Act. The District Court denied the State's motion for partial summary judgment, but certified for interlocutory appeal the question whether the maximum-fee agreements were illegal *per se* under § 1 of the Sherman Act. The Court of Appeals affirmed the denial of the motion for partial summary judgment and held that the certified question could not be answered without evaluating the purpose and effect of the agreements at a full trial.

Held: The maximum-fee agreements, as price-fixing agreements, are *per se* unlawful under § 1 of the Sherman Act. Pp. 342–357.

(a) The agreements do not escape condemnation under the *per se* rule against price-fixing agreements because they are horizontal and fix maximum prices. Horizontal agreements to fix maximum prices are on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211; *Albrecht* v. *Herald Co.*, 390 U. S. 145. The *per se* rule is violated here by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, experience, training, or willingness to employ innovative and difficult procedures in individual cases. Such a restraint may also discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. P. 348.

(b) Nor does the fact that doctors rather than nonprofessionals are the parties to the price-fixing agreements preclude application of the *per se* rule. Respondents do not claim that the quality of the professional serv-

ices their members provide is enhanced by the price restraint, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, and *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, distinguished, and their claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services. Pp. 348–349.

(c) That the judiciary has had little antitrust experience in the health care industry is insufficient reason for not applying the *per se* rule here. "[T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222. Pp. 349–351.

(d) The *per se* rule is not rendered inapplicable in this case for the alleged reason that the agreements in issue have procompetitive justification. The anticompetitive potential in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Even when respondents are given every benefit of doubt, the record in this case is not inconsistent with the presumption that respondents' agreements will not significantly enhance competition. The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers, but there is no reason to believe any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. Pp. 351–354.

(e) Respondents' maximum-fee schedules do not involve price-fixing in only a literal sense. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, distinguished. As agreements among independent competing entrepreneurs, they fit squarely into the horizontal price-fixing mold. Pp. 355–357.

643 F. 2d 553, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 357. BLACKMUN and O'CONNOR, JJ., took no part in the consideration or decision of the case.

Kenneth R. Reed, Special Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Robert K. Corbin*, Attorney General, *Charles L. Eger*, Assistant Attorney General, *Alison B. Swan*, and *Patricia A. Metzger*.

Philip P. Berelson argued the cause for respondents. With him on the brief were *Robert O. Lesher* and *Daniel J. McAuliffe*.

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Barry Grossman, Robert B. Nicholson,* and *Nancy C. Garrison.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Charles A. Graddick*, Attorney General of Alabama, and *Susan Beth Farmer, Sarah M. Spratling*, and *James Drury Flowers*, Assistant Attorneys General; *Wilson L. Condon*, Attorney General of Alaska, and *Louise E. Ma*, Assistant Attorney General; *Steve Clark*, Attorney General of Arkansas, and *David L. Williams*, Deputy Attorney General; *J. D. MacFarlane*, Attorney General of Colorado, and *B. Lawrence Theis*, First Assistant Attorney General; *Carl R. Ajello*, Attorney General of Connecticut, and *Robert M. Langer, John R. Lacey, John M. Looney, Jr.*, and *Steven M. Rutstein*, Assistant Attorneys General; *Richard S. Gebelein*, Attorney General of Delaware, and *Robert P. Lobue*, Deputy Attorney General; *Jim Smith*, Attorney General of Florida, and *Bill L. Bryant, Jr.*, Assistant Attorney General; *Tany S. Hong*, Attorney General of Hawaii, and *Sonia Faust*, Deputy Attorney General; *Tyrone C. Fahner*, Attorney General of Illinois, and *Thomas M. Genovese*, Assistant Attorney General; *Linley E. Pearson*, Attorney General of Indiana, and *Frank A. Baldwin*, Assistant Attorney General; *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Assistant Attorney General; *Robert T. Stephan*, Attorney General of Kansas, and *Carl M. Anderson*, Assistant Attorney General; *Steven L. Beshear*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General; *William J. Guste, Jr.*, Attorney General of Louisiana, and *John R. Flowers, Jr.*, Assistant Attorney General; *James E. Tierney*, Attorney General of Maine; *Stephen H. Sachs*, Attorney General of Maryland, and *Charles O. Monk II*, Assistant Attorney General; *Frank J. Kelley*, Attorney General of Michigan, and *Edwin M. Bladen*, Assistant Attorney General; *Warren R. Spannaus*, Attorney General of Minnesota, and *Stephen P. Kilgriff*, Special Assistant Attorney General; *Bill Allain*, Attorney General of Mississippi, and *Robert E. Sand-*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, has been violated by agreements among competing physicians setting, by majority vote, the maximum fees that they may claim in full

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ers, Special Assistant Attorney General; *John Ashcroft*, Attorney General of Missouri, and *William L. Newcomb, Jr.*, Assistant Attorney General; *Michael T. Greely*, Attorney General of Montana, and *Jerome J. Cate*, Assistant Attorney General; *Paul L. Douglas*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General; *Gregory H. Smith*, Attorney General of New Hampshire; *James R. Zazzali*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General; *Jeff Bingaman*, Attorney General of New Mexico, and *James J. Wechsler* and *Richard H. Levin*, Assistant Attorneys General; *Robert Abrams*, Attorney General of New York, and *Lloyd Constantine*, Assistant Attorney General; *Rufus L. Edmisten*, Attorney General of North Carolina, *H. A. Cole, Jr.*, Special Deputy Attorney General, and *R. Darrell Hancock*, Associate Attorney General; *Robert O. Wefald*, Attorney General of North Dakota, and *Gary H. Lee*, Assistant Attorney General; *Jan Eric Cartwright*, Attorney General of Oklahoma, and *Gary W. Gardenshire*, Assistant Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Special Assistant Attorney General; *Daniel R. McLeod*, Attorney General of South Carolina, and *John M. Cox*, Assistant Attorney General; *Mark V. Meierhenry*, Attorney General of South Dakota, and *James E. McMahon*, Assistant Attorney General; *William M. Leech, Jr.*, Attorney General of Tennessee, and *William J. Haynes*, Deputy Attorney General; *Mark White*, Attorney General of Texas, and *Linda A. Aaker*, Assistant Attorney General; *David L. Wilkinson*, Attorney General of Utah, and *Peter C. Collins*, Assistant Attorney General; *John J. Easton, Jr.*, Attorney General of Vermont, and *Jay I. Ashman*, Assistant Attorney General; *Kenneth O. Eikenberry*, Attorney General of Washington, and *John R. Ellis*, Assistant Attorney General; *Chauncey H. Browning*, Attorney General of West Virginia, and *Charles G. Brown*, Deputy Attorney General; *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; and *John D. Troughton*, Attorney General of Wyoming, and *Gay R. Venderpoel*, Assistant Attorney General; for the State of Ohio by *William J. Brown*, Attorney General, and *Charles D. Weller*, *Doreen C. Johnson*, and *Eugene F. McShane*, Assistant Attorneys General; for Chalmette General Hospi-

payment for health services provided to policyholders of specified insurance plans. The United States Court of Appeals for the Ninth Circuit held that the question could not be answered without evaluating the actual purpose and effect of the agreements at a full trial. 643 F. 2d 553 (1980). Because the undisputed facts disclose a violation of the statute, we granted certiorari, 450 U. S. 979 (1981), and now reverse.

I

In October 1978 the State of Arizona filed a civil complaint against two county medical societies and two "foundations for medical care" that the medical societies had organized. The complaint alleged that the defendants were engaged in illegal price-fixing conspiracies.[1] After the defendants filed their answers, one of the medical societies was dismissed by consent, the parties conducted a limited amount of pretrial discovery, and the State moved for partial summary judgment on the issue of liability. The District Court denied the motion,[2] but entered an order pursuant to 28 U. S. C. § 1292(b),

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tal, Inc., et al. by *John A. Stassi II;* and for Hospital Building Co. by *John K. Train III* and *John R. Jordan, Jr.*

Briefs of *amici curiae* urging affirmance were filed by *William G. Kopit* and *Robert J. Moses* for the American Association of Foundations for Medical Care; by *Richard L. Epstein* and *Jay H. Hedgepeth* for the American Hospital Association; and by *M. Laurence Popofsky* and *Peter F. Sloss* for California Dental Service.

Alfred Miller filed a brief for the American Association of Retired Persons et al. as *amici curiae.*

[1] The complaint alleged a violation of § 1 of the Sherman Act as well as of the Arizona antitrust statute. The state statute is interpreted in conformity with the federal statute. 643 F. 2d 533, 554, n. 1 (CA9 1980). The State of Arizona prayed for an injunction but did not ask for damages.

[2] The District Court offered three reasons for its decision. First, citing *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), the court stated that "a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law." App. to Pet. for Cert. 43. Second, "the two Supreme Court cases invalidating maximum price-

certifying for interlocutory appeal the question "whether the FMC membership agreements, which contain the promise to abide by maximum fee schedules, are illegal per se under section 1 of the Sherman Act."[3]

The Court of Appeals, by a divided vote, affirmed the District Court's order refusing to enter partial summary judgment, but each of the three judges on the panel had a different view of the case. Judge Sneed was persuaded that "the challenged practice is not a per se violation." 643 F. 2d, at

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fixing, [*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), and *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968)], need not be read as establishing a per se rule." *Id.*, at 44. Third, "a profession is involved here." *Id.*, at 45. Under the rule-of-reason approach, the plaintiff's motion for partial summary judgment on the issue of liability could not be granted "because there is insufficient evidence as to the [purpose and effect of the allegedly unlawful practices and the power of the defendants.]" *Id.*, at 47.

The District Court also denied the defendants' motion to dismiss based on the ground that they were engaged in the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.* See App. to Pet. for Cert. 39–41. The defendants did not appeal that portion of the District Court order. 643 F. 2d, at 559, and n. 7.

[3] The quoted language is the Court of Appeals' phrasing of the question. *Id.*, at 554. The District Court had entered an order on June 5, 1979, providing, in relevant part:

"The plaintiff's motion for partial summary judgment on the issue of liability is denied with leave to file a similar motion based on additional evidence if appropriate." App. to Pet. for Cert. 48.

On August 8, 1979, the District Court entered a further order providing:

"The Order of this Court entered June 5, 1979 is amended by addition of the following: This Court's determination that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case to determine whether a violation of Section 1 of the Sherman Act has occurred involves a question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order denying plaintiff's motion for partial summary judgment on the issue of liablity may materially advance the ultimate determination of the litigation. Therefore, the foregoing Order and determination of the Court is certified for interlocutory appeal pursuant to 28 U. S. C. § 1292(b)." *Id.*, at 50–51.

560.[4] Judge Kennedy, although concurring, cautioned that he had not found "these reimbursement schedules to be per se proper, [or] that an examination of these practices under the rule of reason at trial will not reveal the proscribed adverse effect on competition, or that this court is foreclosed at some later date, when it has more evidence, from concluding that such schedules do constitute per se violations." *Ibid.*[5] Judge Larson dissented, expressing the view that a *per se* rule should apply and, alternatively, that a rule-of-reason analysis should condemn the arrangement even if a *per se* approach was not warranted. *Id.*, at 563–569.[6]

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[4]Judge Sneed explained his reluctance to apply the *per se* rule substantially as follows: The record did not indicate the actual purpose of the maximum-fee arrangements or their effect on competition in the health care industry. It was not clear whether the assumptions made about typical price restraints could be carried over to that industry. Only recently had this Court applied the antitrust laws to the professions. Moreover, there already were such significant obstacles to pure competition in the industry that a court must compare the prices that obtain under the maximum-fee arrangements with those that would otherwise prevail rather than with those that would prevail under ideal competitive conditions. Furthermore, the Ninth Circuit had not applied *Keifer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), and *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), to horizontal agreements that establish maximum prices; some of the economic assumptions underlying the rule against maximum price fixing were not sound.

[5]Judge Kennedy's concurring opinion concluded as follows:

"There does not now appear to be a controlling or definitive analysis of the market impact caused by the arrangements under scrutiny in this case, but trial may reveal that the arrangements are, at least in their essentials, not peculiar to the medical industry and that they should be condemned." 643 F. 2d, at 560.

[6]Judge Larson stated, in part:

"Defendants formulated and dispersed relative value guides and conversion factor lists which together were used to set an upper limit on fees received from third-party payors. It is clear that these activities constituted maximum price-fixing by competitors. Disregarding any 'special industry' facts, this conduct is per se illegal. Precedent alone would mandate application of the per se standard.

"I find nothing in the nature of either the medical profession or the

Because the ultimate question presented by the certiorari petition is whether a partial summary judgment should have been entered by the District Court, we must assume that the respondents' version of any disputed issue of fact is correct. We therefore first review the relevant undisputed facts and then identify the factual basis for the respondents' contention that their agreements on fee schedules are not unlawful.

II

The Maricopa Foundation for Medical Care is a nonprofit Arizona corporation composed of licensed doctors of medicine, osteopathy, and podiatry engaged in private practice. Approximately 1,750 doctors, representing about 70% of the practitioners in Maricopa County, are members.

The Maricopa Foundation was organized in 1969 for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans.[7] The foundation performs three primary activities. It establishes the schedule of maximum fees that participating doctors agree to accept as payment in full for services performed for patients insured under plans approved by the foundation. It reviews the medical necessity and appropriateness of treatment provided by its members to such insured persons. It is authorized to draw checks on insurance company accounts to pay doctors for

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health care industry that would warrant their exemption from per se rules for price-fixing." *Id.*, at 563–564 (citations omitted).

[7] Most health insurance plans are of the fee-for-service type. Under the typical insurance plan, the insurer agrees with the insured to reimburse the insured for "usual, customary, and reasonable" medical charges. The third-party insurer, and the insured to the extent of any excess charges, bears the economic risk that the insured will require medical treatment. An alternative to the fee-for-service type of insurance plan is illustrated by the health maintenance organizations authorized under the Health Maintenance Organization Act of 1973, 42 U. S. C. § 300e *et seq.* Under this form of prepaid health plan, the consumer pays a fixed periodic fee to a functionally integrated group of doctors in exchange for the group's agreement to provide any medical treatment that the subscriber might need. The economic risk is thus borne by the doctors.

services performed for covered patients. In performing these functions, the foundation is considered an "insurance administrator" by the Director of the Arizona Department of Insurance. Its participating doctors, however, have no financial interest in the operation of the foundation.

The Pima Foundation for Medical Care, which includes about 400 member doctors,[8] performs similar functions. For the purposes of this litigation, the parties seem to regard the activities of the two foundations as essentially the same. No challenge is made to their peer review or claim administration functions. Nor do the foundations allege that these two activities make it necessary for them to engage in the practice of establishing maximum-fee schedules.

At the time this lawsuit was filed,[9] each foundation made use of "relative values" and "conversion factors" in compiling its fee schedule. The conversion factor is the dollar amount used to determine fees for a particular medical specialty. Thus, for example, the conversion factors for "medicine" and "laboratory" were $8 and $5.50, respectively, in 1972, and $10 and $6.50 in 1974. The relative value schedule provides a numerical weight for each different medical service—thus, an office consultation has a lesser value than a home visit. The relative value was multiplied by the conversion factor to determine the maximum fee. The fee schedule has been revised periodically. The foundation board of trustees would solicit advice from various medical societies about the need

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[8] The record contains divergent figures on the percentage of Pima County doctors that belong to the foundation. A 1975 publication of the foundation reported 80%; a 1978 affidavit by the executive director of the foundation reported 30%.

[9] In 1980, after the District Court and the Court of Appeals had rendered judgment, both foundations apparently discontinued the use of relative values and conversion factors in formulating the fee schedules. Moreover, the Maricopa Foundation that year amended its bylaws to provide that the fee schedule would be adopted by majority vote of its board of trustees and not by vote of its members. The challenge to the foundation activities as we have described them in the text, however, is not mooted by these changes. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953).

for change in either relative values or conversion factors in their respective specialties. The board would then formulate the new fee schedule and submit it to the vote of the entire membership.[10]

The fee schedules limit the amount that the member doctors may recover for services performed for patients insured under plans approved by the foundations. To obtain this approval the insurers—including self-insured employers as well as insurance companies[11]—agree to pay the doctors' charges up to the scheduled amounts, and in exchange the doctors agree to accept those amounts as payment in full for their services. The doctors are free to charge higher fees to uninsured patients, and they also may charge any patient less than the scheduled maxima. A patient who is insured by a foundation-endorsed plan is guaranteed complete coverage for the full amount of his medical bills only if he is treated by a foundation member. He is free to go to a nonmember physician and is still covered for charges that do not exceed the maximum-fee schedule, but he must pay any excess that the nonmember physician may charge.

The impact of the foundation fee schedules on medical fees and on insurance premiums is a matter of dispute. The State of Arizona contends that the periodic upward revisions of the maximum-fee schedules have the effect of stabilizing and enhancing the level of actual charges by physicians, and

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[10] The parties disagree over whether the increases in the fee schedules are the cause or the result of the increases in the prevailing rate for medical services in the relevant markets. There appears to be agreement, however, that 85–95% of physicians in Maricopa County bill at or above the maximum reimbursement levels set by the Maricopa Foundation.

[11] Seven different insurance companies underwrite health insurance plans that have been approved by the Maricopa Foundation, and three companies underwrite the plans approved by the Pima Foundation. The record contains no firm data on the portion of the health care market that is covered by these plans. The State relies upon a 1974 analysis indicating that the insurance plans endorsed by the Maricopa Foundation had about 63% of the prepaid health care market, but the respondents contest the accuracy of this analysis.

that the increasing level of their fees in turn increases insurance premiums. The foundations, on the other hand, argue that the schedules impose a meaningful limit on physicians' charges, and that the advance agreement by the doctors to accept the maxima enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite and therefore serves as an effective cost-containment mechanism that has saved patients and insurers millions of dollars. Although the Attorneys General of 40 different States, as well as the Solicitor General of the United States and certain organizations representing consumers of medical services, have filed *amicus curiae* briefs supporting the State of Arizona's position on the merits, we must assume that the respondents' view of the genuine issues of fact is correct.

This assumption presents, but does not answer, the question whether the Sherman Act prohibits the competing doctors from adopting, revising, and agreeing to use a maximum-fee schedule in implementation of the insurance plans.

III

The respondents recognize that our decisions establish that price-fixing agreements are unlawful on their face. But they argue that the *per se* rule does not govern this case because the agreements at issue are horizontal and fix maximum prices, are among members of a profession, are in an industry with which the judiciary has little antitrust experience, and are alleged to have procompetitive justifications. Before we examine each of these arguments, we pause to consider the history and the meaning of the *per se* rule against price-fixing agreements.

A

Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement "in restraint of trade."[12] In *United States*

[12] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

v. *Joint Traffic Assn.*, 171 U. S. 505 (1898), we recognized that Congress could not have intended a literal interpretation of the word "every"; since *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 (1911), we have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.[13]

The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609–610 (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context. *Id.*, at 609, n. 10; *Northern Pacific R. Co.* v. *United States*, *supra*, at 5.

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per*

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[13] Justice Brandeis provided the classic statement of the rule of reason in *Chicago Bd. of Trade* v. *United States*, 246 U. S. 231, 238 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

se rules.[14] Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.[15] As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.[16]

Thus the Court in *Standard Oil* recognized that inquiry under its rule of reason ended once a price-fixing agreement was proved, for there was "a conclusive presumption which

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[14] For a thoughtful and brief discussion of the costs and benefits of rule-of-reason versus *per se* rule analysis of price-fixing agreements, see F. Scherer, Industrial Market Structure and Economic Performance 438–443 (1970). Professor Scherer's "opinion, shared by a majority of American economists concerned with antitrust policy, is that in the present legal framework the costs of implementing a rule of reason would exceed the benefits derived from considering each restrictive agreement on its merits and prohibiting only those which appear unreasonable." *Id.*, at 440.

[15] "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 5 (citations omitted). See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522–523 (1948).

[16] Thus, in applying the *per se* rule to invalidate the restrictive practice in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), we stated that "[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us." *Id.*, at 609. The Court made the same point in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 50, n. 16:

"*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."

brought [such agreements] within the statute." 221 U. S., at 65. By 1927, the Court was able to state that "it has . . . often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law." *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 398.

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *Id.*, at 397–398.

Thirteen years later, the Court could report that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940). In that case a glut in the spot market for gasoline had prompted the major oil refiners to engage in a concerted effort to purchase and store surplus gasoline in order to maintain stable prices. Absent the agreement, the

companies argued, competition was cutthroat and self-defeating. The argument did not carry the day:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id.*, at 221–222.

The application of the *per se* rule to maximum-price-fixing agreements in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), followed ineluctably from *Socony-Vacuum:*

> "For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223: 'Under

> the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.'" 340 U. S., at 213.

Over the objection that maximum-price-fixing agreements were not the "economic equivalent" of minimum-price-fixing agreements,[17] *Kiefer-Stewart* was reaffirmed in *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968):

> "Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Id.*, at 152–153 (footnote omitted).

We have not wavered in our enforcement of the *per se* rule against price fixing. Indeed, in our most recent price-fixing case we summarily reversed the decision of another Ninth

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[17] *Albrecht* v. *Herald Co.*, 390 U. S., at 156 (Harlan, J., dissenting).

Circuit panel that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980).

B

Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices.[18] The *per se* rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962). In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

Nor does the fact that doctors—rather than nonprofessionals—are the parties to the price-fixing agreements support the respondents' position. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788, n. 17 (1975), we stated that the "public service aspect, and other features of the professions, may

[18] It is true that in *Kiefer-Stewart*, as in *Albrecht*, the agreement involved a vertical arrangement in which maximum resale prices were fixed. But the case also involved an agreement among competitors to impose the resale price restraint. In any event, horizontal restraints are generally less defensible than vertical restraints. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 890, n. 20 (1981).

require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 696 (1978). The price-fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint. The respondents' claim for relief from the *per se* rule is simply that the doctors' agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.

We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.[19] The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U. S., at 222. We also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification" for price-fixing agreements, *id.*, at 220, yet the Court of Appeals refused to apply the *per se* rule in

[19] The argument should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged. See *White Motor Co.* v. *United States*, 372 U. S. 253 (1963). Nor is our unwillingness to examine the economic justification of this particular application of the *per se* rule against price fixing inconsistent with our reexamination of the general validity of the *per se* rule rejected in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, *supra*.

this case in part because the health care industry was so far removed from the competitive model.[20] Consistent with our prediction in *Socony-Vacuum*, 310 U. S., at 221, the result of this reasoning was the adoption by the Court of Appeals of a legal standard based on the reasonableness of the fixed prices,[21] an inquiry we have so often condemned.[22] Finally,

[20] "The health care industry, moreover, presents a particularly difficult area. The first step to understanding is to recognize that not only is access to the medical profession very time consuming and expensive both for the applicant and society generally, but also that numerous government subventions of the costs of medical care have created both a demand and supply function for medical services that is artificially high. The present supply and demand functions of medical services in no way approximate those which would exist in a purely private competitive order. An accurate description of those functions moreover is not available. Thus, we lack baselines by which could be measured the distance between the present supply and demand functions and those which would exist under ideal competitive conditions." 643 F. 2d, at 556.

[21] "Perforce we must take industry as it exists, absent the challenged feature, as our baseline for measuring anticompetitive impact. The relevant inquiry becomes whether fees paid to doctors under that system would be less than those payable under the FMC maximum fee agreement. Put differently, confronted with an industry widely deviant from a reasonably free competitive model, such as agriculture, the proper inquiry is whether the practice enhances the prices charged for the services. In simplified economic terms, the issue is whether the maximum fee arrangement better permits the attainment of the monopolist's goal, viz., the matching of marginal cost to marginal revenue, or in fact obstructs that end." *Ibid.*

[22] In the first price-fixing case arising under the Sherman Act, the Court was required to pass on the sufficiency of the defendants' plea that they had established rates that were actually beneficial to consumers. Assuming the factual validity of the plea, the Court rejected the defense as a matter of law. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). In *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 689 (1978), we referred to Judge Taft's "classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable." See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U. S. 211 (1899). In our latest price-fixing case, we reiterated the point: "It is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647 (1980).

the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 5.

The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.[23] Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application. Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.

The respondents contend that their fee schedules are procompetitive because they make it possible to provide consumers of health care with a uniquely desirable form of insurance coverage that could not otherwise exist. The features of the foundation-endorsed insurance plans that they stress are a choice of doctors, complete insurance coverage, and lower premiums. The first two characteristics, however, are hardly unique to these plans. Since only about 70% of

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[23] "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, n. 59 (1940).

the doctors in the relevant market are members of either foundation, the guarantee of complete coverage only applies when an insured chooses a physician in that 70%. If he elects to go to a nonfoundation doctor, he may be required to pay a portion of the doctor's fee. It is fair to presume, however, that at least 70% of the doctors in other markets charge no more than the "usual, customary, and reasonable" fee that typical insurers are willing to reimburse in full.[24] Thus, in Maricopa and Pima Counties as well as in most parts of the country, if an insured asks his doctor if the insurance coverage is complete, presumably in about 70% of the cases the doctor will say "Yes" and in about 30% of the cases he will say "No."

It is true that a binding assurance of complete insurance coverage—as well as most of the respondents' potential for lower insurance premiums[25]—can be obtained only if the insurer and the doctor agree in advance on the maximum fee that the doctor will accept as full payment for a particular service. Even if a fee schedule is therefore desirable, it is not necessary that the doctors do the price fixing.[26] The

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[24] According to the respondents' figures, this presumption is well founded. See Brief for Respondents 42, n. 120.

[25] We do not perceive the respondents' claim of procompetitive justification for their fee schedules to rest on the premise that the fee schedules actually reduce medical fees and accordingly reduce insurance premiums, thereby enhancing competition in the health insurance industry. Such an argument would merely restate the long-rejected position that fixed prices are reasonable if they are lower than free competition would yield. It is arguable, however, that the existence of a fee schedule, whether fixed by the doctors or by the insurers, makes it easier—and to that extent less expensive—for insurers to calculate the risks that they underwrite and to arrive at the appropriate reimbursement on insured claims.

[26] According to a Federal Trade Commission staff report: "Until the mid-1960's, most Blue Shield plans determined in advance how much to pay for particular procedures and prepared fee schedules reflecting their determinations. Fee schedules are still used in approximately 25 percent of Blue Shield contracts." Bureau of Competition, Federal Trade Commission, Medical Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans 128 (1979). We do not suggest

record indicates that the Arizona Comprehensive Medical/Dental Program for Foster Children is administered by the Maricopa Foundation pursuant to a contract under which the maximum-fee schedule is prescribed by a state agency rather than by the doctors.[27] This program and the Blue Shield plan challenged in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), indicate that insurers are capable not only of fixing maximum reimbursable prices but also of obtaining binding agreements with providers guaranteeing the insured full reimbursement of a participating provider's fee. In light of these examples, it is not surprising that nothing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way.

The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers. The validity of that assumption is far from obvious,[28] but in any event there is no reason to believe

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that Blue Shield plans are not actually controlled by doctors. Indeed, as the same report discusses at length, the belief that they are has given rise to considerable antitrust litigation. See also D. Kass & P. Pautler, Bureau of Economics, Federal Trade Commission, Staff Report on Physician Control of Blue Shield Plans (1979). Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979). See *id.*, at 210, n. 5. In an *amicus curiae* brief, the United States expressed its opinion that such an arrangement would be legal unless the plaintiffs could establish that a conspiracy among providers was at work. Brief for United States as *Amicus Curiae*, O. T. 1978, No. 77-952, pp. 10–11. Our point is simply that the record provides no factual basis for the respondents' claim that the doctors must fix the fee schedule.

[27] In that program the foundation performs the peer review function as well as the administrative function of paying the doctors' claims.

[28] In order to create an insurance plan under which the doctor would agree to accept as full payment a fee prescribed in a fixed schedule, someone must canvass the doctors to determine what maximum prices would be high enough to attract sufficient numbers of individual doctors to sign up

that any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. It is entirely possible that the potential or actual power of the foundations to dictate the terms of such insurance plans may more than offset the theoretical efficiencies upon which the respondents' defense ultimately rests.[29]

C

Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States* v. *Topco Associates, Inc.*, 405 U. S., at 611–612. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are

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but low enough to make the insurance plan competitive. In this case that canvassing function is performed by the foundation; the foundation then deals with the insurer. It would seem that an insurer could simply bypass the foundation by performing the canvassing function and dealing with the doctors itself. Under the foundation plan, each doctor must look at the maximum-fee schedule fixed by his competitors and vote for or against approval of the plan (and, if the plan is approved by majority vote, he must continue or revoke his foundation membership). A similar, if to some extent more protracted, process would occur if it were each insurer that offered the maximum-fee schedule to each doctor.

[29] In this case it appears that the fees are set by a group with substantial power in the market for medical services, and that there is competition among insurance companies in the sale of medical insurance. Under these circumstances the insurance companies are not likely to have significantly greater bargaining power against a monopoly of doctors than would individual consumers of medical services.

better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute.[30]

IV

Having declined the respondents' invitation to cut back on the *per se* rule against price fixing, we are left with the respondents' argument that their fee schedules involve price fixing in only a literal sense. For this argument, the respondents rely upon *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979).

In *Broadcast Music* we were confronted with an antitrust challenge to the marketing of the right to use copyrighted compositions derived from the entire membership of the American Society of Composers, Authors and Publishers (ASCAP). The so-called "blanket license" was entirely different from the product that any one composer was able to sell by himself.[31] Although there was little competition among individual composers for their separate compositions, the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price.[32] But a

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[30] "[Congress] can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." *United States* v. *Topco Associates, Inc.*, 405 U. S., at 610, n. 10. Indeed, it has exempted certain industries from the full reach of the Sherman Act. See, *e. g.*, 7 U. S. C. §§ 291, 292 (Capper-Volstead Act, agricultural cooperatives); 15 U. S. C. §§ 1011–1013 (McCarran-Ferguson Act, insurance); 49 U. S. C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U. S. C. § 1801 (newspaper joint operating agreements).

[31] "Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." 441 U. S., at 22 (footnote omitted).

[32] "Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions

"necessary consequence" of the creation of the blanket license was that its price had to be established. *Id.*, at 21. We held that the delegation by the composers to ASCAP of the power to fix the price for the blanket license was not a species of the price-fixing agreements categorically forbidden by the Sherman Act. The record disclosed price fixing only in a "literal sense." *Id.*, at 8.

This case is fundamentally different. Each of the foundations is composed of individual practitioners who compete with one another for patients. Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product.[33] Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care.

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is

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covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." *Id.*, at 23–24 (footnote omitted).

[33] It may be true that by becoming a member of the foundation the individual practitioner obtains a competitive advantage in the market for medical services that he could not unilaterally obtain. That competitive advantage is the ability to attract as customers people who value both the guarantee of full health coverage and a choice of doctors. But, as we have indicated, the setting of the price *by doctors* is not a "necessary consequence" of an arrangement with an insurer in which the doctor agrees not to charge certain insured customers more than a fixed price.

an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The medical care plan condemned by the Court today is a comparatively new method of providing insured medical services at predetermined maximum costs. It involves no coercion. Medical insurance companies, physicians, and patients alike are free to participate or not as they choose. On its face, the plan seems to be in the public interest.

The State of Arizona challenged the plan on a *per se* antitrust theory. The District Court denied the State's summary judgment motion, and—because of the novelty of the issue—certified the question of *per se* liability for an interlocutory appeal. On summary judgment, the record and all inferences therefrom must be viewed in the light most favorable to the respondents. Nevertheless, rather than identifying clearly the controlling principles and remanding for decision on a completed record, this Court makes its own *per se* judgment of invalidity. The respondents' contention that

the "consumers" of medical services are benefitted substantially by the plan is given short shrift. The Court concedes that "the parties conducted [only] a limited amount of pretrial discovery," *ante*, at 336, leaving undeveloped facts critical to an informed decision of this case. I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public. I therefore dissent.

I

The Maricopa and Pima Foundations for Medical Care are professional associations of physicians organized by the medical societies in their respective counties.[1] The foundations were established to make available a type of prepaid medical insurance plan, aspects of which are the target of this litigation. Under the plan, the foundations insure no risks themselves. Rather, their key function is to secure agreement among their member physicians to a maximum-price schedule for specific medical services. Once a fee schedule has been agreed upon following a process of consultation and balloting, the foundations invite private insurance companies to participate by offering medical insurance policies based upon the maximum-fee schedule.[2] The insurers agree to offer com-

[1] The Pima Foundation is open to any Pima County area physician licensed in Arizona. It has a renewable 5-year membership term. A voluntary resignation provision permits earlier exit on the January 1 following announcement of an intent to resign.

The Maricopa Foundation admits physicians who are members of their county medical society. The Maricopa Foundation has a renewable 1-year term of membership. Initial membership may be for a term of less than a year so that a uniform annual termination date for all members can be maintained.

The medical *societies* are professional associations of physicians practicing in the particular county. The Pima County Medical Society, but not the Pima Foundation, has been dismissed from the case pursuant to a consent decree.

[2] Three private carriers underwrite various Pima Foundation-sponsored plans: Arizona Blue Cross-Blue Shield, Pacific Mutual Life Insurance Co.,

plete reimbursement to their insureds for the full amount of their medical bills—so long as these bills do not exceed the maximum-fee schedule.

An insured under a foundation-sponsored plan is free to go to any physician. The physician then bills the foundation directly for services performed.[3] If the insured has chosen a physician who is *not* a foundation member and the bill exceeds the foundation maximum-fee schedule, the insured is liable for the excess. If the billing physician *is* a foundation member, the foundation disallows the excess pursuant to the agreement each physician executed upon joining the foundation.[4] Thus, the plan offers complete coverage of medical expenses but still permits an insured to choose any physician.

II

This case comes to us on a plaintiff's motion for summary judgment after only limited discovery. Therefore, as noted above, the inferences to be drawn from the record must be viewed in the light most favorable to the respondents. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962).

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and Connecticut General Life Insurance Co. The latter two companies also underwrite plans for the Maricopa Foundation, as do five other private insurance companies. Apparently large employers, such as the State of Arizona and Motorola, also act as foundation-approved insurers with respect to their employees' insurance plans.

[3] The foundations act as the insurance companies' claims agents on a contract basis. They administer the claims and, to some extent, review the medical necessity and propriety of the treatment for which a claim is entered. The foundations charge insurers a fee for their various services. In recent years, this fee has been set at 4% of the insurers' premiums.

[4] This agreement provides in part that the physician agrees "to be bound . . . with respect to maximum fees . . . by any fee determination by the [f]oundation consistent with the schedule adopted by the [foundation physician] membership . . . ." App. 31–32. The agreement also provides that foundation members "understand and agree that participating membership in the [f]oundation shall not affect the method of computation or amount of fees billed by me with respect to any medical care for any patient." *Ibid.*

This requires, as the Court acknowledges, that we consider the foundation arrangement as one that "impose[s] a meaningful limit on physicians' charges," that "enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite," and that "therefore serves as an effective cost containment mechanism that has saved patients and insurers millions of dollars." *Ante*, at 342. The question is whether we should condemn this arrangement forthwith under the Sherman Act, a law designed to *benefit* consumers.

Several other aspects of the record are of key significance but are not stressed by the Court. First, the foundation arrangement forecloses *no* competition. Unlike the classic cartel agreement, the foundation plan does not instruct potential competitors: "Deal with consumers on the following terms and no others." Rather, physicians who participate in the foundation plan are free both to associate with other medical insurance plans—at any fee level, high or low—and directly to serve uninsured patients—at any fee level, high or low. Similarly, insurers that participate in the foundation plan also remain at liberty to do business outside the plan with any physician—foundation member or not—at any fee level. Nor are physicians locked into a plan for more than one year's membership. See n. 1, *supra*. Thus freedom to compete, as well as freedom to withdraw, is preserved. The Court cites no case in which a remotely comparable plan or agreement is condemned on a *per se* basis.

Second, on this record we must find that insurers represent consumer interests. Normally consumers search for high quality at low prices. But once a consumer is insured[5]—*i. e.*, has chosen a medical insurance plan—he is

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[5] At least seven insurance companies are competing in the relevant market. See n. 2, *supra*. At this stage of the case we must infer that they are competing vigorously and successfully.

The term "consumer"—commonly used in antitrust cases and literature—is used herein to mean persons who need or may need medical services from a physician.

largely indifferent to the amount that his physician charges if the coverage is full, as under the foundation-sponsored plan.

The insurer, however, is *not* indifferent. To keep insurance premiums at a competitive level and to remain profitable, insurers—including those who have contracts with the foundations—step into the consumer's shoes with his incentive to contain medical costs. Indeed, insurers may be the only parties who have the effective power to restrain medical costs, given the difficulty that patients experience in comparing price and quality for a professional service such as medical care.

On the record before us, there is no evidence of opposition to the foundation plan by insurance companies—or, for that matter, by members of the public. Rather seven insurers willingly have chosen to contract out to the foundations the task of developing maximum-fee schedules.[6] Again, on the record before us, we must infer that the foundation plan—open as it is to insurers, physicians, and the public—has in fact benefitted consumers by "enabl[ing] the insurance carriers to limit and to calculate more efficiently the risks they underwrite." *Ante*, at 342. Nevertheless, even though the case is here on an incomplete summary judgment record, the Court conclusively draws contrary inferences to support its *per se* judgment.

III

It is settled law that once an arrangement has been labeled as "price fixing" it is to be condemned *per se*. But it is equally well settled that this characterization is not to be ap-

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[6] The State introduced no evidence on its summary judgment motion supporting its apparent view that insurers effectively can perform this function themselves, without physician participation. It is clear, however, that price and quality of professional services—unlike commercial products—are difficult to compare. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 391–395 (1977) (opinion of POWELL, J.). This is particularly true of medical service. Presumably this is a reason participating insurers wish to utilize the foundations' services.

plied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach. The inquiry in an antitrust case is not simply one of "determining whether two or more potential competitors have literally 'fixed' a 'price.' . . . [Rather], it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979).

Before characterizing an arrangement as a *per se* price-fixing agreement meriting condemnation, a court should determine whether it is a "'naked restrain[t] of trade with no purpose except stifling of competition.'" *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 608 (1972), quoting *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). See also *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49–50 (1977). Such a determination is necessary because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.*, at 58–59. As part of this inquiry, a court must determine whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement.

For example, in *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), we held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members. After the parties had "compiled a voluminous discovery and trial record," *id.*, at 685, we carefully considered—rather than rejected out of hand—the engineers' "affirmative defense" of their agreement: that competitive bidding would tempt engineers to do inferior work that would threaten pub-

lic health and safety. *Id.*, at 693. We refused to accept this defense because its merits "confirm[ed] rather than refut[ed] the anticompetitive purpose and effect of [the] agreement." *Ibid.* The analysis incident to the "price fixing" characterization found no substantial procompetitive efficiencies. See also *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 646, n. 8, and 649–650 (1980) (challenged arrangement condemned because it lacked "a procompetitive justification" and had "no apparent potentially redeeming value").

In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, there *was* minimum price fixing in the most "literal sense." *Id.*, at 8. We nevertheless agreed, unanimously,[7] that an arrangement by which copyright clearinghouses sold performance rights to their entire libraries on a blanket rather than individual basis did not warrant condemnation on a *per se* basis. Individual licensing would have allowed competition between copyright owners. But we reasoned that licensing on a blanket basis yielded substantial efficiencies that otherwise could not be realized. See *id.*, at 20–21. Indeed, the blanket license was itself "to some extent, a different product." *Id.*, at 22.[8]

In sum, the fact that a foundation-sponsored health insurance plan *literally* involves the setting of ceiling prices among competing physicians does not, of itself, justify condemning the plan as *per se* illegal. Only if it is clear from the record that the agreement among physicians is "so plainly

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[7] See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S., at 25 (STEVENS, J., dissenting in part) ("The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding").

[8] Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 54 (1977) (identifying achievement of efficiencies as "redeeming virtue" in decision sustaining an agreement against *per se* challenge); L. Sullivan, Law of Antitrust § 74, p. 200 (1977) (*per se* characterization inappropriate if price agreement achieves great economies of scale and thereby improves economic performance); *id.*, § 66, p. 180 (higher burden might reasonably be placed on plaintiff where agreement may involve efficiencies).

anticompetitive that no elaborate study of [its effects] is needed to establish [its] illegality" may a court properly make a *per se* judgment. *National Society of Professional Engineers* v. *United States*, *supra*, at 692. And, as our cases demonstrate, the *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case. See *Broadcast Music*, *supra*, at 9–10; *United States* v. *Topco Associates, Inc.*, *supra*, at 607–608 ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations").

IV

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices. *Ante*, at 355–357. One also would have expected it to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined. It is content simply to brand this type of plan as "price fixing" and describe the agreement in *Broadcast Music*—which also literally involved the fixing of prices—as "fundamentally different." *Ante*, at 356.

In fact, however, the two agreements are similar in important respects. Each involved competitors and resulted in cooperative pricing.[9] Each arrangement also was prompted

[9] In this case the physicians in effect vote on foundation maximum-fee schedules. In *Broadcast Music*, the copyright owners aggregated their copyrights into a group package, sold rights to the package at a group price, and distributed the proceeds among themselves according to an agreed-upon formula. See *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F. 2d 130, 135–136 (CA2 1977).

by the need for better service to the consumers.[10] And each arrangement apparently makes possible a new product by reaping otherwise unattainable efficiencies.[11] The Court's effort to distinguish *Broadcast Music* thus is unconvincing.[12]

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[10] In this case, the foundations' maximum-fee schedules attempt to rectify the inflationary consequence of patients' indifference to the size of physicians' bills and insurers' commitment to reimburse whatever "usual, customary, and reasonable" charges physicians may submit. In *Broadcast Music*, the market defect inhered in the fact that "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." 441 U. S., at 4–5.

[11] In this case, the record before us indicates that insurers—those best situated to decide and best motivated to inspire trust in their judgment—believe that the foundations are the most efficient providers of the maximum-fee scheduling service. In *Broadcast Music*, we found that the blanket copyright clearinghouse system "reduce[d] costs absolutely . . . ." *Id.*, at 21.

[12] The Court states that in *Broadcast Music* "there was little competition among individual composers for their separate compositions." *Ante*, at 355. This is an irrational ground for distinction. Competition *could* have existed, 441 U. S., at 6; see also 562 F. 2d, at 134–135, 138, but did not because of the cooperative agreement. That competition yet persists among *physicians* is not a sensible reason to invalidate their agreement while refusing similarly to condemn the *Broadcast Music* agreements that were *completely* effective in eliminating competition.

The Court also offers as a distinction that the foundations do not permit the creation of "any different product." *Ante*, at 356. But the foundations provide a "different product" to precisely the same extent as did *Broadcast Music*'s clearinghouses. The clearinghouses provided only what copyright holders offered as individual sellers—the rights to use individual compositions. The clearinghouses were able to obtain these same rights more efficiently, however, because they eliminated the need to engage in individual bargaining with each individual copyright owner. See 441 U. S., at 21–22.

In the same manner, the foundations set up an innovative means to deliver a basic service—insured medical care from a wide range of physicians of one's choice—in a more economical manner. The foundations' maximum-fee schedules replace the weak cost containment incentives in typical

The Court, in defending its holding, also suggests that "respondents' arguments against application of the *per se* rule . . . are better directed to the Legislature." *Ante*, at 354–355. This is curious advice. The Sherman Act does not mention *per se* rules. And it was not Congress that decided *Broadcast Music* and the other relevant cases. Since the enactment of the Sherman Act in 1890, it has been the duty of *courts* to interpret and apply its general mandate—and to do so for the benefit of consumers.

As in *Broadcast Music*, the plaintiff here has not yet discharged its burden of proving that respondents have entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification. In my view, the District Court therefore correctly refused to grant the State's motion for summary judgment.[13] This critical and disputed issue of fact remains unresolved. See Fed. Rule Civ. Proc. 56(c).

"usual, customary, and reasonable" insurance agreements with a stronger cost control mechanism: an absolute ceiling on maximum fees that can be charged. The conduct of the insurers in this case indicates that they believe that the foundation plan as it presently exists is the most efficient means of developing and administering such schedules. At this stage in the litigation, therefore, we must agree that the foundation plan permits the more economical delivery of the basic insurance service—"to some extent, a different product." *Broadcast Music*, 441 U. S., at 22.

[13] Medical services differ from the typical service or commercial product at issue in an antitrust case. The services of physicians, rendered on a patient-by-patient basis, rarely can be compared by the recipient. A person requiring medical service or advice has no ready way of comparing physicians or of "shopping" for quality medical service at a lesser price. Primarily for this reason, the foundations—operating the plan at issue—perform a function that neither physicians nor prospective patients can perform individually. On a collective—and average—basis, the physicians themselves express a willingness to render certain identifiable services for not more than specified fees, leaving patients free to choose the physician. We thus have a case in which we derive little guidance from the conventional "perfect market" analysis of antitrust law. I would give greater weight than the Court to the uniqueness of medical services, and certainly would not invalidate on a *per se* basis a plan that may in fact perform a uniquely useful service.

V

I believe the Court's action today loses sight of the basic purposes of the Sherman Act. As we have noted, the antitrust laws are a "consumer welfare prescription." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 343 (1979). In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that *may* have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them.

In a complex economy, complex economic arrangements are commonplace. It is unwise for the Court, in a case as novel and important as this one, to make a final judgment in the absence of a complete record and where mandatory inferences create critical issues of fact.

Affirmance of the District Court's holding would not have immunized the medical service plan at issue. Nor would it have foreclosed an eventual conclusion on remand that the arrangement should be deemed *per se* invalid. And if the District Court had found that petitioner had failed to establish a *per se* violation of the Sherman Act, the question would have remained whether the plan comports with the rule of reason. See, *e. g.*, *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 441, n. 16 (1978).

UNITED STATES *v.* GOODWIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-2195. Argued April 21, 1982—Decided June 18, 1982

After initially expressing an interest in plea bargaining on misdemeanor charges, respondent decided not to plead guilty and requested a trial by jury. While the misdemeanor charges were still pending, he was indicted and convicted in Federal District Court on a felony charge arising out of the same incident as the misdemeanor charges. Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, contending that the felony indictment gave rise to an impermissible appearance of retaliation. The District Court denied the motion. The Court of Appeals reversed, holding that, although the prosecutor did not act with actual vindictiveness in seeking a felony indictment, the Due Process Clause prohibits the Government from bringing more serious charges against the defendant after he has invoked his right to a jury trial, unless the prosecutor comes forward with objective evidence that the increased charges could not have been brought before the defendant exercised his right. Believing that the circumstances surrounding the felony indictment gave rise to a genuine risk of retaliation, the court adopted a legal presumption of prosecutorial vindictiveness.

Held: A presumption of prosecutorial vindictiveness was not warranted in this case, and absent such a presumption no due process violation was established. Pp. 372–384.

(a) In cases in which action detrimental to a defendant has been taken after the exercise of a legal right, the presumption of an improper vindictive motive has been applied only where a reasonable likelihood of vindictiveness existed. *North Carolina* v. *Pearce*, 395 U. S. 711; *Blackledge* v. *Perry*, 417 U. S. 21. Cf. *Bordenkircher* v. *Hayes*, 434 U. S. 357. Pp. 372–380.

(b) A change in the prosecutor's charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision. It is unrealistic to assume that a prosecutor's probable response to such pretrial motions as to be tried by a jury is to seek to penalize and to deter. Here, the timing of the prosecutor's action suggests that a presumption of vindictiveness was not warranted. A prosecutor should remain free before trial to exercise his discretion to determine the extent of the societal interest in the prosecution. The ini-

tial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution. *Bordenkircher, supra.* Pp. 380-382.

(c) The nature of the right asserted by respondent confirms that a presumption of vindictiveness was not warranted in this case. The mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unwarranted. *Bordenkircher, supra.* Pp. 382–383.

(d) The fact that respondent, as opposed to having a bench trial, requested a jury trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are thereafter brought. While there may have been an opportunity for vindictiveness here, a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted. Pp. 383–384.

637 F. 2d 250, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, at 385. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, at 386.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Shapiro,* and *Robert J. Erickson.*

Paul W. Spence, by appointment of the Court, 454 U. S. 1138, argued the cause and filed a brief for respondent.

JUSTICE STEVENS delivered the opinion of the Court.

This case involves presumptions. The question presented is whether a presumption that has been used to evaluate a judicial or prosecutorial response to a criminal defendant's exercise of a right to be retried after he has been convicted

should also be applied to evaluate a prosecutor's pretrial response to a defendant's demand for a jury trial.

After the respondent requested a trial by jury on pending misdemeanor charges, he was indicted and convicted on a felony charge. Believing that the sequence of events gave rise to an impermissible appearance of prosecutorial retaliation against the defendant's exercise of his right to be tried by jury, the United States Court of Appeals for the Fourth Circuit reversed the felony conviction. 637 F. 2d 250. Because this case presents an important question concerning the scope of our holdings in *North Carolina* v. *Pearce*, 395 U. S. 711, and *Blackledge* v. *Perry*, 417 U. S. 21, we granted the Government's petition for certiorari. 454 U. S. 1079.

I

Respondent Goodwin was stopped for speeding by a United States Park Policeman on the Baltimore-Washington Parkway. Goodwin emerged from his car to talk to the policeman. After a brief discussion, the officer noticed a clear plastic bag underneath the armrest next to the driver's seat of Goodwin's car. The officer asked Goodwin to return to his car and to raise the armrest. Respondent did so, but as he raised the armrest he placed the car into gear and accelerated rapidly. The car struck the officer, knocking him first onto the back of the car and then onto the highway. The policeman returned to his car, but Goodwin eluded him in a high-speed chase.

The following day, the officer filed a complaint in the District Court charging respondent with several misdemeanor and petty offenses, including assault. Goodwin was arrested and arraigned before a United States Magistrate. The Magistrate set a date for trial, but respondent fled the jurisdiction. Three years later Goodwin was found in custody in Virginia and was returned to Maryland.

Upon his return, respondent's case was assigned to an attorney from the Department of Justice, who was detailed

temporarily to try petty crime and misdemeanor cases before the Magistrate. The attorney did not have authority to try felony cases or to seek indictments from the grand jury. Respondent initiated plea negotiations with the prosecutor, but later advised the Government that he did not wish to plead guilty and desired a trial by jury in the District Court.[1]

The case was transferred to the District Court and responsibility for the prosecution was assumed by an Assistant United States Attorney. Approximately six weeks later, after reviewing the case and discussing it with several parties, the prosecutor obtained a four-count indictment charging respondent with one felony count of forcibly assaulting a federal officer and three related counts arising from the same incident.[2] A jury convicted respondent on the felony count and on one misdemeanor count.

Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, contending that the indictment on the felony charge gave rise to an impermissible appearance of retaliation. The District Court denied the motion, finding that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent."[3]

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[1] At that time, there was no statutory provision allowing a trial by jury before a magistrate.

[2] By affidavit, the Assistant United States Attorney later set forth his reasons for this action: (1) he considered respondent's conduct on the date in question to be a serious violation of law, (2) respondent had a lengthy history of violent crime, (3) the prosecutor considered respondent's conduct to be related to major narcotics transactions, (4) the prosecutor believed that respondent had committed perjury at his preliminary hearing, and (5) respondent had failed to appear for trial as originally scheduled. The Government attorney stated that his decision to seek a felony indictment was not motivated in any way by Goodwin's request for a jury trial in District Court.

[3] App. to Pet. for Cert. 22a; cf. n. 2, *supra*. The District Court considered the merits of respondent's motion even though it was not timely filed in accordance with Rule 12(b)(1) of the Federal Rules of Criminal Procedure. The District Court found sufficient "cause" for respondent's procedural default pursuant to Federal Rule of Criminal Procedure 12(f). The

Although the Court of Appeals readily concluded that "the prosecutor did not act with actual vindictiveness in seeking a felony indictment," 637 F. 2d, at 252, it nevertheless reversed. Relying on our decisions in *North Carolina* v. *Pearce*, *supra*, and *Blackledge* v. *Perry*, *supra*, the court held that the Due Process Clause of the Fifth Amendment prohibits the Government from bringing more serious charges against a defendant after he has invoked his right to a jury trial, unless the prosecutor comes forward with objective evidence to show that the increased charges could not have been brought before the defendant exercised his rights. Because the court believed that the circumstances surrounding the felony indictment gave rise to a genuine risk of retaliation, it adopted a legal presumption designed to spare courts the "unseemly task" of probing the actual motives of the prosecutor. 637 F. 2d, at 255.

II

To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363. In a series of cases beginning with *North Carolina* v. *Pearce* and culminating in *Bordenkircher* v. *Hayes*, the Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.[4]

The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive

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Court of Appeals did not consider the propriety of the District Court's ruling in this regard and neither do we.

[4] "[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (quoting *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 32–33, n. 20).

motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to "presume" an improper vindictive motive. Given the severity of such a presumption, however—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

In *North Carolina* v. *Pearce*, the Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause prohibits a trial judge from imposing a harsher sentence on retrial after a criminal defendant successfully attacks an initial conviction on appeal. The Court stated, however, that "[i]t can hardly be doubted that it would be a flagrant violation [of the Due Process Clause] of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 395 U. S., at 723–724. The Court continued:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory

motivation on the part of the sentencing judge." *Id.*, at 725.

In order to assure the absence of such a motivation, the Court concluded:

> "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726.

In sum, the Court applied a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.[5]

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[5] Two subsequent cases developed the principles set forth in *Pearce*. In *Colten* v. *Kentucky*, 407 U. S. 104, the Court refused to apply the prophylactic rule of *Pearce* to an allegation of vindictiveness that arose in a case involving Kentucky's two-tier system for adjudicating less serious criminal charges. In that system, a defendant who is convicted and sentenced in an inferior court is entitled to a trial *de novo* in a court of general jurisdiction. The defendant in *Colten* exercised that right and received a more severe sentence from the court of general jurisdiction. This Court found that "[t]he possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system." 407 U. S., at 116. The Court emphasized that the second trial was conducted, and the final sentence was imposed, by a different court that was not asked "to do over what it thought it had already done correctly." *Id.*, at 117. The Court noted: "It may often be that the superior court will impose a punishment more severe than that received from an inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty." *Ibid.* Ultimately, the Court described the sentence received from the inferior tribunal as "in effect . . . no more than an offer in settlement." *Id.*, at 119.

In *Chaffin* v. *Stynchcombe*, 412 U. S. 17, the Court held that the prophylactic rule of *Pearce* does not apply when the second sentence is im-

In *Blackledge* v. *Perry*, 417 U. S. 21, the Court confronted the problem of increased punishment upon retrial after appeal in a setting different from that considered in *Pearce*. Perry was convicted of assault in an inferior court having exclusive jurisdiction for the trial of misdemeanors. The court imposed a 6-month sentence. Under North Carolina law, Perry had an absolute right to a trial *de novo* in the Superior Court, which possessed felony jurisdiction. After Perry filed his notice of appeal, the prosecutor obtained a felony indictment charging him with assault with a deadly weapon. Perry pleaded guilty to the felony and was sentenced to a term of five to seven years in prison.

In reviewing Perry's felony conviction and increased sentence,[6] this Court first stated the essence of the holdings in *Pearce* and the cases that had followed it:

> "The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U. S., at 27.

The Court held that the opportunities for vindictiveness in the situation before it were such "as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Ibid.* It explained:

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posed on retrial by a jury. The Court emphasized that the decision in *Pearce* "was premised on the apparent need to guard against *vindictiveness* in the resentencing process." 412 U. S., at 25 (emphasis in original). The Court found that the possibility of vindictiveness was *de minimis* when resentencing was by jury in a properly controlled retrial. The Court noted that (1) the jury typically will not be aware of the prior sentence, (2) the jury, unlike a judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication, and (3) the jury will not likely be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals. *Id.*, at 26–27.

[6] The Court held that in pleading guilty Perry had not waived the right "not to be haled into court at all upon the felony charge." 417 U. S., at 30.

> "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial." *Id.*, at 27–28.

The Court emphasized in *Blackledge* that it did not matter that no evidence was present that the prosecutor had acted in bad faith or with malice in seeking the felony indictment.[7] As in *Pearce*, the Court held that the likelihood of vindictiveness justified a presumption that would free defendants of apprehension of such a retaliatory motivation on the part of the prosecutor.[8]

Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of *stare decisis*, res judicata, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias.

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[7] "There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry." *Id.*, at 28.

[8] The presumption again could be overcome by objective evidence justifying the prosecutor's action. The Court noted: "This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States*, 223 U. S. 442." *Id.*, at 29, n. 7.

While none of these doctrines barred the retrials in *Pearce* and *Blackledge*, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.

In *Bordenkircher* v. *Hayes*, 434 U. S. 357, the Court for the first time considered an allegation of vindictiveness that arose in a pretrial setting. In that case the Court held that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. The prosecutor in that case had explicitly told the defendant that if he did not plead guilty and "save the court the inconvenience and necessity of a trial" he would return to the grand jury to obtain an additional charge that would significantly increase the defendant's potential punishment.[9] The defendant refused to plead guilty and the prosecutor obtained the indictment. It was not disputed that the additional charge was justified by the evidence, that the prosecutor was in possession of this evidence at the time the original indictment was obtained, and that the prosecutor sought the additional charge because of the accused's refusal to plead guilty to the original charge.

In finding no due process violation, the Court in *Bordenkircher* considered the decisions in *Pearce* and *Blackledge*, and stated:

> "In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-

[9] The prosecutor advised the defendant that he would obtain an indictment under the Kentucky Habitual Criminal Act, which would subject the accused to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Absent the additional indictment, the defendant was subject to a punishment of 2 to 10 years in prison.

> take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.' *Parker* v. *North Carolina*, 397 U. S. 790, 809 (opinion of BRENNAN, J.)." 434 U. S., at 362.

The Court stated that the due process violation in *Pearce* and *Blackledge* "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." 434 U. S., at 363.

The Court held, however, that there was no such element of punishment in the "give-and-take" of plea negotiation, so long as the accused "is free to accept or reject the prosecution's offer." *Ibid.* The Court noted that, by tolerating and encouraging the negotiation of pleas, this Court had accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial. The Court concluded:

> "We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." *Id.*, at 365.

The outcome in *Bordenkircher* was mandated by this Court's acceptance of plea negotiation as a legitimate process.[10] In declining to apply a presumption of vindictiveness,

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[10] Cf. 434 U. S., at 364–365 ("To hold that the prosecutor's desire to induce a guilty plea . . . may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself"). If a prosecutor could not threaten to bring additional charges dur-

the Court recognized that "additional" charges obtained by a prosecutor could not necessarily be characterized as an impermissible "penalty." Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a "benefit" to the defendant—changes in the charging decision that occur in the

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ing plea negotiation, and then obtain those charges when plea negotiation failed, an equally compelling argument could be made that a prosecutor's initial charging decision could never be influenced by what he hoped to gain in the course of plea negotiation. Whether "additional" charges were brought originally and dismissed, or merely threatened during plea negotiations, the prosecutor could be accused of using those charges to induce a defendant to forgo his right to stand trial. If such use of "additional" charges were presumptively invalid, the institution of plea negotiation could not survive. Thus, to preserve the plea negotiation process, with its correspondent advantages for both the defendant and the State, the Court in *Bordenkircher* held that "additional" charges *may* be used to induce a defendant to plead guilty. Once that conclusion was accepted, it necessarily followed that it did not matter whether the "additional" charges were obtained in the original indictment or merely threatened in plea negotiations and obtained once those negotiations broke down. In the former situation, the prosecutor could be said simply to have "anticipated" that the defendant might refuse to plead guilty and, as a result, to have placed his "threat" in the original indictment. Cf. *id.*, at 360–361 ("As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain").

The decision in *Bordenkircher* also was influenced by the fact that, had the Court recognized a distinction of constitutional dimension between the dismissal of charges brought in an original indictment and the addition of charges after plea negotiation, the aggressive prosecutor would merely be prompted "to bring the greater charge initially in every case, and only thereafter to bargain." *Id.*, at 368 (BLACKMUN, J., dissenting). The consequences of such a decision often would be prejudicial to defendants, for an accused "would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea." *Ibid.* Moreover, in those cases in which a defendant accepted the prosecution's offer, his reputation would be spared the unnecessary damage that would result from the placement of the additional charge on the public record.

context of plea negotiation are an inaccurate measure of improper prosecutorial "vindictiveness."[11] An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.[12]

III

This case, like *Bordenkircher*, arises from a pretrial decision to modify the charges against the defendant. Unlike *Bordenkircher*, however, there is no evidence in this case that could give rise to a claim of *actual* vindictiveness; the

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[11] The Court in *Bordenkircher* stated that the validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against an accused. "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.*, at 364 (quoting *Oyler* v. *Boles*, 368 U. S. 448, 456). A charging decision does not levy an improper "penalty" unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in prosecution. See Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif. L. Rev. 471, 486 (1978).

[12] In rejecting a presumption of vindictiveness, the Court in *Bordenkircher* did not foreclose the possibility that a defendant might prove through objective evidence an improper prosecutorial motive. In the case before it, however, the Court did not find such proof in the fact that the prosecutor had stated explicitly that additional charges were brought to persuade the defendant to plead guilty. The fact that the prosecutor threatened the defendant did not prove that the action threatened was not permissible; the prosecutor's conduct did not establish that the additional charges were brought solely to "penalize" the defendant and could not be justified as a proper exercise of prosecutorial discretion.

prosecutor never suggested that the charge was brought to influence the respondent's conduct.[13] The conviction in this case may be reversed only if a *presumption* of vindictiveness—applicable in all cases—is warranted.

There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted.

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[13] See n. 12, *supra*.

A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.[14] As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.[15]

The nature of the right asserted by the respondent confirms that a presumption of vindictiveness is not warranted in this case. After initially expressing an interest in plea negotiation, respondent decided not to plead guilty and requested a trial by jury in District Court. In doing so, he forced the Government to bear the burdens and uncertainty of a trial. This Court in *Bordenkircher* made clear that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging deci-

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[14] We recognize that prosecutors may be trained to bring all legitimate charges against an individual at the outset. Certainly, a prosecutor should not file any charge until he has investigated fully all of the circumstances surrounding a case. To presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources. Moreover, there are certain advantages in avoiding a rule that would compel prosecutors to attempt to place every conceivable charge against an individual on the public record from the outset. See n. 10, *supra*.

[15] Respondent argues that the Court's refusal to presume vindictiveness in *Bordenkircher* is not controlling in this case because he had refused to plead guilty and the plea negotiation process was over. Respondent's argument is not strengthened, however, by the fact that the additional charge in this case was brought outside the context of plea negotiation. The fact that the increased charge in *Bordenkircher* was brought after a "warning" made during plea negotiation was the principal basis for the defendant's claim that the charge was an unjustified response to his legal right to stand trial. But cf. n. 12, *supra*. Respondent's argument in this case has no such predicate; unlike the defendant in *Bordenkircher*, the only evidence respondent is able to marshal in support of his allegation of vindictiveness is that the additional charge was brought at a point in time after his exercise of a protected legal right.

sion are unjustified. Respondent argues that such a presumption is warranted in this case, however, because he not only requested a trial—he requested a trial by jury.

We cannot agree. The distinction between a bench trial and a jury trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are brought after a jury is demanded. To be sure, a jury trial is more burdensome than a bench trial. The defendant may challenge the selection of the venire; the jury itself must be impaneled; witnesses and arguments must be prepared more carefully to avoid the danger of a mistrial. These matters are much less significant, however, than the facts that before either a jury or a judge the State must present its full case against the accused and the defendant is entitled to offer a full defense. As compared to the complete trial *de novo* at issue in *Blackledge*, a jury trial—as opposed to a bench trial—does not require duplicative expenditures of prosecutorial resources before a final judgment may be obtained. Moreover, unlike the trial judge in *Pearce*, no party is asked "to do over what it thought it had already done correctly."[16] A prosecutor has no "personal stake" in a bench trial and thus no reason to engage in "self-vindication" upon a defendant's request for a jury trial.[17] Perhaps most importantly, the institutional bias against the retrial of a decided question that supported the decisions in *Pearce* and *Blackledge* simply has no counterpart in this case.[18]

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[16] Cf. *Colten* v. *Kentucky*, 407 U. S., at 117.

[17] Cf. *Chaffin* v. *Stynchcombe*, 412 U. S., at 27.

[18] Indeed, there is a strong tradition in this country in favor of jury trials, despite the additional burdens that they entail for all parties. In many cases—and for many reasons—both the judge and the prosecutor may prefer to have a case tried by jury. See, *e. g.*, *Vines* v. *Muncy*, 553 F. 2d 342 (CA4 1977); *United States* v. *Morlang*, 531 F. 2d 183 (CA4 1975); *United States* v. *Ceja*, 451 F. 2d 399 (CA1 1971); see also Fed. Rule Crim. Proc. 23(a). In *Singer* v. *United States*, 380 U. S. 24, this Court held that a criminal defendant does not have a constitutional right to waive a jury trial and to have his case tried before a judge alone. The Court stated: "Trial by jury has been established by the Constitution as the 'normal and . . .

There is an opportunity for vindictiveness, as there was in *Colten* and *Chaffin*. Those cases demonstrate, however, that a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. As *Blackledge* makes clear, "the Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U. S., at 27. The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted.

IV

In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.[19] In this case, however, the Court of Appeals stated: "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." 637 F. 2d, at 252. Respondent does not challenge that finding. Absent a presumption of vindictiveness, no due process violation has been established.

The judgment of the Court of Appeals is reversed. The

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preferable mode of disposing of issues of fact in criminal cases.' *Patton* v. *United States*, 281 U. S. 276, 312." *Id.*, at 35.

[19] As the Government states in its brief:

"Accordingly, while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a procedural right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration." Brief for United States 28, n. 9.

case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

Like JUSTICE BRENNAN, I believe that our precedents mandate the conclusion that "a realistic likelihood of 'vindictiveness'" arises in this context. *Blackledge* v. *Perry*, 417 U. S. 21, 27 (1974). The Assistant United States Attorney responsible for increasing the charges against respondent was aware of the initial charging decision; he had the means available to discourage respondent from electing a jury trial in District Court; he had a substantial stake in dissuading respondent from exercising that option; and he was familiar with, and sensitive to, the institutional interests that favored a trial before the Magistrate.

Moreover, I find no support in our prior cases for any distinction between pretrial and post-trial vindictiveness. As I have said before: "Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 368 (1978) (dissenting opinion). And, as JUSTICE BRENNAN points out, *Bordenkircher* does not dictate the result here. In fact, in *Bordenkircher* the Court expressly distinguished and left *unresolved* cases such as this one, "where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original [charges] had ended with the defendant's insistence on pleading not guilty." *Id.*, at 360.

The Court's ruling in *Bordenkircher* did not depend on a distinction between the pretrial and post-trial settings: rather, the Court declined to apply its prior opinions in *Blackledge* and *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), because those cases involved "the State's unilateral imposition of a penalty," rather than "'the give-and-take negotiation common in plea bargaining.'" 434 U. S., at

362, quoting *Parker* v. *North Carolina*, 397 U. S. 790, 809 (1970) (opinion of BRENNAN, J.). Here, as in *Pearce* and *Blackledge*, the prosecutor unilaterally imposed a penalty in response to respondent's exercise of a legal right.

Adopting the prophylactic rule of *Pearce* and *Blackledge* in this case will not, as the Court would insist, undercut "the broad discretion entrusted to [the prosecutor] to determine the extent of the societal interest in prosecution." *Ante*, at 382. "[T]he prosecutor initially 'makes a discretionary determination that the interests of the state are served by not seeking more serious charges.'" *Bordenkircher* v. *Hayes*, 434 U. S., at 367 (dissenting opinion), quoting *Hayes* v. *Cowan*, 547 F. 2d 42, 44 (CA6 1976). Moreover, the Due Process Clause does not deprive a prosecutor of the flexibility to add charges after a defendant has decided not to plead guilty and has elected a jury trial in District Court—so long as the adjustment is based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original" charging decision. *North Carolina* v. *Pearce*, 395 U. S., at 726. In addition, I believe that the prosecutor adequately explains an increased charge by pointing to objective information that he could not reasonably have been aware of at the time charges were initially filed. Cf. *ante*, at 381.

Because I find that the Assistant United States Attorney's explanation for seeking a felony indictment satisfies these standards, see *ante*, at 371, n. 2, I conclude that the Government has dispelled the appearance of vindictiveness and, therefore, that the imposition of additional charges did not violate respondent's due process rights. Accordingly, I concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Blackledge* v. *Perry*, 417 U. S. 21 (1974), this Court held that the Due Process Clause prohibits a prosecutor from re-

sponding to the defendant's invocation of his statutory right to a trial *de novo* by bringing more serious charges against him that arise out of the same conduct. In the case before us, the prosecutor responded to the defendant's invocation of his statutory *and constitutional* right to a trial *by jury* by raising petty offenses to felony charges based on the same conduct. Yet the Court holds, in the teeth of *Blackledge*, that here there is no denial of due process. In my view, *Blackledge* requires affirmance of the Court of Appeals, and the Court's attempt to distinguish that case from the present one is completely unpersuasive.

The salient facts of this case are quite simple. Respondent was originally charged with several petty offenses and misdemeanors—speeding, reckless driving, failing to give aid at the scene of an accident, fleeing from a police officer, and assault by striking a police officer—arising from his conduct on the Baltimore-Washington Parkway. Assuming that respondent had been convicted on every count charged in this original complaint, the maximum punishment to which he conceivably could have been exposed was fines of $3,500 and 28 months in prison.[1] Because all of the charges against respondent were petty offenses or misdemeanors, they were scheduled for trial before a magistrate, see 28 U. S. C. § 636(a)(3); 18 U. S. C. § 3401(a), who was not authorized to

[1] Two counts of "speeding" and one count of "reckless driving," in violation of 36 CFR §§ 50.31, 50.32 (1981), are each punishable by fines of not more than $500, or imprisonment for not more than six months, or both, 36 CFR § 50.5(a) (1981). One count of "failing to give aid at the scene of an accident," in violation of 18 U. S. C. §§ 7, 13, Md. Transp. Code Ann. §§ 20–102, 20–104 (1977), is punishable by a fine of not more than $1,000, or imprisonment for not more than four months, or both, §§ 27–101(c)(12), (14). One count of "fleeing from a police officer," in violation of 18 U. S. C. §§ 7, 13, Md. Transp. Code Ann. § 21–904 (1977), is punishable by a fine of not more than $500, § 27–101(b). One count of "assault by striking" a police officer, in violation of 18 U. S. C. § 113(d), is punishable by a fine of not more than $500, or imprisonment for not more than six months, or both.

conduct jury trials, see *ante*, at 371, n. 1. In addition, the case was assigned to a prosecutor who, owing to inexperience, was not even authorized to try felony cases. Thus the Government recognized that respondent's alleged crimes were relatively minor, and attempted to dispose of them in an expedited manner. But respondent frustrated this attempt at summary justice by demanding a jury trial in Federal District Court. This was his right, of course, not only under the applicable statute, 18 U. S. C. § 3401(b), but also under the Constitution.[2]

Respondent's demand required that the case be transferred from the Magistrate's Court in Hyattsville to the District Court in Baltimore, and that the prosecution be reassigned to an Assistant United States Attorney, who was authorized to prosecute cases in the District Court. The new prosecutor sought and obtained a second, four-count indictment, in which the same conduct originally charged as petty-offense and misdemeanor counts was now charged as a misdemeanor and two felonies: assaulting, resisting, or impeding a federal officer with a deadly weapon, and assault with a dangerous weapon. If we assume (as before) that respondent was convicted on all of these charges, his maximum exposure to punishment had now become fines of $11,500 and 15 years in prison.[3] Respondent's claim below was that such

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[2] See *District of Columbia* v. *Colts*, 282 U. S. 63, 73–74 (1930); *United States* v. *Hamdan*, 552 F. 2d 276, 278–280 (CA9 1977); *United States* v. *Sanchez-Meza*, 547 F. 2d 461, 464–465 (CA9 1976); *United States* v. *Potvin*, 481 F. 2d 380, 381–383 (CA10 1973).

[3] "Assaulting, resisting, or impeding" a federal officer with a deadly weapon, in violation of 18 U. S. C. § 111, is punishable by a fine of not more than $10,000, or imprisonment for not more than 10 years, or both. "Assault with a dangerous weapon," in violation of 18 U. S. C. § 113(c), is punishable by a fine of not more than $1,000, or imprisonment for not more than five years, or both. A third count in the new indictment was "fleeing from a police officer," in violation of 18 U. S. C. §§ 7, 13, Md. Transp. Code Ann. § 21–904 (1977), which is punishable by a fine of not more than $500, § 27–101(b). The fourth count of the indictment was "failure to appear," in violation of 18 U. S. C. § 3150.

an elevation of the charges against him from petty offenses to felonies, following his exercise of his statutory and constitutional right to a jury trial, reflected prosecutorial vindictiveness that denied him due process of law.

The Court attempts to denigrate respondent's claim by asserting that this case "involves presumptions," *ante*, at 369, and by arguing that "there is no evidence in this case that could give rise to a claim of *actual* vindictiveness," *ante*, at 380 (emphasis in original). By casting respondent's claim in terms of a "mere" legal presumption, the Court hopes to make that claim appear to be unreal or technical. But such an approach is contrary to the letter and spirit of *Blackledge*. There we focused upon the accused's "apprehension of . . . retaliatory motivation," 417 U. S., at 28, and we held that the Due Process Clause is violated when situations involving increased punishment "pose a realistic likelihood of 'vindictiveness,'" *id.*, at 27. In such situations, the criminal defendant's apprehension of retaliatory motivation does not amount to an unreal or technical violation of his constitutional rights. On the contrary, as we recognized in *North Carolina* v. *Pearce*, 395 U. S. 711, 725 (1969), "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise" of his rights.

The Court does not contend that *Blackledge* is inapplicable to instances of pretrial as well as post-trial vindictiveness. But after examining the record before us for objective indications of such vindictiveness, the Court concludes, *ante*, at 382, that "a presumption of vindictiveness is not warranted in this case." With all respect, I disagree both with the Court's conclusion and with its reasoning. In my view, the question here is not one of "presumptions." Rather, I would analyze respondent's claim in the terms employed by our precedents. Did the elevation of the charges against respondent "pose a realistic likelihood of 'vindictiveness?'" See *Blackledge* v. *Perry*, 417 U. S., at 27. Is it possible that "the fear of such vindictiveness may unconstitutionally deter" a person in respondent's position from exercising his statutory and

constitutional right to a jury trial? See *North Carolina* v. *Pearce*, *supra*, at 725. The answer to these questions is plainly, "Yes."

The Court suggests, *ante*, at 383, that the distinction between a bench trial and a jury trial is unimportant in this context. Such a suggestion is demonstrably fallacious. Experienced criminal practitioners, for both prosecution and defense, know that a jury trial entails far more prosecutorial work than a bench trial. Defense challenges to the potential-juror array, *voir dire* examination of potential jurors, and suppression hearings all take up a prosecutor's time before a jury trial, adding to his scheduling difficulties and caseload. More care in the preparation of his requested instructions, of his witnesses, and of his own remarks is necessary in order to avoid mistrial or reversible error. And there is always the specter of the "irrational" acquittal by a jury that is unreviewable on appeal. Thus it is simply inconceivable that a criminal defendant's election to be tried by jury would be a matter of indifference to his prosecutor. On the contrary, the prosecutor would almost always prefer that the defendant waive such a "troublesome" right. And if the defendant refuses to do so, the prosecutor's subsequent elevation of the charges against the defendant manifestly poses a realistic likelihood of vindictiveness.

The truth of my conclusion, and the patent fallacy of the Court's, is particularly evident on the record before us. The practical effect of respondent's demand for a jury trial was that the Government had to transfer the case from a trial before a Magistrate in Hyattsville to a trial before a District Judge and jury in Baltimore, and had to substitute one prosecutor for another. The Government thus suffered not only administrative inconvenience: It also lost the value of the preparation and services of the first prosecutor, and was forced to commit a second prosecutor to prepare the case from scratch. Thus, just as in *Blackledge*, respondent's elec-

tion had the effect of "clearly requir[ing] increased expenditures of prosecutorial resources before the defendant's conviction" could finally be achieved. 417 U. S., at 27. And, to paraphrase *Blackledge*,

> "if the prosecutor has the means readily at hand to discourage such [elections]—by 'upping the ante' through a felony indictment . . . —the State can insure that only the most hardy defendants will brave the hazards of a [jury] trial." Cf. *id.*, at 27–28.

I conclude that the facts of this case easily support the inference of "a realistic likelihood of vindictiveness."

The Court discusses *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), *ante*, at 377–380, and suggests some analogy between that case and the present one, *ante*, at 380. In my view, such an analogy is quite inapt. *Bordenkircher* dealt only with the context of plea bargaining and with the narrow situation in which the prosecutor "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing [increased] charges." 434 U. S., at 365. *Bordenkircher* did not remotely suggest that a pretrial increase in charges, made as a response to a demand for jury trial, would not present a realistic likelihood of vindictiveness when the demand put the prosecution to an added burden such as that imposed in this case. Indeed, *Bordenkircher* expressly distinguished its facts from those in *Blackledge* and *Pearce:* "In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . . —a situation 'very different from the give-and-take negotiation common in plea bargaining . . . .'" 434 U. S., at 362, quoting *Parker* v. *North Carolina*, 397 U. S. 790, 809 (1970). The facts in this case plainly fit within the pattern of *Pearce* and *Blackledge*, not of *Bordenkircher*. There was no ongoing "give-and-take negotiation" between respondent and the Government, and there

was the "unilateral imposition of a penalty" in response to respondent's choice "to exercise a legal right."

Because it seems clear to me that *Blackledge* requires it, I would affirm the judgment of the Court of Appeals.

CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 81-31. Argued March 30, 1982—Decided June 18, 1982*

The Federal Unemployment Tax Act established a cooperative federal-state scheme to provide benefits to unemployed workers. The Act requires employers to pay an excise tax on wages paid to employees in "covered" employment, but entitles them to a credit on the federal tax for contributions paid into federally approved state unemployment compensation programs. The Act, in 26 U. S. C. § 3309(b), exempts from mandatory state coverage employees of, *inter alia*, "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches." A number of California churches and religious schools, including religious schools unaffiliated with any church, brought suit in Federal District Court to enjoin the Secretary of Labor from conditioning his approval of the California unemployment insurance program on its coverage of plaintiffs' employees, and to enjoin the State from collecting both tax information and the state unemployment compensation tax. The District Court conducted various proceedings and issued several opinions and orders extending over almost a year and a half, in one of which proceedings it rejected the Federal Government's argument that the court was barred from granting injunctive relief by the Tax Injunction Act, which provides that district courts "shall not enjoin, suspend or restrain" the assessment or collection of any state tax where "a plain, speedy and efficient remedy" may be had in the courts of such State. Ultimately, as pertinent here, on the ground that the benefit entitlement decisions for employees of the religious schools unaffiliated with churches risked excessive entanglement with religion in violation of the Establishment Clause of the First Amendment, the court permanently enjoined the state defendants from collecting unemployment taxes from such schools but did not issue an injunction against the federal defendants as to the schools because it had no information as to

*Together with No. 81-228, *United States et al.* v. *Grace Brethren Church et al.*; and No. 81-455, *Grace Brethren Church et al.* v. *United States et al.*, also on appeal from the same court.

what response the Secretary of Labor would make to the court's conclusion that the state defendants could not constitutionally impose state unemployment taxes on the employees of such schools. The court said that if the Secretary instituted decertification proceedings against California for failing to collect the taxes on behalf of such employees, the parties could apply to the court for further relief.

Held:

1. This Court has jurisdiction to hear these appeals under 28 U. S. C. § 1252, which permits appeals to this Court from a federal-court judgment holding an Act of Congress unconstitutional in any civil action to which the United States or any of its agencies, or any officer or employee thereof, is a party. While the District Court did not expressly hold § 3309(b) unconstitutional as applied to religious schools unaffiliated with churches, the effect of its several opinions and orders was to make "the United States or its officers . . . bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U. S. 21, 31. Pp. 404–407.

2. The Tax Injunction Act deprived the District Court of jurisdiction to issue declaratory and injunctive relief. Pp. 407–419.

(a) That Act prohibits declaratory as well as injunctive relief. Because the declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299, the very language of the Act—"suspend or restrain" the assessment or collection of state taxes—suggests that a district court is prohibited from issuing declaratory relief in state tax cases. Moreover, because there is little practical difference between injunctive and declaratory relief, it is unlikely that Congress intended to prohibit taxpayers from seeking one form of relief, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act "to limit drastically" federal-court interference with the assessment and collection of state taxes. Pp. 407–411.

(b) A state-court remedy is "plain, speedy and efficient" within the meaning of the Tax Injunction Act only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 514. Pp. 411–413.

(c) Here, because the taxpayers in question could seek a refund of their state unemployment insurance taxes through state administrative and judicial procedures, and thereby obtain state judicial review of their constitutional claims, their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act. There is no merit to the taxpayers' argument that the California refund procedures

did not constitute a "plain, speedy and efficient remedy" because their First Amendment claims could be effectively remedied only by injunctive relief and that such relief was unavailable in California. First, under California procedures, the taxpayers should be able to challenge the constitutionality of the unemployment tax in state court before extensive entanglement occurs, and state tax collection agencies can be expected to abide by resulting state-court rulings. Second, to the extent that any entanglement occurs before state review of the constitutional questions, that entanglement would not be reduced by seeking relief instead in the federal courts. Moreover, to carve out a special exception for taxpayers who raise First Amendment claims would undermine the Tax Injunction Act's primary purpose. Pp. 413–417.

(d) Where the District Court was without jurisdiction, this Court will not consider the merits of the taxpayers' First Amendment claims. *McLucas* v. *DeChamplain*, *supra*, and *Weinberger* v. *Salfi*, 422 U. S. 749, distinguished. Pp. 418–419.

Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 419.

Harriet S. Shapiro argued the cause for the United States et al. in Nos. 81–228 and 81–455. With her on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Wallace*, *Mark C. Rutznick*, and *F. James Foley*.

Jeffrey M. Vesely, Deputy Attorney General of California, argued the cause for appellants in No. 81–31. With him on the briefs were *George Deukmejian*, Attorney General, and *Edmond B. Mamer*, Deputy Attorney General.

William Bentley Ball argued the cause for appellees in Nos. 81–31 and 81–228 and appellants in No. 81–455. With him on the brief for Grace Brethren Church et al. were *Philip J. Murren* and *Robert L. Toms*. *Donald A. Daucher* filed a brief for the Lutheran Church-Missouri Synod et al.†

†*Nathan Z. Dershowitz* and *Marc D. Stern* filed a brief for the American Jewish Congress as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

The principal question presented by the parties to these appeals is whether certain state and federal statutes violate the Establishment and Free Exercise Clauses of the First Amendment[1] by requiring religious schools unaffiliated with any church to pay unemployment insurance taxes. We do not reach this substantive question, however, holding instead that the Tax Injunction Act, 28 U. S. C. § 1341,[2] deprived the District Court of jurisdiction to hear these challenges. Accordingly, we vacate the judgment below.

I

Last Term, in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772 (1981), this Court considered statutory and constitutional challenges to provisions of the Federal Unemployment Tax Act (FUTA), 26 U. S. C. §§ 3301–3311 (1976 ed. and Supp. IV). Because the present claims involve the same provisions that we interpreted in *St. Martin*, we recount only briefly the substance and legislative history of the relevant statutes before turning to the facts in the present cases.

A

In FUTA,[3] Congress has authorized a cooperative federal-state scheme to provide benefits to unemployed workers.

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[1] The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise and Establishment Clauses apply to the States through the Due Process Clause of the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947).

[2] The Act provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[3] FUTA was enacted originally as Title IX of the Social Security Act of 1935, ch. 531, 49 Stat. 639.

The Act requires employers to pay an excise tax on wages paid to employees in "covered" employment,[4] but entitles them to a credit of up to 90% of the federal tax for contributions they have paid into federally approved state unemployment compensation programs.[5] One of the requirements for federal approval is that state programs "cover" certain broad categories of employment.

Until 1970, 26 U. S. C. § 3306(c)(8) excluded from the definition of covered employment "service performed in the employ of a religious, charitable, educational, or other [tax exempt] organization." Pub. L. 86-778, § 533, 74 Stat. 984. As a consequence, such organizations were not required to pay either federal excise taxes or state unemployment compensation taxes. In 1970, Congress amended FUTA to require state plans to cover employees of nonprofit organizations, state hospitals, and state institutions of higher education, thus eliminating the broad exemption available to nonprofit organizations.[6] See § 3309(a)(1). At the same time, Congress enacted § 3309(b) to exempt from mandatory

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[4] See 26 U. S. C. § 3301.

[5] See 26 U. S. C. § 3302 (1976 ed. and Supp. IV). Each state program receives annual approval after the Secretary of Labor finds that it complies with federal statutory standards. See 26 U. S. C. §§ 3304(a), (c) (1976 ed. and Supp. IV). The federal standards for the state programs are contained in §§ 3304 and 3309. If a state plan complies with federal standards, the State is authorized to receive a federal grant to administer the state plan. See 29 U. S. C. § 49d(b); 42 U. S. C. § 501.

[6] See Employment Security Amendments of 1970, Pub. L. 91-373, § 104 (b)(1), 84 Stat. 697. Under §§ 3309(a)(2) and 3304(a)(6)(B), such nonprofit organizations were given the option of either making the same contribution to the state unemployment compensation fund required of other employers, or reimbursing the fund for unemployment compensation payments actually made to the nonprofit organizations' former employees.

Although nonprofit organizations were covered by federally approved state unemployment compensation laws, they continued to be exempt from the federal excise tax on wages because the definition of "employment" in § 3306(c)(8), excluding services performed for such organizations, remained unchanged.

state coverage a narrow class of religious and educational employees, *i. e.*, Congress exempted services performed

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education." Pub. L. 91-373, § 104(b)(1), 84 Stat. 698.

In 1976, Congress again amended FUTA, this time eliminating the substance of § 3309(b)(3), thereby removing the blanket exemption for school employees. See Unemployment Compensation Amendments of 1976, Pub. L. 94-566, § 115(b)(1), 90 Stat. 2670.[7] In order to maintain compliance with FUTA, the States promptly amended their corresponding state programs. See, *e. g.*, Cal. Un. Ins. Code Ann. §§ 634.5(a), (b) (West Supp. 1982).

B

The plaintiffs in these cases, a number of California churches and religious schools, sought to enjoin the Secretary of Labor from conditioning his approval of the California unemployment insurance program on its coverage of the plaintiffs' employees, and to enjoin the State from collecting both tax information and the state tax.[8] For the purposes of

[7] In its place, Congress substituted an unrelated provision.

[8] This litigation grew out of two suits, one filed in the District Court by Grace Brethren Church et al. (Case No. CV 79-93 MRP), and the other filed in state court by the Lutheran Church Missouri Synod. The Secre-

evaluating their statutory and constitutional claims, the District Court divided the plaintiffs into three classes of employers: Category I represents those schools that are part of the corporate structure of a church or association of churches; Category II includes schools that are separate corporations formed by a church or association of churches; and Category III includes schools that are "operated primarily for religious purposes, but which [are] not operated, supervised, controlled or principally supported by a church or convention or association of churches, *i. e.*, an independent, non-church affiliated religious school." Supplemental Opinion, reprinted in App. to Juris. Statement in No. 81-31, p. 71 (J. S. App.).[9]

On September 21, 1979, the District Court granted a preliminary injunction against the State restraining it from collecting the state unemployment tax from the Category I plaintiffs. See *id.*, at 51. The basis for the court's order was its conclusion that the plaintiffs were exempt from mandatory state coverage under § 3309(b)(1), and alternatively, that if they were not exempt under the terms of FUTA, collection of the tax from the plaintiffs would involve excessive governmental entanglement with religion, in violation of the Establishment Clause of the First Amendment. See J. S. App. 58–65.

In the same opinion, the District Court rejected the Federal Government's argument that, because the state remedy was "plain, speedy and efficient," the Tax Injunction Act, 28 U. S. C. § 1341, barred the court from granting injunctive relief. Considering first the availability of injunctive relief

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tary of Labor successfully removed the *Lutheran Church* case (Case No. CV 79-162 MRP) to the District Court, which consolidated the cases for trial.

[9] Category I and II schools comprise schools from the *Lutheran Church* case, see Order (filed Apr. 3, 1981), reprinted in J. S. App. 49, as well as some of the schools from the *Grace Brethren* case. See Order (filed Apr. 3, 1981), reprinted in J. S. App. 45. Category III schools include only schools from the *Grace Brethren* case. See J. S. App. 46.

from the state courts, the court concluded that state statutory and constitutional provisions[10] made such relief "at best,

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[10] California Un. Ins. Code Ann. § 1851 (West 1972) provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division."

California Const., Art. XIII, § 32, provides:

"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Despite the apparently unambiguous language of these provisions, the District Court considered the availability of injunctive relief only "uncertain" because of state decisions indicating that injunctive relief may be available when the plaintiff challenges the state tax law as being unconstitutional. See *Las Animas & San Joaquin Land Co.* v. *Preciado*, 167 Cal. 580, 587, 140 P. 239, 242 (1914) (injunction available to restrain a school district from assessing property taxes on land over which it has no authority); *Bueneman* v. *City of Santa Barbara*, 8 Cal. 2d 405, 407, 65 P. 2d 884, 886 (1937) (statutory provision precluding courts from enjoining execution of public laws for public benefit does not apply to claims that a taxing statute is unconstitutional).

More recent decisions, however, have held injunctive relief to be precluded. See *Modern Barber Colleges, Inc.* v. *California Employment Stabilization Comm'n*, 31 Cal. 2d 720, 723, 192 P. 2d 916, 918 (1948) (holding that a provision in the Unemployment Insurance Act, similar to § 1851, prohibited injunctive relief, leaving the taxpayer only with the option to pay the tax and seek a refund); *Aronoff* v. *Franchise Tax Board*, 60 Cal. 2d 177, 180, 383 P. 2d 409, 411 (1963) (holding that Cal. Const., Art. XIII, § 15, and Cal. Rev. & Tax Code Ann. § 19081 (West 1970) preclude issuance of an injunction to prevent collection of additional income taxes). Relying on *Aronoff*, a District Court of Appeal held that Cal. Const., Art. XIII, § 32 (which, in 1974, became the successor to § 15), and the corresponding statutory provision, Cal. Un. Ins. Code Ann. § 1851 (West 1972), prohibit the courts from enjoining the collection of unemployment insurance taxes. *Lorco Properties, Inc.* v. *Department of Benefit Payments*, 57 Cal. App. 3d 809, 815, 129 Cal. Rptr. 312, 315 (1976). Recently, in *Pacific Gas & Electric Co.* v. *State Board of Equalization*, 27 Cal. 3d 277, 279, 611 P. 2d 463, 464 (1980), the California Supreme Court held that under Cal. Const., Art. XIII, § 32, a taxpayer was barred from seeking relief compelling the

uncertain." J. S. App. 66. The court then concluded that a state suit for a refund was an inadequate remedy because the plaintiffs claimed not only that their property had been taken unlawfully, but also that the "very process of determining whether any tax is due at all results in a violation of their First Amendment rights." *Id.*, at 67. Because this First Amendment injury was "irreparable" once the taxes had been collected, only an injunction against collection of the tax could remedy the plaintiffs' claims. Accordingly, because there existed no "plain, speedy and efficient" remedy in the state courts, the District Court concluded that it had jurisdiction to grant injunctive and declaratory relief.

In a supplemental opinion filed June 2, 1980, the court clarified its earlier opinion, stating expressly that the preliminary injunction covered only Category I plaintiffs. See *id.*, at 71. For the same reasons that it had granted the initial preliminary injunction, however, the court extended the preliminary injunction to Category II plaintiffs. The court continued to deny relief to the Category III plaintiffs after concluding that they were not covered by the statutory exemptions in § 3309(b) and that the risk of excessive governmental entanglement with religion was too small to violate the Establishment Clause. J. S. App. 77–79.[11]

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state tax board to adjust the taxpayer's real property assessments. The court expressly held that there were no equitable exceptions to this rule, *id.*, at 282, 611 P. 2d, at 466, and reaffirmed the importance of the state policy to permit the uninterrupted collection of taxes. Cf. *Pacific Motor Transport Co.* v. *State Board of Equalization*, 28 Cal. App. 3d 230, 236, 104 Cal. Rptr. 558, 562 (1972) (noted without approval in *Pacific Gas & Electric Co.* v. *State Board of Equalization*, *supra*, and holding that a taxpayer could seek declaratory relief to challenge the validity of a tax regulation, but that such relief could not "'prevent or enjoin' or otherwise hamper present or future tax assessment or collection effort").

[11] The court also rejected the arguments offered by the Category III plaintiffs that imposition of the tax violates the Free Exercise Clause, and that the unique statutory treatment of Category III plaintiffs violates equal protection. J. S. App. 78.

Finally, on April 3, 1981, the court filed a second supplemental opinion ruling on all of the plaintiffs' motions for permanent injunctions enjoining the State from collecting unemployment compensation taxes and the Federal Government from conditioning approval of the state unemployment compensation programs on their inclusion of the plaintiffs' employees. See *id.*, at 1. Considering first the statutory claims, the court concluded that Category I and Category II schools, but not Category III schools, are exempt from coverage under 26 U. S. C. § 3309(b) and the corresponding state provision, Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982). J. S. App. 3–15.[12] The court also found that the benefit entitlement decisions for employees of Category III schools risk excessive governmental entanglement with religion in violation of the Establishment Clause of the First Amendment. *Id.*, at 25–33.[13] Consequently, the court held that "constitutional considerations bar the application of the scheme" to the Category III plaintiffs. *Id.*, at 33.

Based on these findings, the court issued orders permanently enjoining the federal defendants from requiring state unemployment insurance programs to cover Category I and Category II schools as a precondition for federal approval of the state programs, *id.*, at 47, 51, and permanently enjoining

[12] The court held alternatively that if the Secretary of Labor's interpretation of § 3309(b) were correct (*i. e.*, Category I and II schools were not exempt from coverage), then that provision violated the First Amendment because it caused excessive governmental entanglement with religion by requiring "[i]ntrusive monitoring of the activities of employees of religious schools in order to determine whether or not those employees are exempt from unemployment insurance . . . taxes" and by requiring "[i]nvolvement of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools." Order (filed Apr. 3, 1981), reprinted in J. S. App. 45, 46; Order (filed Apr. 3, 1981), reprinted in *id.*, at 49, 50.

[13] The court again rejected the plaintiffs' argument that statutory coverage of Category III schools violates the Free Exercise Clause of the First Amendment, *id.*, at 16–25, and found it unnecessary to reach the Category III plaintiffs' equal protection claim. *Id.*, at 35.

the state defendants from "collecting, or attempting to collect, unemployment compensation . . . taxes" from the Category I, II, or III schools. *Id.*, at 47, 50. The court expressly held Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982) unconstitutional. See J. S. App. 45, 46. The court did not issue an injunction against the federal defendants as to Category III schools because it

> "has no information indicating what response, if any, the Secretary will make to the Court's conclusion that the state defendants may not constitutionally impose the state unemployment compensation tax scheme on the Category 3 employees of non-church affiliated schools. . . . If the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category 3 employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief." Second Supplemental Opinion, reprinted in J. S. App. 44, n. 39.

Following issuance of the court's injunction, this Court decided *St. Martin Evangelical Lutheran Church* v. *South Dakota*, holding that § 3309(b)(1)(A) exempts Category I schools from mandatory coverage under the state unemployment insurance programs. Although no Category II schools were before the Court in *St. Martin*, the Court noted in a footnote that

> "[t]o establish exemption from FUTA, a separately incorporated church school (or other organization) must satisfy the requirements of 3309(b)(1)(B): (1) that the organization 'is operated primarily for religious purposes,' and (2) that it is 'operated, supervised, controlled, or principally supported by a church or convention or association of churches.'" 451 U. S., at 782–783, n. 12.

As a result of this opinion, the Secretary of Labor reconsidered his position and decided that both Category I and Cate-

gory II schools are statutorily exempt from mandatory coverage under FUTA. Consequently, the federal defendants, as well as the state defendants, have not appealed the District Court's injunction involving Category I and Category II schools, but only that part of the District Court order involving the Category III schools.[14]

II

An initial matter requiring our attention is whether this Court has jurisdiction to hear these appeals.[15] Congress has provided that

> "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." 28 U. S. C. § 1252.

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[14] See J. S. App. 11–12; Juris. Statement in No. 81–228, pp. 4, n. 2, 6, n. 5. The Category III schools are parties only in the *Grace Brethren* case, the suit originally filed in federal court. See n. 8, *supra*.

The *Grace Brethren* appellees filed a cross-appeal (No. 81–455) claiming that the District Court erred in holding that FUTA and the corresponding California statutory provisions do not violate the Free Exercise Clause of the First Amendment. The cross-appeal, however, is unnecessary to preserve this argument since under this Court's Rule 10.5 "an appellee, without filing a cross-appeal, [may] defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted."

The plaintiffs in the *Lutheran Church* case have filed a brief in support of the judgment below. Because, however, neither the State nor the Federal Government appealed from that part of the judgment involving the Lutheran Church plaintiffs, we do not address their claims.

[15] In our order setting these cases for oral argument, we postponed the question of jurisdiction until consideration of the merits. See 454 U. S. 961 (1981).

The only possible doubt regarding our appellate jurisdiction under this provision is the requirement that the District Court hold "an Act of Congress unconstitutional."

In *McLucas* v. *DeChamplain*, 421 U. S. 21 (1975), we stated that § 1252 was an unambiguous exception to the policy of minimizing the mandatory docket of this Court. Indeed, the "language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." *Id.*, at 31. Moreover, this Court has appellate jurisdiction under § 1252 "when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance, . . . rather than upon the challenged statute as a whole." *Fleming* v. *Rhodes*, 331 U. S. 100, 102–103 (1947) (discussing the predecessor to § 1252, Act of Aug. 24, 1937, 50 Stat. 751). See *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, 563 (1972) *(per curiam); United States* v. *Darusmont*, 449 U. S. 292, 293 (1981). Finally, § 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that a statutory provision was unconstitutional "was a necessary predicate to the relief" that the lower court granted. *United States* v. *Clark*, 445 U. S. 23, 26, n. 2 (1980).[16]

In the present case, the District Court did not expressly hold § 3309(b) of FUTA unconstitutional as applied to the Category III appellees,[17] but the effect of its several opinions

[16] In *Clark*, the Court of Claims simply ordered relief based on its earlier decision in another case. In that earlier decision, the court had declared the challenged statutory provision unconstitutional. See *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977).

[17] See Order (filed Apr. 3, 1981), reprinted in J. S. App. 45, 46 (holding Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982) unconstitutional, but making no direct reference to § 3309(b)).

and orders was to make "the United States or its officers . . . bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, *supra*, at 31. For example, while discussing the Establishment Clause claim of the Category III schools, the District Court held:

> "Since such entanglement [involving the resolution of questions of faith and doctrine by secular tribunals] is inevitable during the benefit eligibility determination process if religious schools are brought within the scope of the unemployment compensation tax *scheme*, constitutional considerations bar the *application of the scheme* to them." Second Supplemental Opinion, reprinted in J. S. App. 33 (emphasis added).

Examination of other portions of the court's opinion makes clear that the court's use of the word "scheme" refers to the combined federal and state provisions. See, *e. g.*, *id.*, at 26 (expressly referring to both federal and state statutory provisions in discussing the "unemployment compensation scheme"); *id.*, at 25 (referring to the intent of Congress and the California Legislature in discussing the "unemployment compensation tax scheme"). Moreover, the District Court's analysis leading to its order holding the California provision unconstitutional is based solely on its understanding of the operation and effect of FUTA, which of course prompted the passage of the corresponding state statute in the first place.[18]

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[18] The court's analysis of Category I and II schools also demonstrates that it believed FUTA, as applied to Category III schools, to be unconstitutional. In its discussion of Category I and II schools, the court held that if it were to follow the Secretary's interpretation of § 3309, *i. e.*, if *no* exemption existed, then FUTA would be unconstitutional as applied to those schools in part because of the excessive governmental entanglement in the benefit eligibility hearing. See n. 12, *supra*. Since the court also found an entanglement problem with respect to benefit eligibility hearings for Category III schools, and since there is no statutory exemption for those schools, it follows that the District Court must have believed that FUTA was unconstitutional as applied to the Category III plaintiffs.

Cf. *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S., at 780, n. 9 (holding that the Court could review the South Dakota Supreme Court's interpretation of its unemployment compensation tax statute because its "analysis depended entirely on its understanding of the meaning of FUTA and the First Amendment"). Finally, in its second supplemental opinion, the court made clear that if the Secretary "institutes decertification proceedings against the State of California" for failing to collect unemployment compensation taxes on behalf of Category III employees, "the parties may apply to this Court for further relief," which can only mean injunctive relief against the Secretary. J. S. App. 44, n. 39. Under these circumstances, it is clear that the Secretary is "bound by a holding of unconstitutionality," and that this Court has jurisdiction under § 1252 to hear this appeal.

III

As we noted above, the District Court declared Cal. Un. Ins. Code Ann. § 634.5(a) (West Supp. 1982) unconstitutional and enjoined the state defendants from collecting state unemployment compensation taxes from the Category III schools.[19] In the course of granting this declaratory and injunctive relief, the court expressly rejected the Federal Government's argument that the Tax Injunction Act, 28 U. S. C. § 1341, deprived the court of jurisdiction. See J. S. App. 65–69. Consequently, before reaching the merits of the appellees' claim, we must decide whether the District Court correctly ruled that it had jurisdiction under the Tax Injunction Act to issue declaratory and injunctive relief.

A

The Tax Injunction Act states simply that the district courts "shall not enjoin, suspend or restrain the . . . col-

[19] No federal tax is involved in this case, for the services performed for Category III schools are exempted by § 3306(c)(8) from the definition of employment for which the federal excise tax must be paid.

lection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. Although this Court once reserved the question,[20] we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.

Initially, we observe that the Act not only divests the district court of jurisdiction to issue an injunction enjoining state officials, but also of jurisdiction to take actions that "suspend or restrain" the assessment and collection of state taxes. Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943), the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases.[21] Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern

[20] See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943).

[21] In enacting the Declaratory Judgment Act, Congress recognized the substantial effect declaratory relief would have on legal disputes. Thus, while Congress perceived declaratory judgments as a device to reduce federal-court abuses associated with injunctions, Congress also recognized that declaratory relief would "settle controversies," S. Rep. No. 1005, 73d Cong., 2d Sess., 2 (1934), and permit the federal courts "the power to exercise in some instances preventive relief." H. R. Rep. No. 1264, 73d Cong., 2d Sess., 2 (1934).

as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 522 (1981).[22] As JUSTICE BRENNAN

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[22] To be sure, in enacting the Tax Injunction Act, Congress considered primarily injunctions against state officials because that form of anticipatory relief was the principal weapon used by businesses to delay or avoid paying state taxes. See, *e. g.*, S. Rep. No. 1035, 75th Cong., 1st Sess., 1–2 (1937); 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). Moreover, it is arguable that Congress' failure to mention the Declaratory Judgment Act, enacted only three years earlier, indicates that Congress intended the Tax Injunction Act to prohibit only federal injunctive relief. Nevertheless, the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisidiction to interfere with state tax administration.

Both the Senate and House Reports, as well as the congressional debates of the Act, expressly rely on the congressional purpose underlying the Johnson Act of 1934, 28 U. S. C. § 1342, which divests the district courts of jurisdiction of any suit to "enjoin, suspend, or restrain the operation" of any public utility commission order. See S. Rep. No. 1035, *supra*, at 2; H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937); 81 Cong. Rec. 1415–1417 (1937) (remarks of Sen. Bone). The legislative history of the Johnson Act, in turn, makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings. See, *e. g.*, S. Rep. No. 125, 73d Cong., 1st Sess., 3 (1933) (in support of the Johnson bill, declaring that a utility "will be required, in all cases where a State has set up a public utility commission, to proceed before that commission if it has any complaint. It can appeal from this State board to the State courts and, if it is dissatisfied with the final judgment of the supreme court of the State, it can take an appeal to the Supreme Court of the United States"); *id.*, at 33 ("It is the jurisdiction which Congress has given to Federal courts to pass on matters of State regulation which holds up the laws of the States, prevents the officials of the States from doing their duty, and robs the people of the benefit which would accrue to them, if the commissions which they have set up by law in the various States were permitted to perform their duty"); H. R. Rep. No. 1194, 73d Cong., 2d Sess., 2 (1934) (in opposition to the Johnson bill, declaring that it "seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commissions affecting rates chargeable by public utilities"); 78 Cong. Rec. 1916 (1934) (remarks of Sen. Johnson); *id.*, at 1918 ("the object is to make [the utilities] subject to

stated in his opinion concurring in part and dissenting in part in *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971):

> "If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts."

See *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 108–109, n. 6 (1981).[23]

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the jurisdiction of the laws of our States; to give them their rights in every instance to the trial of the question of fact first before the public-utility commission, to give them every legal right they have, and if any right that is guaranteed by the Constitution is infringed upon at all, then, of course, the legal right of appeal ultimately from the highest tribunal in the State to the United States Supreme Court"); *id.*, at 8324 (remarks of Rep. Mapes) ("It is simply a question as to whether or not States are going to be allowed to perform their proper functions in the supervision and fixing of rates, without interference of Federal law. It is a question as to whether or not Congress is going to continue to permit the utilities in important cases to thwart the will of the States and the State authorities. . . . This bill will only deprive the lower Federal courts of the jurisdiction they now have over rate cases"); *id.*, at 8328 (remarks of Rep. Lewis) ("The Johnson bill absolutely abolishes the jurisdiction of the United States courts in rate cases"); *id.*, at 8338 (remarks of Rep. Tarver) ("The Johnson bill contains but one substantive proposition, and that is to divest the district courts of the United States of jurisdiction in public-utility rate cases"); *id.*, at 8419 (remarks of Rep. Hancock) ("the Johnson bill seeks to [save time and money] by divesting the Federal courts of all jurisdiction in public-utility cases except the right of appeal to the Supreme Court of the United States after the final decision of the State court of last resort").

[23] This Court has long recognized the dangers inherent in disrupting the administration of state tax systems. See, *e. g.*, *Dows* v. *City of Chicago*,

Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief. Accordingly, the District Court in this case was without jurisdiction to declare the California tax provision unconstitutional or to issue its injunction against state authorities unless the appellees had no "plain, speedy and efficient remedy" in the state courts.

Last Term, in *Rosewell* v. *LaSalle National Bank*, this Court had occasion to consider the meaning of the "plain, speedy and efficient" exception in the Tax Injunction Act. After reviewing previous decisions[24] and the legislative history of the Act,[25] the Court concluded that the "plain, speedy and efficient" exception requires the "state-court remedy [to meet] certain minimal *procedural* criteria." 450 U. S., at 512 (emphasis in original). In particular, a state-court remedy is "plain, speedy and efficient" only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Id.*, at 514 (quoting *LaSalle National Bank* v. *County of Cook*, 57 Ill. 2d 318, 324, 312 N. E. 2d 252, 255–256

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11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public").

[24] See *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 74 (1976); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625 (1946); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S., at 300–301.

[25] See 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone); S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937). The Court also relied on the legislative history of the Johnson Act of 1934, 28 U. S. C. § 1342 (prohibiting federal-court interference with orders issued by state administrative agencies to public utilities), on which the Tax Injunction Act was modeled.

(1974)).[26] Applying these considerations, the *Rosewell* Court held that an Illinois tax scheme, requiring the taxpayer to pay an allegedly unconstitutional tax[27] and seek a refund through state administrative and judicial procedures, was a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act. In reaching this holding, the Court specifically relied on legislative Reports demonstrating congressional awareness that refunds were the exclusive remedy in many state tax systems.[28]

The holding in *Rosewell* reflects not only Congress' express command in the Tax Injunction Act, but also the historical reluctance of the federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts. As this Court stated in *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871), long before enactment of the Tax Injunction Act:

> "No court of equity will . . . allow its injunction to issue to restrain [state officers collecting state taxes], except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, . . . before the aid of a court of equity can be invoked."[29]

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[26] See also 450 U. S., at 515, and n. 19, 517 (making clear that some opportunity to raise constitutional objections is the most important consideration); S. Rep. No. 1035, *supra*, at 2 (under the Tax Injunction Act, a "full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases").

[27] The plaintiff in *Rosewell* had claimed that requiring payment of the county property tax violated her equal protection and due process rights.

[28] See S. Rep. 1035, *supra*, at 1 (state "statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest"); H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937).

[29] See also *Boise Artesian Hot and Cold Water Co.* v. *Boise City*, 213 U. S. 276, 282 (1909) (holding that "the illegality or unconstitutionality of a

In order to accommodate these concerns and be faithful to the congressional intent "to limit drastically" federal-court interference with state tax systems, we must construe narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act.

With these cases and principles in mind, we turn to the California provisions to determine whether there exists a "plain, speedy and efficient" state remedy for the appellees' claim.

B

There is no dispute that appellees in the present cases can seek a refund of the California unemployment tax through state administrative and judicial procedures. Once a taxpayer has sought and been denied a refund from the appropriate state agency, see Cal. Un. Ins. Code Ann. §§ 1176–1185 (West 1972 and Supp. 1982),[30] he may file an action

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state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity"); *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 488 (1913) (holding that federal courts will not enjoin the collection of unconstitutional state taxes where the taxpayer "ha[s] a plain, adequate and complete remedy" at law); *Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*, at 299 (holding that the same "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure"); *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 103 (1981) (noting that the Tax Injunction Act, "and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation").

[30] Apparently, California taxpayers cannot raise their constitutional challenges in the administrative tax refund proceeding unless an appellate court already has sustained such a challenge. See Cal. Const., Art. III, § 3.5, which provides in part that

"[a]n administrative agency . . . has no power:

"(a) To declare a statute unenforceable, or refuse to enforce a statute, on

in Superior Court for a refund of the taxes paid, raising all arguments against the validity of the tax. Cal. Un. Ins. Code Ann. § 1241 (West Supp. 1982). If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. Nothing in this scheme prevents the taxpayer from "rais[ing] any and all constitutional objections to the tax" in the state courts. *Rosewell* v. *LaSalle National Bank*, 450 U. S., at 514. As the Court in *Rosewell* noted, the "Act contemplates nothing more." *Id.*, at 516, n. 19.[31] Moreover, assuming that the appellees' constitutional claims are meritorious, an issue on which we express no view, there is every reason to believe that once a state appellate court has declared the tax unconstitutional the appropriate state agencies will respect that declaration. See *Pacific Motor Transport Co.* v. *State Board of Equalization*, 28 Cal. App. 3d 230, 236, 104 Cal. Rptr. 558, 562 (1972) (noting that while the "relief afforded may not 'prevent or enjoin' or otherwise hamper present or future tax assessment or collection effort . . . [i]t will be presumed that

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the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

"(b) To declare a statute unconstitutional."

[31] Significantly, the California administrative and judicial scheme for challenging a tax assessment is remarkably similar to the Illinois scheme that we upheld in *Rosewell* as "plain, speedy and efficient." See 450 U. S., at 508–509, and nn. 6, 7. In fact, the California tax scheme is more favorable to the taxpayer than the Illinois scheme in that it requires the State to pay interest on improperly collected taxes. See Cal. Un. Ins. Code Ann. § 1242 (West Supp. 1982).

This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceedings is uncertain. In *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946), the taxpayer could not raise his constitutional challenge in the administrative proceedings, and appeal to the state courts was discretionary with those courts. Consequently, because "there [was] such uncertainty concerning the New Jersey remedy as to make it speculative," *id.*, at 625, the Court held that the taxpayer could seek declaratory relief in federal court.

the governmental agency will respect a judicial declaration concerning a regulation's validity"). Accordingly, it appears that *Rosewell* is directly applicable to the present case, and that the District Court had no jurisdiction to hear the appellees' claims.

The appellees contend, however, that the California refund procedures do not constitute a "plain, speedy and efficient remedy" because their claims can be remedied only by injunctive relief, and that such relief is unavailable in California courts to restrain the collection of state taxes. See n. 10, *supra*. Injunctive relief is necessary, the appellees claim, because prior to state judicial review, the employer must meet certain recordkeeping, registration, and reporting requirements, see Cal. Un. Ins. Code Ann. §§ 1085, 1086, 1088, 1092 (West 1972 and Supp. 1982), and potentially is subject to administrative benefit eligibility hearings[32] in violation of the appellees' First Amendment rights. The appellees thus fear that their constitutional rights will be violated before they have an opportunity to challenge the constitutionality of the unemployment tax scheme in state court.

This argument is unpersuasive. First, nothing in the California scheme precludes the appellees from challenging the unemployment tax before a benefit eligibility hearing is held for one of their former employees. As soon as an employer makes its first payment to the state unemployment insurance fund, it may file for a refund and, after exhausting state administrative remedies, seek a judicial determination of the constitutionality of the tax.[33] If the employer ultimately pre-

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[32] Under Cal. Un. Ins. Code Ann. § 1256 (West Supp. 1982), a former employee can collect unemployment benefits only if he has not been dismissed for "misconduct" or "left his most recent work voluntarily without good cause."

[33] Part of the appellees' argument for the necessity of injunctive relief rests on the premise that payments to the state fund are made only after a benefit eligibility hearing has been held. Under 26 U. S. C. §§ 3309(a)(2) and 3304(a)(6)(B), however, the States are required to give nonprofit organizations, including the appellees, the option either of making regular contributions to the state unemployment insurance fund or of reimbursing the

vails on his constitutional argument, the state taxing authorities can be expected to respect that court's holding in future administrative proceedings. See *Pacific Motor Transport Co.* v. *State Board of Equalization*, *supra*, at 236, 104 Cal. Rptr., at 562. Thus, before any entanglement from the benefit eligibility hearings occurs, the appellees should be able to challenge the constitutionality of the state unemployment insurance taxes.

Second, while an employer may be subject to some recordkeeping and reporting requirements, or even a benefit eligibility hearing, pending the resolution of its constitutional claims in state court, it will be subject to the same burdens even if it seeks relief from the federal courts. Thus, whatever harm the appellees may suffer pending resolution of their constitutional claims, that harm is not reduced by seeking relief in federal court. Stated differently, there are no apparent advantages to federal-court relief that make state-court remedies less than "plain, speedy and efficient."[34]

Finally, we must keep in mind that at the time that it passed the Tax Injunction Act, Congress was well aware that refund procedures were the sole remedy in many States for unlawfully collected taxes. See S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937).[35] Carving out a special exception for tax-

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fund for payments actually made to the employers' former employees. The nonprofit organizations are not required to choose the reimbursement method, however, and can make regular payments to the fund in advance of any employee being discharged.

[34] Our conclusion that the state-court remedy is plain, speedy and efficient is reenforced by our observation that it took the appellees in this case over two years to obtain injunctive relief in federal court.

[35] The dissent errs when it states, without authority, that the Tax Injunction Act is not applicable to these cases because of the "layers of review that must be exhausted in the California system." *Post*, at 422, n. 4. Certainly, nothing in the legislative history of the Act suggests that requiring a taxpayer to seek a refund first through administrative procedures makes the state remedy less than "plain, speedy and efficient." More-

payers raising First Amendment claims would undermine significantly Congress' primary purpose "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U. S., at 522.[36] Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims.[37] Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.[38]

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over, the legislative history of the Johnson Act, after which the Tax Injunction Act was modeled, see n. 22, *supra*, makes clear congressional intent that a state remedy is "plain, speedy and efficient" even though a utility must proceed first through administrative and then judicial proceedings in order to challenge the constitutionality of utility rates. See S. Rep. No. 125, 73d Cong., 1st Sess., 2–3 (1933).

[36] In addition, there seems to be no principled basis for limiting the appellees' argument to First Amendment claims. Any employer required to pay state taxes in a manner allegedly violating the Equal Protection Clause, for example, might argue that the absence of state injunctive relief permitted the infliction of an irreparable injury that could be remedied only by a federal injunction.

[37] We also reject the appellees' argument to the extent that it assumes that the state courts will not protect their constitutional rights. As we stated in another context: "[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone* v. *Powell*, 428 U. S. 465, 494, n. 35 (1976).

[38] The state defendants also argue that because the Federal Government is an indispensable party to this action, and could not be compelled to submit to state-court jurisdiction, the state courts could not afford the appel-

C

Despite the absence of jurisdiction in the District Court, the federal defendants urge us to consider the merits of the appellees' First Amendment claims because of the "public interest in, and the Secretary's need for, a definitive interpretation of 26 U. S. C. § 3309(b)." Brief for United States 21. The Government bases this argument on our decision in *McLucas* v. *DeChamplain*, 421 U. S., at 32, in which we held that "whether the District Court did or did not have jurisdiction to act, this case is properly here under § 1252." See also *Weinberger* v. *Salfi*, 422 U. S. 749, 763, n. 8 (1975).

The Government's argument is unavailing, however, for in *McLucas* and *Salfi*, *some* federal trial court had jurisdiction,[39]

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lees complete relief. Consequently, the state defendants reason, the Tax Injunction Act does not deprive the District Court of jurisdiction. See Brief for Appellants State of California et al. 35. The error in this argument is its premise; as *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772 (1981), demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims.

Finally, none of the parties suggests that we avoid the jurisdictional bar of the Tax Injunction Act by restricting our review to the appellees' challenge to 26 U. S. C. § 3309(b), and disregarding their challenge to the corresponding state provisions, §§ 634.5(a), (b). Such a suggestion would be untenable since, after all, the state provisions were enacted in order to comply with federal statutory requirements, and consequently are identically worded to the federal provisions. Thus, a challenge to FUTA would be a direct effort to "enjoin, suspend or restrain" state tax officials from collecting unemployment taxes from the appellees. Alternatively, if the challenge to FUTA would not affect the actions of state officials, there would be serious doubts whether the appellees were injured by FUTA's provisions. Accordingly, we vacate not only the District Court's judgment with respect to the appellees' state claims, but also its judgment regarding the constitutionality of FUTA.

[39] In both of those cases, the question was whether a single district judge or a three-judge district court had jurisdiction. In the present case, by contrast, the issue is whether the federal courts or the state courts have jurisdiction.

whereas in the present cases, no federal district court had jurisdiction. If this Court were nonetheless to reach the First Amendment issues presented in these appeals, the litigants would have sidestepped neatly Congress' intent and our longstanding policy "to limit drastically" federal interference in the administration of state taxes when a "plain, speedy and efficient" state remedy is available.[40] Accordingly, we do not reach the appellees' First Amendment claims.

The judgment of the District Court is vacated, and the cases are remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Appellee Grace Brethren Church filed suit against the United States Secretary of Labor and other defendants in the United States District Court for the Central District of California claiming that the Federal Unemployment Tax Act violates the First Amendment to the Federal Constitution. The District Court held the Act unconstitutional. Pursuant to a federal statute providing for expedited review in cases of this kind,[1] the defendants appealed directly to this Court, by-

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[40] Similarly, the state defendants' reliance on *Williams* v. *Zbaraz*, 448 U. S. 358 (1980), is misplaced. In that case, the District Court had held unconstitutional a federal statute that the parties had not challenged. We held that because there was no case or controversy on that issue, the District Court had exceeded its jurisdiction for that issue. *Id.*, at 367. Nevertheless, because of the holding of unconstitutionality we concluded that we had jurisdiction under § 1252 to "review the 'whole case.'" *Id.*, at 368. That review, however, was restricted to those issues over which the District Court had had jurisdiction, and we vacated that portion of the judgment holding the federal statute unconstitutional. *Ibid.*

[1] Title 28 U. S. C. § 1252 provides:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . hold-

passing the Court of Appeals precisely as Congress intended. Recognizing the need for prompt review of a constitutional question affecting the nationwide operation of a federal statute, the Court holds that this special jurisdiction was properly invoked. It then reaches the curious conclusion that, because some of the defendants are California taxing authorities that administer this cooperative federal-state program in that State, Congress intended that only *state* courts could pass on the constitutional validity of this *federal* statute.[2] Neither the language nor the legislative history of the Tax Injunction Act requires such a strange result.

The Tax Injunction Act provides that federal district courts "shall not enjoin, suspend, or restrain" the activities of state taxing authorities. The preclusion of federal injunctive relief was a response to a specific problem that concerned Congress in 1937. In the States in which taxpayers were required to challenge a tax assessment in a refund suit, only taxpayers that could sue state taxing authorities in federal court could obtain injunctive relief. The privileged taxpayers were primarily the foreign corporations that could invoke federal diversity jurisdiction. These federal suits were objectionable not only because of this discrimination but also because state treasuries often were deprived of tax revenues while the federal suits were adjudicated and because the federal suits involved only state-law questions that were more appropriate for state-court resolution. See S. Rep. No. 1035, 75th Cong., 1st Sess., 1–2 (1937); 81 Cong. Rec. 1416–1417 (1937) (Sen. Bone); see also *Rosewell* v. *LaSalle*

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ing an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

[2] A further irony is that the Secretary of Labor, who is certainly the principal defendant even if not an indispensable party, could remove such an action if it were filed in state court. Indeed, with respect to one of the actions consolidated in the District Court, the Secretary did just that.

National Bank, 450 U. S. 503, 533 (STEVENS, J., dissenting).

A literal reading of the Tax Injunction Act manifestly does not preclude the declaratory judgment entered in this litigation. Nor do the concerns that gave rise to its enactment require such a bar. Appellees' challenge is based on the Federal Constitution and is directed at a federal-state program administered according to federal requirements. Only federal questions are involved.

In *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, the Court recognized that equitable considerations can in some cases provide adequate justification for federal courts to withhold declaratory relief when the Tax Injunction Act precluded injunctive relief. In the intervening 40 years, this equitable doctrine has been sufficient to protect state tax laws from unnecessary federal interference. Today, however, the Court confronts a situation in which the challenge to a state tax does not implicate these concerns.[3] Ironically, the absence in these unusual cases of the traditional justification for a ban on declaratory relief seems to spur the Court to revise the Tax Injunction Act to preclude declaratory as well as injunctive relief. To accomplish this revision, the Court must ignore the plain meaning of the statute and the limited concerns that gave rise to its enactment. The Court instead relies upon the legislative history of the Johnson Act, ch. 283, 48 Stat. 775, see *ante*, at 409–410, n. 22, even though that statute was enacted before the Declaratory Judgment Act, ch. 512, 48 Stat. 955. Even if that suspect analysis could be overlooked, the fact remains that, after the Declaratory Judgment Act was on the books for three years, Congress did not see fit to bar declaratory relief when it expressly precluded injunctive relief in the Tax Injunction Act. The avoidance of

[3] Indeed, to the extent that equitable considerations are implicated they favor the procedure followed in these cases whereby expedited review in this Court is available.

a decision on the merits in this litigation hardly seems worth the Court's nimble exercise in lawmaking.[4]

The Court has both the power and the duty to decide the merits. I therefore respectfully dissent.

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[4] There is an independent reason why the Tax Injunction Act does not preclude federal declaratory relief in this litigation. When one compares the layers of review that must be exhausted in the California system with the direct appeal to this Court provided by 28 U. S. C. § 1252, one surely cannot conclude that the state system provides the "plain, speedy and efficient" remedy that Congress intended for the resolution of the federal questions these cases present.

MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81–460. Argued March 31, 1982—Decided June 21, 1982

Under rules promulgated by the New Jersey Supreme Court pursuant to its authority under the State Constitution to license and discipline attorneys admitted to practice in the State, a claim of unethical conduct by an attorney is first considered by a local District Ethics Committee appointed by the Supreme Court. If a complaint is issued, the attorney whose conduct is challenged is served with the complaint and has 10 days to answer. Upon a determination that a prima facie case of unethical conduct exists, a formal hearing is held. The attorney charged may have counsel, discovery is available, and all witnesses are sworn. The Committee may ultimately dismiss the complaint, issue a private letter of reprimand, or forward a presentment to the statewide Disciplinary Review Board, which is also appointed by the Supreme Court. After a *de novo* review, the Board is required to make formal findings and recommendations to the Supreme Court, which reviews all decisions beyond a private reprimand and which permits briefing and oral argument for cases involving disbarment or suspension for more than one year. Respondent Hinds, a member of the New Jersey Bar, was served by petitioner, a local Ethics Committee, with a formal statement of charges of violating certain Supreme Court disciplinary rules. Instead of filing an answer to the charges, Hinds and the three respondent organizations of lawyers filed suit in Federal District Court, contending that the disciplinary rules violated their rights under the Federal Constitution. The court dismissed the complaint on the basis of the abstention principles of *Younger* v. *Harris*, 401 U. S. 37. The Court of Appeals reversed on the ground that the disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims, notwithstanding an affidavit stating that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and would consider whether such a procedure should be made explicit in the Supreme Court rules.

Held: The federal courts should abstain from interfering with the ongoing disciplinary proceedings within the jurisdiction of the New Jersey Supreme Court. Pp. 431–437.

(a) The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved.

Where such interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims. The pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. Pp. 431–432.

(b) The New Jersey Supreme Court considers its disciplinary proceedings, beginning with the filing of a complaint with the local Ethics Committee, as "judicial in nature." As such, the proceedings are of a character to warrant federal-court deference. Pp. 432–434.

(c) The State has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. The State's interest in the present litigation is demonstrated by the fact that petitioner, an agency of the New Jersey Supreme Court, is the named defendant in the present suit and was the body which initiated the state proceedings against Hinds. The importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play. Pp. 434–435.

(d) In light of the unique relationship between the New Jersey Supreme Court and the local Ethics Committee, and in view of the nature of the proceedings, it cannot be concluded that there was no "adequate opportunity" for Hinds to raise his constitutional claims. Any doubt as to this matter was laid to rest by the New Jersey Supreme Court's subsequent actions when, prior to the filing of the petition for certiorari in this Court, it *sua sponte* entertained the constitutional issues raised by Hinds. And there is no reason to disturb the District Court's unchallenged findings that there was no bad faith or harrassment on petitioner's part and that the state disciplinary rules were not "flagrantly and patently" unconstitutional. Nor have any other extraordinary circumstances been presented to indicate that abstention would not be appropriate. Pp. 435–437.

643 F. 2d 119 and 651 F. 2d 154, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 438. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 438.

Mary Ann Burgess, Assistant Attorney General of New Jersey, argued the cause for petitioner. With her on the briefs were *Irwin I. Kimmelman*, Attorney General, *James R. Zazzali*, former Attorney General, *Erminie L. Conley* and *James J. Ciancia*, Assistant Attorneys General, and

Richard M. Hluchan and *Jaynee LaVecchia*, Deputy Attorneys General.

Morton Stavis argued the cause for respondents. With him on the brief were *Bernard K. Freamon* and *Louise Halper.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings within the jurisdiction of the New Jersey Supreme Court. 454 U. S. 962 (1981). The Court of Appeals held that it need not abstain under *Younger* v. *Harris*, 401 U. S. 37 (1971). We reverse.

I

A

The Constitution of New Jersey charges the State Supreme Court with the responsibility for licensing and disciplining attorneys admitted to practice in the State. Art. 6, §2, ¶3.[1] Under the rules established by the New Jersey Supreme Court, promulgated pursuant to its constitutional authority, a complaint moves through a three-tier procedure. First, local District Ethics Committees appointed by the

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*Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* and *Arthur N. Eisenberg* for the American Civil Liberties Union; and by *Max D. Stern* for the National Alliance Against Racist and Political Repression.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, and *Bill Lann Lee* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae*.

[1] Article 6, §2, ¶3, provides:

"The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

State Supreme Court are authorized to receive complaints relating to claimed unethical conduct by an attorney. New Jersey Court Rule 1:20–2(d). At least two of the minimum of eight members of the District Ethics Committee must be nonattorneys. Complaints are assigned to an attorney member of the Committee to report and make a recommendation. Rule 1:20–2(h). The decision whether to proceed with the complaint is made by the person who chairs the Ethics Committee. If a complaint is issued by the Ethics Committee it must state the name of the complainant, describe the claimed improper conduct, cite the relevant rules, and state, if known, whether the same or a similar complaint has been considered by any other Ethics Committee. The attorney whose conduct is challenged is served with the complaint and has 10 days to answer.[2]

Unless good cause appears for referring the complaint to another Committee member, each complaint is referred to the member of the Committee who conducted the initial investigation for review and further investigation, if necessary. The Committee member submits a written report stating whether a prima facie indication of unethical or unprofessional conduct has been demonstrated. The report is then evaluated by the chairman of the Ethics Committee to determine whether a prima facie case exists. Absent a prima facie showing, the complaint is summarily dismissed. If a prima facie case is found, a formal hearing on the complaint is held before three or more members of the Ethics Committee,

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[2] For a more detailed explanation of the disciplinary procedure of the District Ethics Committees, see Rule 1:20–2. As noted below, the procedure, as amended in 1981, now provides that a charged attorney may raise constitutional questions in the District Committees. Any constitutional challenges are to be set forth in the answer to the complaint. Rule 1:20–2(j) now provides:

"All constitutional questions shall be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board. Interlocutory relief may be sought only in accordance with R. 1:20–4(d)(i)."

a majority of whom must be attorneys. The lawyer who is charged with unethical conduct may have counsel, discovery is available, and all witnesses are sworn. The panel is required to prepare a written report with its findings of fact and conclusions. The full Committee, following the decision of the panel, has three alternatives. The Committee may dismiss the complaint, prepare a private letter of reprimand, or prepare a presentment to be forwarded to the Disciplinary Review Board. Rule 1:20–2(o).[3]

The Disciplinary Review Board, a statewide board which is also appointed by the Supreme Court, consists of nine members, at least five of whom must be attorneys and at least three of whom must be nonattorneys. The Board makes a *de novo* review. Rule 1:20–3(d)(3).[4] The Board is required to make formal findings and recommendations to the New Jersey Supreme Court.

All decisions of the Disciplinary Review Board beyond a private reprimand are reviewed by the New Jersey Supreme Court. Briefing and oral argument are available in the Supreme Court for cases involving disbarment or suspension for more than one year. Rule 1:20–4.

B

Respondent Lennox Hinds, a member of the New Jersey Bar, served as executive director of the National Conference of Black Lawyers at the time of his challenged conduct. Hinds represented Joanne Chesimard in a civil proceeding challenging her conditions of confinement in jail. In 1977

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[3] Each District Ethics Committee appoints one member of the bar to serve as Secretary. The Secretary maintains records of the proceedings. The Secretary also transmits copies of all documents filed to the Division of Ethics and Professional Services. Rule 1:20–2(c).

[4] Subsequent to the initiation of the disciplinary hearing involved in this case, Rule 1:20–3(e) was amended to provide:

"Constitutional challenges to the proceedings not raised before the District Committee shall be preserved, without Board action, for Supreme Court consideration as part of its review of the matter on the merits. Interlocutory relief may be sought only in accordance with Rule 1:20–4(d)(i)."

Chesimard went to trial in state court for the murder of a policeman. Respondent Hinds was not a counsel of record for Chesimard in the murder case. However, at the outset of the criminal trial Hinds took part in a press conference, making statements critical of the trial and of the trial judge's judicial temperament and racial insensitivity. In particular, Hinds referred to the criminal trial as "a travesty," a "legalized lynching," and "a kangaroo court."

One member of the Middlesex County Ethics Committee read news accounts of Hinds' comments and brought the matter to the attention of the Committee. In February 1977 the Committee directed one of its members to conduct an investigation. A letter was written to Hinds, who released the contents of the letter to the press. The Ethics Committee on its own motion then suspended the investigation until the conclusion of the Chesimard criminal trial.

After the trial was completed the Committee investigated the complaint and concluded that there was probable cause to believe that Hinds had violated DR 1-102(A)(5) of the Disciplinary Rules of the Code of Professional Responsibility.[5] That section provides that "[a] lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." Respondent Hinds also was charged with violating DR 7-107(D), which prohibits extrajudicial statements by lawyers associated with the prosecution or defense of a criminal matter.[6] The Committee then served a formal statement of charges on Hinds.

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[5] The Disciplinary Rules of the Code of Professional Responsibility and Code of Judicial Conduct of the American Bar Association, with amendment and supplementation, have been adopted by the New Jersey Supreme Court as the applicable standard of conduct for members of the bar and the judges of New Jersey. New Jersey Court Rule 1:14.

[6] DR 7-107 deals with "Trial Publicity" and states:

"(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that he expects to be disseminated by means of public communication and

Instead of filing an answer to the charges in accordance with the New Jersey Bar disciplinary procedures, Hinds and the three respondent organizations filed suit in the United States District Court for the District of New Jersey contending that the disciplinary rules violated respondents' First Amendment rights. In addition, respondents charged that the disciplinary rules were facially vague and overbroad. The District Court granted petitioner's motion to dismiss based on *Younger* v. *Harris*, 401 U. S. 37 (1971), concluding that "[t]he principles of comity and federalism dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge." App. to Pet. for Cert. 53a–54a. At respondents' request the District Court reopened the case to allow respondents an opportunity to establish bad faith, harassment, or other extraordinary circumstance which would constitute an exception to *Younger* abstention. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). After two days of hearings the District Court found no evidence to justify an exception to the *Younger* abstention doctrine and dismissed the federal-court complaint.

A divided panel of the United States Court of Appeals for the Third Circuit reversed on the ground that the state bar disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims. 643 F. 2d 119 (1981). The court reasoned that the disciplinary proceedings in this case are unlike the state judicial proceedings to which the federal courts usually defer. The Court of Appeals majority viewed the proceedings in this case as administrative, "nonadjudicative" proceedings analogous to the preindictment stage of a criminal proceeding.[7]

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that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial . . . ."

[7] The majority concluded that the hearings are designed to elicit facts, not legal arguments, as indicated by the presence of nonlawyers. The court also found that the ability to raise constitutional claims before the

On petition for rehearing petitioner attached an affidavit from the Clerk of the New Jersey Supreme Court which stated that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and that the court would consider whether such a procedure should be made explicit in the Supreme Court rules. On reconsideration a divided panel of the Third Circuit declined to alter its original decision, stating that the relevant facts concerning abstention are those that existed at the time of the District Court's decision. 651 F. 2d 154 (1981).[8]

Pending review in this Court, the New Jersey Supreme Court has heard oral arguments on the constitutional challenges presented by respondent Hinds and has adopted a rule allowing for an aggrieved party in a disciplinary hearing to

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Ethics Committee does not constitute a meaningful opportunity to have constitutional questions adjudicated. No formal opinion is filed by the District Ethics Committee. The Third Circuit distinguished *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701 (CA3 1977), on the ground that in *Gipson* the attorney being disciplined was already subject to the state-court action at the time the federal proceeding had been initiated.

Judge Adams, concurring, emphasized that state courts have the primary responsibility to discipline their bar and, in general, the federal judiciary is to exercise no supervisory powers. Judge Weis, dissenting, argued that respondents have full opportunity in the New Jersey proceedings to raise constitutional issues, concluding that the disciplinary proceedings are not a series of separate segments before independent bodies but are part of a whole. Judge Weis also concluded that there was nothing to prevent the Ethics Committee from considering constitutional claims.

[8] The panel majority noted that no rule existed at the time of the District Court's decision to assure the Court of Appeals that the New Jersey Supreme Court would consider the constitutional claims. The court also concluded that the possibility of a formal procedure of the New Jersey court for consideration of constitutional claims does not moot this case because the underlying dispute as to the validity of the rules still remains. Judge Weis, again dissenting, concluded that no justiciable controversy remained as to the issue in the Court of Appeals and recommended that the case be remanded and dismissed as moot.

seek interlocutory review of a constitutional challenge to the proceedings.[9]

II

A

Younger v. *Harris*, *supra*, and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying *Younger* abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*, at 44.[10] Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.

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[9] Rule 1:20–4(d) states:

"(i) Interlocutory Review. An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R. 2:8–1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument.

"(ii) Final Review. In any case in which a constitutional challenge to the proceedings has been properly raised below and preserved pending review of the merits of the disciplinary matter by the Supreme Court, the aggrieved party may, within 10 days of the filing of the report and recommendation of the Disciplinary Review Board, seek the review of the Court by proceeding in accordance with the applicable provisions of R. 1:19–8."

[10] *Samuels* v. *Mackell*, 401 U. S. 66 (1971), concluded that the same comity and federalism principles govern the issuance of federal-court declaratory judgments concerning the state statute that is the subject of the ongoing state criminal proceeding.

The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Moore* v. *Sims*, 442 U. S. 415, 423 (1979); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604–605 (1975). The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman, supra*. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Juidice* v. *Vail*, 430 U. S. 327 (1977). Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U. S., at 426. "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims . . . ." *Id.*, at 430. See also *Gibson* v. *Berryhill*, 411 U. S. 564 (1973).

The question in this case is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

B

The State of New Jersey, in common with most States,[11] recognizes the important state obligation to regulate persons

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[11] See M. Shoaf, State Disciplinary Enforcement Systems Structural Survey (ABA National Center for Professional Responsibility 1980).

The New Jersey allocation of responsibility is consistent with § 2.1 of the ABA Standards for Lawyer Discipline and Disability Proceedings (Proposed Draft 1978), which states that the "[u]ltimate and exclusive responsibility within a state for the structure and administration of the lawyer discipline and disability system and the disposition of individual cases is within the inherent power of the highest court of the state."

who are authorized to practice law. New Jersey expresses this in a state constitutional provision vesting in the New Jersey Supreme Court the authority to fix standards, regulate admission to the bar, and enforce professional discipline among members of the bar. N. J. Const., Art. 6, § 2, ¶ 3. The Supreme Court of New Jersey has recognized that the local District Ethics Committees act as the arm of the court in performing the function of receiving and investigating complaints and holding hearings. Rule 1:20–2; *In re Logan*, 70 N. J. 222, 358 A. 2d 787 (1976). The New Jersey Supreme Court has made clear that filing a complaint with the local Ethics and Grievance Committee "is in effect a filing with the Supreme Court . . . ." *Toft* v. *Ketchum*, 18 N. J. 280, 284, 113 A. 2d 671, 674, cert. denied, 350 U. S. 887 (1955). "From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee."[12] 18 N. J., at 284, 113 A. 2d, at 674. It is clear beyond doubt that the New Jersey Supreme Court considers its bar disciplinary proceedings as "ju-

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The rationale for vesting responsibility with the judiciary is that the practice of law "is so directly connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate it naturally and logically belongs to the judicial department." *Id.*, commentary to § 2.1.

[12] The New Jersey Supreme Court has concluded that bar disciplinary proceedings are neither criminal nor civil in nature, but rather are *sui generis*. *In re Logan*, 70 N. J. 222, 358 A. 2d 787 (1976). See also ABA Standards for Lawyer Discipline and Disability Proceedings § 1.2 (Proposed Draft 1978). As recognized in *Juidice* v. *Vail*, 430 U. S. 327 (1977), however, whether the proceeding "is labeled civil, quasi-criminal, or criminal in nature," the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state. *Id.*, at 335–336.

The instant case arose before the 1978 rule change. In 1978 the New Jersey Supreme Court established a Disciplinary Review Board charged with review of findings of District Ethics Committees. Nothing in this rule change, however, altered the nature of such proceedings. The responsibility under Art. 6, § 2, ¶ 3, remains with the New Jersey Supreme Court.

dicial in nature."[13] As such, the proceedings are of a character to warrant federal-court deference. The remaining inquiries are whether important state interests are implicated so as to warrant federal-court abstention and whether the federal plaintiff has an adequate opportunity to present the federal challenge.

C

The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys. See n. 11, *supra*. The ultimate objective of such control is "the protection of the public, the purification of the bar and the prevention of a re-occurrence." *In re Baron*, 25 N. J. 445, 449, 136 A. 2d 873, 875 (1957). The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. See *In re Stein*, 1 N. J. 228, 237, 62 A. 2d 801, 805 (1949), quoting *In re Cahill*, 66 N. J. L. 527, 50 A. 119 (1901). The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance. Finally, the State's interest in the present litigation is demonstrated by the fact that the Middlesex County Ethics Committee, an agency of the Supreme Court of New Jersey, is the named defendant in the present

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[13] The role of local ethics or bar association committees may be analogized to the function of a special master. *Anonymous* v. *Assn. of Bar of City of New York*, 515 F. 2d 427 (CA2), cert. denied, 423 U. S. 863 (1975). The essentially judicial nature of disciplinary actions in New Jersey has been recognized previously by the federal courts. In *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701 (CA3 1977), the United States Court of Appeals for the Third Circuit agreed that "incursions by federal courts into ongoing [New Jersey] disciplinary proceedings would be peculiarly disruptive of notions of comity." *Id.*, at 704.

suit and was the body which initiated the state proceedings against respondent Hinds.

The importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain.

D

Respondent Hinds contends that there was no opportunity in the state disciplinary proceedings to raise his federal constitutional challenge to the disciplinary rules. Yet Hinds failed to respond to the complaint filed by the local Ethics Committee and failed even to *attempt* to raise any federal constitutional challenge in the state proceedings. Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees. Abstention is based upon the theory that "'[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'" *Younger* v. *Harris*, 401 U. S., at 45, quoting *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926).

In light of the unique relationship between the New Jersey Supreme Court and the local Ethics Committee, and in view of the nature of the proceedings, it is difficult to conclude that there was no "adequate opportunity" for respondent Hinds

379-674 O—83-13

to raise his constitutional claims.[14] *Moore*, 442 U. S., at 430.

Whatever doubt, if any, that may have existed about respondent Hinds' ability to have constitutional challenges heard in the bar disciplinary hearings was laid to rest by the subsequent actions of the New Jersey Supreme Court. Prior to the filing of the petition for certiorari in this Court the New Jersey Supreme Court *sua sponte* entertained the constitutional issues raised by respondent Hinds. Respondent Hinds therefore has had abundant opportunity to present his constitutional challenges in the state disciplinary proceedings.[15]

There is no reason for the federal courts to ignore this subsequent development. In *Hicks* v. *Miranda*, 422 U. S. 332 (1975), we held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of *Younger* v. *Harris* should apply in full force." *Id.*, at 349. An analogous situation is presented here; the principles of comity and federalism which call for abstention remain in full

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[14] This case is distinguishable from *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974), in which there was no ongoing state proceeding to serve as a vehicle for vindicating the constitutional rights of the federal plaintiff. This case is also distinguishable from *Gerstein* v. *Pugh*, 420 U. S. 103, 108, n. 9 (1975), in which the issue of the legality of a pretrial detention could not be raised in defense of a criminal prosecution. See also *Juidice* v. *Vail*, *supra*, at 337.

[15] In addition, after the filing of the writ of certiorari the New Jersey Supreme Court amended the state bar disciplinary rules to expressly permit a motion directly to the New Jersey Supreme Court for interlocutory adjudication of constitutional issues. Rule 1:20–4(d)(i). See n. 9, *supra*. Even if interlocutory review is not granted, constitutional issues are preserved for consideration by the New Jersey Supreme Court. Rule 1:20–2(j).

The New Jersey Supreme Court reviews all disciplinary actions except the issuance of private letters of reprimand. Rule 1:20–4. Rule 1:20–2(j), however, requires that all constitutional issues be withheld for consideration by the Supreme Court as part of its review of the decision of the Disciplinary Review Board. This appears to provide for Supreme Court review of constitutional challenges even when a private reprimand is made.

force. Thus far in the federal-court litigation the sole issue has been whether abstention is appropriate. No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles. It would trivialize the principles of comity and federalism if federal courts failed to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court. 422 U. S., at 350.[16]

Respondents have not challenged the findings of the District Court that there was no bad faith or harassment on the part of petitioner and that the state rules were not "'flagrantly and patently'" unconstitutional. *Younger*, *supra*, at 53, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). See App. to Pet. for Cert. 50a–52a. We see no reason to disturb these findings, and no other extraordinary circumstances have been presented to indicate that abstention would not be appropriate.[17]

III

Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," *Gibson* v. *Berryhill*, 411 U. S., at 577, and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings. Accordingly, the judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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[16] Indeed, the decision of the New Jersey Supreme Court to consider respondent Hinds' constitutional challenges indicates that the state court desired to give Hinds a swift judicial resolution of his constitutional claims.

[17] It is not clear whether the Court of Appeals decided whether abstention would be proper as to the respondent organizations who are not parties to the state disciplinary proceedings. We leave this issue to the Court of Appeals on remand.

JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated by JUSTICE MARSHALL, I join the judgment in this case. I agree that federal courts should show particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the State's bar, where there is an adequate opportunity to raise federal issues in that proceeding. The traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars and the quasi-criminal nature of bar disciplinary proceedings, *In re Ruffalo*, 390 U. S. 544, 551 (1968), call for exceptional deference by the federal courts. See *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701, 703–704 (CA3 1977); *Erdmann* v. *Stevens*, 458 F. 2d 1205, 1209–1210 (CA2 1972). I continue to adhere to my view, however, that *Younger* v. *Harris*, 401 U. S. 37 (1971), is in general inapplicable to civil proceedings. See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 613 (1975) (BRENNAN, J., dissenting).

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I agree with much of the general language in the Court's opinion discussing the importance of the State's interest in regulating the professional conduct of its attorneys. However, I believe that the question whether *Younger* abstention would have been appropriate at the time that the District Court or the Court of Appeals considered this issue is not as simple as the Court's opinion might be read to imply. As the Court acknowledges, absent an ongoing judicial proceeding in which there is an adequate opportunity for a party to raise federal constitutional challenges, *Younger* is inapplicable. *Ante*, at 432. See also *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973). Here, it is unclear whether, at the time the lower courts addressed this issue, there was an adequate opportunity in the state disciplinary proceedings to raise a constitu-

tional challenge to the disciplinary rules. Furthermore, it is unclear whether proceedings before the Ethics Committee are more accurately viewed as prosecutorial rather than judicial in nature.

I agree with the Court that we may consider events subsequent to the decisions of the courts below because the federal litigation has addressed only the question whether abstention is appropriate. Thus far, there have been no proceedings on the merits in federal court. *Ante*, at 436–437. After the Court of Appeals rendered its decision and denied petitioner's petition for rehearing, the New Jersey Supreme Court certified the complaint against respondent Hinds to itself. App. to Pet. for Cert. 62a. Now, there are ongoing judicial proceedings in the New Jersey Supreme Court in which Hinds has been given the opportunity to raise his constitutional challenges. As a result, *Younger* abstention, at least with respect to Hinds, is appropriate at this time. For this reason only, I join the judgment of the Court.

CONNECTICUT ET AL. *v.* TEAL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-2147. Argued March 29, 1982—Decided June 21, 1982

Respondent black employees of a Connecticut state agency were promoted provisionally to supervisors. To attain permanent status as supervisors, they had to participate in a selection process that required, as a first step, a passing score on a written examination. Subsequently, an examination was given to 48 black and 259 white candidates. Fifty-four percent of the black candidates passed, this being approximately 68 percent of the passing rate for the white candidates. Respondent black employees failed the examination and were thus excluded from further consideration for permanent supervisory positions. They then brought an action in Federal District Court against petitioners (the State of Connecticut and certain state agencies and officials), alleging that petitioners had violated Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related. In the meantime, before trial, petitioners made promotions from the eligibility list, the overall result being that 22.9 percent of the black candidates were promoted but only 13.5 percent of the white candidates. Petitioners urged that this "bottom-line" result, more favorable to blacks than to whites, was a complete defense to the suit. The District Court agreed and entered judgment for petitioners, holding that the "bottom line" percentages precluded the finding of a Title VII violation and that petitioners were not required to demonstrate that the promotional examination was job related. The Court of Appeals reversed, holding that the District Court erred in ruling that the examination results alone were insufficient to support a prima facie case of disparate impact in violation of Title VII.

Held: Petitioners' nondiscriminatory "bottom line" does not preclude respondents from establishing a prima facie case nor does it provide petitioners with a defense to such a case. Pp. 445–456.

(a) Despite petitioners' nondiscriminatory "bottom line," respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2) of Title VII, which makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees" in any way which would deprive "any individual of employ-

ment opportunities" because of race, color, religion, sex, or national origin. To measure disparate impact only at the "bottom line" ignores the fact that Title VII guarantees these individual black respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria. Respondents' rights under § 703(a)(2) have been violated unless petitioners can demonstrate that the examination in question was not an artificial, arbitrary, or unnecessary barrier but measured skills related to effective performance as a supervisor. Pp. 445–451.

(b) No special haven for discriminatory tests is offered by § 703(h) of Title VII, which provides that it shall not be an unlawful employment practice for an employer to act upon results of an ability test if such test is "not designed, intended, or used to discriminate" because of race, color, religion, sex, or national origin. A non-job-related test that has a disparate impact and is used to "limit" or "classify" employees is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. Pp. 451–452.

(c) The principal focus of § 703(a)(2) is the protection of the individual employee, rather than the protection of the minority group as a whole. To suggest that the "bottom line" may be a defense to a claim of discrimination against an individual employee confuses unlawful discrimination with discriminatory intent. Resolution of the factual question of intent is not what is at issue in this case, but rather petitioners seek to justify discrimination against the black respondents on the basis of petitioners' favorable treatment of other members of these respondents' racial group. Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. Pp. 452–456.

645 F. 2d 133, affirmed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 456.

Bernard F. McGovern, Jr., Assistant Attorney General of Connecticut, argued the cause for petitioners. With him on the briefs were *Carl R. Ajello*, Attorney General, *Peter W. Gillies*, Deputy Attorney General, and *Robert E. Walsh*, *Sidney D. Giber*, and *Thomas P. Clifford III*, Assistant Attorneys General.

Thomas W. Bucci argued the cause for respondents. With him on the brief was *Sidney L. Dworkin.**

JUSTICE BRENNAN delivered the opinion of the Court.

We consider here whether an employer sued for violation of Title VII of the Civil Rights Act of 1964[1] may assert a "bottom-line" theory of defense. Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotions—effected by an examination having disparate impact—would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom-line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case.

I

Four of the respondents, Winnie Teal, Rose Walker, Edith Latney, and Grace Clark, are black employees of the Department of Income Maintenance of the State of Connecticut.[2]

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Harriet S. Shapiro, Brian K. Landsberg, David L. Rose,* and *Joan A. Magagna* for the United States; by *Robert E. Williams* and *Douglas S. McDowell* for the Equal Employment Advisory Council et al.; and by *Leonard S. Janofsky* and *Paul Grossman* for the National League of Cities et al.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Robert M. Weinberg, Michael H. Gottesman,* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Richard C. Dinkelspiel, William L. Robinson, Norman J. Chachkin,* and *Beatrice Rosenberg* for the Lawyers' Committee for Civil Rights Under Law.

[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV).

[2] The black respondents were joined as plaintiffs by four white employees on a pendent claim that the written test violated provisions of state law that require promotional exams to be job related. That claim is not before us. See 645 F. 2d 133, 135, n. 3 (CA2 1981).

Each was promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for almost two years. To attain permanent status as supervisors, however, respondents had to participate in a selection process that required, as the first step, a passing score on a written examination. This written test was administered on December 2, 1978, to 329 candidates. Of these candidates, 48 identified themselves as black and 259 identified themselves as white. The results of the examination were announced in March 1979. With the passing score set at 65,[3] 54.17 percent of the identified black candidates passed. This was approximately 68 percent of the passing rate for the identified white candidates.[4] The four respondents were among the blacks who failed the examination, and they were thus excluded

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[3] The mean score on the examination was 70.4 percent. However, because the black candidates had a mean score 6.7 percentage points lower than the white candidates, the passing score was set at 65, apparently in an attempt to lessen the disparate impact of the examination. See *id.*, at 135, and n. 4.

[4] The following table shows the passing rates of various candidate groups:

Candidate Group	Number	No. Receiving Passing Score	Passing Rate (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.54
Unidentified	15	9	60.00
Total	329	246	74.77

Petitioners do not contest the District Court's implicit finding that the examination itself resulted in disparate impact under the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. See App. to Pet. for Cert. 18a, 23a, and n. 2. Those guidelines provide that a selection rate that "is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 CFR § 1607.4D (1981).

from further consideration for permanent supervisory positions. In April 1979, respondents instituted this action in the United States District Court for the District of Connecticut against petitioners, the State of Connecticut, two state agencies, and two state officials. Respondents alleged, *inter alia*, that petitioners violated Title VII by imposing, as an absolute condition for consideration for promotion, that applicants pass a written test that excluded blacks in disproportionate numbers and that was not job related.

More than a year after this action was instituted, and approximately one month before trial, petitioners made promotions from the eligibility list generated by the written examination. In choosing persons from that list, petitioners considered past work performance, recommendations of the candidates' supervisors and, to a lesser extent, seniority. Petitioners then applied what the Court of Appeals characterized as an affirmative-action program in order to ensure a significant number of minority supervisors.[5] Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted.[6] It is this "bottom-line" result, more favorable to blacks than to whites, that petitioners urge should be adjudged to be a complete defense to respondents' suit.

After trial, the District Court entered judgment for petitioners. App. to Pet. for Cert. 18a. The court treated respondents' claim as one of disparate impact under *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), *Albemarle Paper Co.*

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[5] Petitioners contest this characterization of their selection procedure. We have no need, however, to resolve this dispute in the context of the present controversy.

[6] The actual promotion rate of blacks was thus close to 170 percent that of the actual promotion rate of whites.

v. *Moody*, 422 U. S. 405 (1975), and *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977). However, the court found that, although the comparative passing rates for the examination indicated a prima facie case of adverse impact upon minorities, the result of the entire hiring process reflected no such adverse impact. Holding that these "bottom-line" percentages precluded the finding of a Title VII violation, the court held that the employer was not required to demonstrate that the promotional examination was job related. App. to Pet. for Cert. 22a–24a, 26a. The United States Court of Appeals for the Second Circuit reversed, holding that the District Court erred in ruling that the results of the written examination alone were insufficient to support a prima facie case of disparate impact in violation of Title VII. 645 F. 2d 133 (1981). The Court of Appeals stated that where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process," that barrier must be shown to be job related. *Id.*, at 138. We granted certiorari, 454 U. S. 813 (1981), and now affirm.

II

A

We must first decide whether an examination that bars a disparate number of black employees from consideration for promotion, and that has not been shown to be job related, presents a claim cognizable under Title VII. Section 703 (a)(2) of Title VII provides in pertinent part:

> "It shall be an unlawful employment practice for an employer—
>
> . . . . .
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a)(2).

Respondents base their claim on our construction of this provision in *Griggs* v. *Duke Power Co.*, *supra*. Prior to the enactment of Title VII, the Duke Power Co. restricted its black employees to the labor department. Beginning in 1965, the company required all employees who desired a transfer out of the labor department to have either a high school diploma or to achieve a passing grade on two professionally prepared aptitude tests. New employees seeking positions in any department other than labor had to possess both a high school diploma and a passing grade on these two examinations. Although these requirements applied equally to white and black employees and applicants, they barred employment opportunities to a disproportionate number of blacks. While there was no showing that the employer had a racial purpose or invidious intent in adopting these requirements, this Court held that they were invalid because they had a disparate impact and were not shown to be related to job performance:

> "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U. S., at 431.

Griggs and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to

avoid a finding of discrimination. *Griggs*, *supra*, at 432. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination. See *Albemarle Paper Co.*, *supra*, at 425; *Dothard*, *supra*, at 329.[7]

Griggs recognized that in enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment" and professional development that had historically been encountered by women and blacks as well as other minorities. 401 U. S., at 431. See also *Dothard* v. *Rawlinson*, *supra*.[8] *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), explained that

> "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *Id.*, at 806.

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[7] Petitioners apparently argue both that the nondiscriminatory "bottom line" precluded respondents from establishing a prima facie case and, in the alternative, that it provided a defense.

[8] The legislative history of the 1972 amendments to Title VII, 86 Stat. 103–113, is relevant to this case because those amendments extended the protection of the Act to respondents here by deleting exemptions for state and municipal employers. See 86 Stat. 103. That history demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting:

"Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." S. Rep. No. 92–415, p. 5 (1971).

See also H. R. Rep. No. 92–238, p. 8 (1971). In addition, the section-by-section analyses of the 1972 amendments submitted to both Houses explicitly stated that in any area not addressed by the amendments, present case law—which as Congress had already recognized included our then recent decision in *Griggs*—was intended to continue to govern. 118 Cong. Rec. 7166, 7564 (1972).

Petitioners' examination, which barred promotion and had a discriminatory impact on black employees, clearly falls within the literal language of § 703(a)(2), as interpreted by *Griggs*. The statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*.[9] A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U. S., at 429–430 (emphasis added). When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity* "because of . . . race, color, religion, sex, or national origin." In other words, § 703(a)(2) prohibits discriminatory "artificial, arbitrary, and unnecessary barriers to employment," 401 U. S., at 431, that "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment *opportunities*." (Emphasis added.)

Relying on § 703(a)(2), *Griggs* explicitly focused on employment "practices, procedures, or tests," 401 U. S., at 430, that deny equal employment "opportunity," *id.*, at 431. We concluded that Title VII prohibits "procedures or testing mechanisms that operate as 'built-in headwinds' for minority

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[9] In contrast, the language of § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1), if it were the only protection given to employees and applicants under Title VII, might support petitioners' exclusive focus on the overall result. That subsection makes it an unlawful employment practice

"to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

groups." *Id.*, at 432. We found that Congress' primary purpose was the prophylactic one of achieving equality of employment "opportunities" and removing "barriers" to such equality. *Id.*, at 429–430. See *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417. The examination given to respondents in this case surely constituted such a practice and created such a barrier.

Our conclusion that § 703(a)(2) encompasses respondents' claim is reinforced by the terms of Congress' 1972 extension of the protections of Title VII to state and municipal employees. See n. 8, *supra*. Although Congress did not explicitly consider the viability of the defense offered by the state employer in this case, the 1972 amendments to Title VII do reflect Congress' intent to provide state and municipal employees with the protection that Title VII, as interpreted by *Griggs*, had provided to employees in the private sector: equality of *opportunity* and the elimination of discriminatory *barriers* to professional development. The Committee Reports and the floor debates stressed the need for equality of opportunity for minority applicants seeking to obtain governmental positions. *E. g.*, S. Rep. No. 92–415, p. 10 (1971); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams). Congress voiced its concern about the widespread use by state and local governmental agencies of "invalid selection techniques" that had a discriminatory impact. S. Rep. No. 92–415, *supra*, at 10; H. R. Rep. No. 92–238, p. 17 (1971); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins).[10]

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[10] The Committee Reports in both Houses, and Senator Williams, principal sponsor of the Senate bill that was ultimately enacted in large part, relied upon a report of the United States Commission on Civil Rights, which Senator Williams placed in the Congressional Record. See H. R. Rep. No. 92–238, p. 17 (1971); S. Rep. No. 92–415, p. 10 (1971); 118 Cong. Rec. 1815–1819 (1972). The Commission concluded that serious "[b]arriers to equal opportunity" existed for state and local government employees. Two of the three barriers cited were "recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal

The decisions of this Court following *Griggs* also support respondents' claim. In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted. Thus *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977), found that minimum statutory height and weight requirements for correctional counselors were the sort of arbitrary barrier to equal employment opportunity for women forbidden by Title VII. Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment. *Id.*, at 329–330, and n. 12. Similarly, in *Albemarle Paper Co.* v. *Moody*, *supra*, the action was remanded to allow the employer to attempt to show that the tests that he had given to his employees for promotion were job related. We did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden. See 422 U. S., at 436. See also *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 584 (1979) ("A prima facie violation of the Act may be established by statistical evidence showing that an employment *practice* has the effect of denying members of one race equal access to employment *opportunities*") (emphasis added).

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treatment of minorities," and promotions made on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." U. S. Commission on Civil Rights, For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment 119 (1969), reprinted in 118 Cong. Rec. 1817 (1972).

In short, the District Court's dismissal of respondents' claim cannot be supported on the basis that respondents failed to establish a prima facie case of employment discrimination under the terms of § 703(a)(2). The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria. Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional development that have a discriminatory impact upon individuals. Therefore, respondents' rights under § 703(a)(2) have been violated, unless petitioners can demonstrate that the examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance in the role of Welfare Eligibility Supervisor.

B

The United States, in its brief as *amicus curiae*, apparently recognizes that respondents' claim in this case falls within the affirmative commands of Title VII. But it seeks to support the District Court's judgment in this case by relying on the defenses provided to the employer in § 703(h).[11] Section 703(h) provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate be-

[11] The Government's brief is submitted by the Department of Justice, which shares responsibility for federal enforcement of Title VII with the Equal Employment Opportunity Commission (EEOC). The EEOC declined to join this brief. See Brief for United States as *Amicus Curiae* 1, and n.

cause of race, color, religion, sex or national origin." 78 Stat. 257, as amended, 42 U. S. C. § 2000e–2(h).

The Government argues that the test administered by the petitioners was not "used to discriminate" because it did not actually deprive disproportionate numbers of blacks of promotions. But the Government's reliance on § 703(h) as offering the employer some special haven for discriminatory tests is misplaced. We considered the relevance of this provision in *Griggs*. After examining the legislative history of § 703(h), we concluded that Congress, in adding § 703(h), intended only to make clear that tests that were *job related* would be permissible despite their disparate impact. 401 U. S., at 433–436. As the Court recently confirmed, § 703 (h), which was introduced as an amendment to Title VII on the Senate floor, "did not alter the meaning of Title VII, but 'merely clarifie[d] its present intent and effect.'" *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 73, n. 11 (1982), quoting 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey). A non-job-related test that has a disparate racial impact, and is used to "limit" or "classify" employees, is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. See *Griggs*, 401 U. S., at 433.

In sum, respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2), despite their employer's nondiscriminatory "bottom line," and that "bottom line" is no defense to this prima facie case under § 703(h).

III

Having determined that respondents' claim comes within the terms of Title VII, we must address the suggestion of petitioners and some *amici curiae* that we recognize an exception, either in the nature of an additional burden on plaintiffs

seeking to establish a prima facie case or in the nature of an affirmative defense, for cases in which an employer has compensated for a discriminatory pass-fail barrier by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory "bottom line." We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.[12]

Section 703(a)(2) prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the mi-

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[12] Petitioners suggest that we should defer to the EEOC Guidelines in this regard. But there is nothing in the Guidelines to which we might defer that would aid petitioners in this case. The most support petitioners could conceivably muster from the Uniform Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1981) (now issued jointly by the EEOC, the Office of Personnel Management, the Department of Labor, and the Department of Justice, see 29 CFR § 1607.1A (1981)), is *neutrality* on the question whether a discriminatory barrier that does not result in a discriminatory overall result constitutes a violation of Title VII. Section 1607.4C of the Guidelines, relied upon by petitioners, states that as a matter of "*administrative and prosecutorial discretion, in usual circumstances*," the agencies will not take enforcement action based upon the disparate impact of any component of a selection process if the total selection process results in no adverse impact. (Emphasis added.) The agencies made clear that the "guidelines do not address the underlying question of law," and that an individual "who is denied the job because of a particular component in a procedure which otherwise meets the 'bottom line' standard . . . retains the right to proceed through the appropriate agencies, and into Federal court." 43 Fed. Reg. 38291 (1978). See 29 CFR § 1607.16I (1981). In addition, in a publication entitled Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, the agencies stated:

"Since the [bottom-line] concept is not a rule of law, it does not affect the discharge by the EEOC of its statutory responsibilities to investigate charges of discrimination, render an administrative finding on its investigation, and engage in voluntary conciliation efforts. Similarly, with respect to the other issuing agencies, the bottom line concept applies not to the processing of individual charges, but to the initiation of enforcement action." 44 Fed. Reg. 12000 (1979).

nority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e. g.*, §§ 703(a)(1), (b), (c), 704(a), 78 Stat. 255–257, as amended, 42 U. S. C. §§ 2000e–2(a)(1), (b), (c), 2000e–3(a); 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); *id.*, at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job").

In suggesting that the "bottom line" may be a defense to a claim of discrimination against an individual employee, petitioners and *amici* appear to confuse unlawful discrimination with discriminatory intent. The Court has stated that a nondiscriminatory "bottom line" and an employer's good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 580 (1978). See also *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977). But resolution of the factual question of intent is not what is at issue in this case. Rather, petitioners seek simply to justify discrimination against respondents on the basis of their favorable treatment of other members of respondents' racial group. Under Title VII, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction Corp.* v. *Waters*, 438 U. S., at 579.

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether

members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.*, 401 U. S., at 430; *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 279 (1976)." *Ibid.* (emphasis in original).

It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous." *Id.*, at 708. Similarly, in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) *(per curiam)*, we recognized that a rule barring employment of all married *women* with preschool children, if not a bona fide occupational qualification under § 703(e), violated Title VII, even though female applicants without preschool children were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position plaintiff sought.

Petitioners point out that *Furnco*, *Manhart*, and *Phillips* involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy. The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be "of little comfort to the victims of . . . discrimination." *Teamsters* v. *United States*, *supra*, at 342. Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every *individual* employee is protected against both discriminatory treatment

and "practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U. S., at 431. Requirements and tests that have a discriminatory impact are merely some of the more subtle, but also the more pervasive, of the "practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 800.

IV

In sum, petitioners' nondiscriminatory "bottom line" is no answer, under the terms of Title VII, to respondents' prima facie claim of employment discrimination. Accordingly, the judgment of the Court of Appeals for the Second Circuit is affirmed, and this case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

In past decisions, this Court has been sensitive to the critical difference between cases proving discrimination under Title VII, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), by a showing of disparate treatment or discriminatory intent and those proving such discrimination by a showing of disparate impact. Because today's decision blurs that distinction and results in a holding inconsistent with the very nature of disparate-impact claims, I dissent.

I

Section 703(a)(2) of Title VII, 42 U. S. C. § 2000e–2(a)(2), provides that it is an unlawful employment practice for an employer to

> "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

> otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Although this language suggests that discrimination occurs only on an individual basis, in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971), the Court held that discriminatory intent on the part of the employer against an individual need not be shown when "employment procedures or testing mechanisms . . . operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Thus, the Court held that the "disparate impact" of an employer's practices on a racial group can violate § 703(a)(2) of Title VII. In *Griggs* and each subsequent disparate-impact case, however, the Court has considered, not whether the claimant as an individual had been classified in a manner impermissible under § 703(a)(2), but whether an employer's procedures have had an adverse impact on the protected *group* to which the individual belongs.

Thus, while disparate-*treatment* cases focus on the way in which an individual has been treated, disparate-*impact* cases are concerned with the protected group. This key distinction was explained in *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 581–582 (1978) (MARSHALL, J., concurring in part):

> "It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977). An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial group."[1]

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[1] See also *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977) (similar explanation).

In keeping with this distinction, our disparate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group.[2] If this case were decided by reference to the total process—as our cases suggest that it should be—the result would be clear. Here 22.9% of the blacks who entered the selection process were ultimately promoted, compared with only 13.5% of the whites. To say that this selection process had an unfavorable "disparate impact" on blacks is to ignore reality.

The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. It emphasizes that some individual blacks were eliminated by the disparate impact of the preliminary test. But this argument confuses the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of cases—those involving direct proof of discriminatory intent—the plaintiff seeks to establish direct, intentional discrimination against him. In that type of case, the individual is at the forefront throughout the entire presentation of evidence. In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group

[2] See *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977) (statutory height and weight requirements operated as a bar to *employment* of disproportionate number of women); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 409–411 (1975) (seniority system allegedly locked blacks into lower paying jobs; applicants to skilled lines of progression were required to pass two tests); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971) (tests were an absolute bar to transfers or hiring; the Court observed that all Congress requires is "the removal of artificial, arbitrary, and unnecessary barriers to *employment* . . .") (emphasis added).

to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' "'built-in headwinds.'" *Griggs, supra,* at 432. But this method of proof—which actually *defines* disparate-impact theory under Title VII—invites the plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual.[3] There can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group.*[4]

In this case respondent black employees seek to benefit from a conflation of "discriminatory treatment" and "disparate impact" theories. But they cannot have it both ways. Having undertaken to prove discrimination by reference to one set of group figures (used at a preliminary point in the selection process), these respondents then claim that *non*discrimination cannot be proved by viewing the impact of the entire process on the group as a whole. The fallacy of this reasoning—accepted by the Court—is transparent. It is to

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[3] Initially, the plaintiff bears the burden of establishing a prima facie case that Title VII has been infringed. See *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248, 252–253 (1981). In a disparate-impact case, this burden is met by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group. See *Teamsters* v. *United States, supra,* at 336–338. Regardless of whether the plaintiff's prima facie case must itself focus on the defendant's overall selection process or whether it is sufficient that the plaintiff establish that at least one pass-fail barrier has resulted in disparate impact, the employer's presentation of evidence showing that its overall selection procedure does not operate in a discriminatory fashion certainly dispels any inference of discrimination. In such instances, at the close of the evidence, the plaintiff has failed to show disparate impact by a preponderance of the evidence.

[4] The Equal Employment Opportunity Commission and other federal enforcement agencies have adopted the "bottom-line" principle—*i. e.,* the process viewed as a whole—in deciding when to bring an action against an employer. See Uniform Guidelines on Employee Selection Procedures, 5 CFR § 300.103(c) (1981).

confuse the individualistic *aim* of Title VII with the methods of proof by which Title VII rights may be vindicated. The respondents, as individuals, are entitled to the full personal protection of Title VII. But, having undertaken to prove a violation of their rights by reference to group figures, respondents cannot deny petitioners the opportunity to rebut their evidence by introducing figures of the same kind. Having pleaded a disparate-impact case, the plaintiff cannot deny the defendant the opportunity to show that there was no disparate impact. As the Court of Appeals for the Third Circuit noted in *EEOC* v. *Greyhound Lines, Inc.*, 635 F. 2d 188, 192 (1980):

> "[N]o violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is [an ultimate] disparate impact."

Where, under a facially neutral employment process, there has been no adverse effect on the group—and certainly there has been none here—Title VII has not been infringed.

II

The Court's position is no stronger in case authority than it is in logic. None of the cases relied upon by the Court controls the outcome of this case.[5] Indeed, the disparate-

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[5] The Court concentrates on cases of questionable relevance. Most of the lower courts that have squarely considered the question have concluded that there can be no violation of Title VII on a disparate-impact basis when there is no disparate impact at the *bottom line*. See, *e. g.*, *EEOC* v. *Greyhound Lines, Inc.*, 635 F. 2d 188 (CA3 1980); *EEOC* v. *Navajo Refining Co.*, 593 F. 2d 988 (CA10 1979); *Friend* v. *Leidinger*, 588 F. 2d 61, 66 (CA4 1978); *Rule* v. *International Assn. of Ironworkers*, 568 F. 2d 558 (CA8 1977); *Smith* v. *Troyan*, 520 F. 2d 492, 497–498 (CA6 1975), cert. denied, 426 U. S. 934 (1976); *Williams* v. *City & County of San Francisco*, 483 F. Supp. 335 (ND Cal. 1979); *Brown* v. *New Haven Civil Service*

impact cases do not even support the propositions for which they are cited. For example, the Court cites *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977) (holding impermissible minimum statutory height and weight requirements for correctional counselors), and observes that "[a]lthough we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this 'bottom line.' We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment." *Ante*, at 450. In *Dothard*, however, the Court was not considering a case in which there was any difference between the discriminatory effect of the employment standard and the number of minority members actually hired. The *Dothard* Court itself stated:

> "[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question *select* applicants *for hire* in a discriminatory pattern. Once it is shown that *the employment standards* are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" 433 U. S., at 329 (emphasis added).

The *Dothard* Court did not decide today's case. It addressed only a case in which the challenged standards had a discriminatory impact at the bottom line—the hiring decision. And the *Dothard* Court's "focus," referred to by the Court, is of no help in deciding the instant case.[6]

Board, 474 F. Supp. 1256 (Conn. 1979); *Lee* v. *City of Richmond*, 456 F. Supp. 756 (ED Va. 1978).

[6] The Court cites language from two other disparate-impact cases. The Court notes that in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), the Court "remanded to allow the employer to attempt to show that the tests . . . given . . . for promotion were job related." *Ante*, at 450. But the fact that the Court did so without suggesting "that by promoting a suf-

The Court concedes that the other major cases on which it relies, *Furnco*, *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), and *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) *(per curiam)* "involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy." *Ante*, at 455. The Court nevertheless applies the principles derived from those cases to the case at bar. It does so by reiterating the view that Title VII protects *individuals*, not *groups*, and therefore that the manner in which an employer has treated other members of a group cannot defeat the claim of an individual who has suffered as a result of even a facially neutral policy. As appealing as this sounds, it confuses the distinction—uniformly recognized until today—between disparate *impact* and disparate *treatment*. See *supra*, at 457–458. Our cases, cited above, have made clear that discriminatory-impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less well than other groups under a policy, practice, or test. Indeed, if only one minority member has

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ficient number of black employees who passed the examination, the employer could avoid this burden," *ibid.*, can hardly be precedent for the negative of that proposition when the issue was neither presented in the facts of the case nor addressed by the Court.

Similarly, *New York Transit Authority* v. *Beazer*, 440 U. S. 568 (1979), provides little support despite the language quoted by the Court. See *ante*, at 450, quoting 440 U. S., at 584 ("'A prima facie violation of the Act may be established by statistical evidence showing that an employment *practice* has the effect of denying members of one race equal access to employment *opportunities*'") (emphasis added by the Court). In *Beazer*, the Court ruled that the statistical evidence actually presented was insufficient to establish a prima facie case of discrimination, and in doing so it indicated that it would have found statistical evidence of the number of applicants *and* employees in a methadone program quite probative. See *id.*, at 585. *Beazer* therefore does not justify the Court's speculation that the number of blacks and Hispanics actually employed were irrelevant to whether a case of disparate impact had been established under Title VII.

taken a test, a disparate-impact claim cannot be made, regardless of whether the test is an initial step in the selection process or one of several factors considered by the employer in making an employment decision.[7]

III

Today's decision takes a long and unhappy step in the direction of confusion. Title VII does not require that employers adopt merit hiring or the procedures most likely to permit the greatest number of minority members to be considered for or to qualify for jobs and promotions. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258–259 (1981); *Furnco*, 438 U. S., at 578. Employers need not develop tests that accurately reflect the skills of every individual candidate; there are few if any tests that do so. Yet the Court seems unaware of this practical reality, and perhaps oblivious to the likely consequences of its decision. By its holding today, the Court may force employers either to eliminate tests or rely on expensive, job-related, testing procedures, the validity of which may or may not be sustained if challenged. For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring.[8] This arbi-

[7] Courts have recognized that the probative value of statistical evidence varies with sample size in disparate-impact cases. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S., at 340, n. 20 ("Considerations such as small sample size may, of course, detract from the value of such evidence . . ."); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 621 (1974) ("[T]he District Court's concern for the smallness of the sample presented by the 13-member Panel was . . . well founded"); *Rogillio* v. *Diamond Shamrock Chemical Co.*, 446 F. Supp. 423, 427–428 (SD Tex. 1978) (sample of 10 too small); *Dendy* v. *Washington Hospital Center*, 431 F. Supp. 873, 876 (DC 1977) (sample must be "large enough to mirror the reality of the employment situation"). A sample of only one would have far too little probative value to establish a prima facie case of disparate impact.

[8] Another possibility is that employers may integrate consideration of test results into one overall hiring decision based on that "factor" *and* addi-

trary method of employment is itself unfair to individual applicants, whether or not they are members of minority groups. And it is not likely to produce a competent work force. Moreover, the Court's decision actually may result in employers employing *fewer* minority members. As Judge Newman noted in *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1263 (Conn. 1979):

> "[A]s private parties are permitted under Title VII itself to adopt voluntary affirmative action plans, . . . Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority policemen approximating their percentage of the local population, instead of relying on the expectation that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less minority hiring."

Finding today's decision unfortunate in both its analytical approach and its likely consequences, I dissent.

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tional factors. Such a process would not, even under the Court's reasoning, result in a finding of discrimination on the basis of disparate impact unless the actual hiring decisions had a disparate impact on the minority group. But if employers integrate test results into a single-step decision, they will be free to select *only* the number of minority candidates proportional to their representation in the work force. If petitioner had used this approach, it would have been able to hire substantially fewer blacks without liability on the basis of disparate impact. The Court hardly could have intended to encourage this.

BLUE SHIELD OF VIRGINIA ET AL. *v.* McCREADY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-225. Argued March 24, 1982—Decided June 21, 1982

Respondent employee was provided coverage under a prepaid group health plan purchased by her employer from petitioner Blue Shield of Virginia (Blue Shield). The plan provided reimbursement for part of the cost incurred by subscribers for outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield's practice was to reimburse subscribers for services provided by *psychiatrists* but not by *psychologists* unless the treatment was supervised by and billed through a physician. Respondent was treated by a clinical psychologist and submitted claims to Blue Shield for the costs of the treatment. After the claims were routinely denied because they had not been billed through a physician, respondent brought a class action in Federal District Court, alleging that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the Sherman Act to exclude psychologists from receiving compensation under Blue Shield's plans. She further alleged that Blue Shield's failure to reimburse was in furtherance of the conspiracy and had caused injury to her business or property for which she was entitled to treble damages under § 4 of the Clayton Act, which provides for recovery of such damages by "[a]ny person" injured "by reason of anything" prohibited in the antitrust laws. The District Court granted petitioners' motion to dismiss, holding that respondent had no standing under § 4 to maintain her suit. The Court of Appeals reversed.

Held: Respondent has standing to maintain the action under § 4 of the Clayton Act. Pp. 472–485.

(a) The lack of restrictive language in § 4 reflects Congress' expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to victims of antitrust violations. In the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, § 4 is to be applied in accordance with its plain language and its broad remedial and deterrent objectives. Pp. 472–473.

(b) Permitting respondent to proceed does not offer the slightest possibility of a duplicative exaction from petitioners, *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, and *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720,

distinguished, since she had paid her psychologist, who thus was not injured by Blue Shield's refusal to reimburse respondent. And whatever the adverse effect of Blue Shield's actions on respondent's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits. Pp. 473–475.

(c) In determining whether a particular injury is too remote from the alleged violation to warrant § 4 standing, consideration is to be given (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4. Pp. 476–478.

(d) Respondent's injury is not rendered "remote" merely because the alleged goal of petitioners was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves. Here, the § 4 remedy cannot reasonably be restricted to those competitors whom petitioners hoped to eliminate from the market. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its alleged illegal ends, and respondent's injury was precisely the type of loss that the claimed violations would be likely to cause. Nor is the § 4 remedy unavailable to respondent on the asserted ground that standing should be limited to participants in the restrained market in group health care plans—that is, to entities, such as respondent's employer, who were purchasers of group health plans. Respondent did not allege a restraint in the market for group health plans, but instead premised her claim on the concerted refusal to reimburse under a plan that would permit reimbursement for psychologists' services. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, she was within that area of the economy endangered by the breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse. Pp. 478–481.

(e) Section 4 standing is not precluded on the asserted ground that respondent's injury does not reflect the "anticompetitive" effect of the alleged boycott. Her injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws. Respondent did not yield to Blue Shield's coercive pressure to induce its subscribers into selecting psychiatrists over psychologists for the services they required, but instead bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. In light of the conspiracy here alleged, respondent's injury "flows from that which

makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489, and falls squarely within the area of congressional concern. Pp. 481–484.

649 F. 2d 228, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 485. STEVENS, J., filed a dissenting opinion, *post*, p. 492.

Griffin B. Bell argued the cause for petitioners. With him on the briefs were *James D. Miller*, *William B. Poff*, *Ronald M. Ayers*, *Heman A. Marshall III*, *Joel I. Klein*, and *H. Bartow Farr III*.

Warwick R. Furr II argued the cause for respondent. With him on the brief were *Timothy J. Bloomfield* and *Thomas M. Brownell*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County,

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**Paul R. Friedman*, *Bruce J. Ennis*, and *Donald N. Bersoff* filed a brief for the American Psychological Association as *amicus curiae* urging affirmance.

Va. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).[1] The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reimbursed subscribers for psychotherapy provided by *psychiatrists*. But Blue Shield did not provide reimbursement for the services of *psychologists* unless the treatment was supervised by and billed through a physician.[2] While a subscriber to the plan, McCready was treated by a clinical psychologist. She submitted claims to Blue Shield for the costs of that treatment, but those claims were routinely denied because they had not been billed through a physician.[3]

In 1978, McCready brought this class action in the United States District Court for the Eastern District of Virginia, on behalf of all Blue Shield subscribers who had incurred costs

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[1] With petitioner Blue Shield of Southwestern Virginia.

[2] Petitioners contend that the contract between the county and Blue Shield must be read to bar payments for the services of nonphysicians. Respondent counters that between 1962 and 1972 Blue Shield routinely reimbursed subscribers for psychotherapy provided by psychologists, and that this practice was revised in 1972 as a result of the alleged conspiracy. In addition, respondent notes that in 1973 the Virginia Legislature passed a "freedom of choice" statute, Va. Code § 38.1–824 (1981), that required Blue Shield to pay for services rendered by licensed psychologists. See *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F. 2d 476, 478 (CA4 1980). She argues that Blue Shield's obligations must be read consistently with that statute, at least until that statute was held invalid as applied in *Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 349, 269 S. E. 2d 827 (1980). This case arises on a motion to dismiss. We therefore assume, as McCready has alleged, that but for the alleged conspiracy to deny payment, she would have been reimbursed by Blue Shield for the cost of her psychologist's services.

[3] Apparently Blue Shield inadvertently paid one of McCready's claims. After the error was discovered, Blue Shield sought to obtain a refund from McCready for the amount paid. 649 F. 2d 228, 230, n. 4 (1981).

for psychological services since 1973 but who had not been reimbursed.[4] The complaint alleged that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the

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[4] A similar complaint was filed by the Virginia Academy of Clinical Psychologists (VACP) and its president against the same defendants. The District Court addressed the motions to dismiss filed in each of the cases in a single opinion. The court dismissed McCready's case—thus giving rise to the appellate decision at issue in this Court—but permitted the *VACP* case to proceed to trial. Following trial, the District Court entered judgment for the defendants, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 469 F. Supp. 552 (1979), but the Court of Appeals reversed with respect to defendant Blue Shield, 624 F. 2d 476 (CA4 1980). The opinion of the Court of Appeals for the Fourth Circuit in the instant case states that the opinion in *VACP* "should be read in connection with" its own opinion. 649 F. 2d, at 230. A brief recitation of the decision in the *VACP* case is thus helpful in understanding the precise nature of McCready's claim.

In *VACP*, the Court of Appeals rejected the District Court's treatment of Blue Shield as a distinct entity for purposes of determining whether a conspiracy or agreement had been shown. 624 F. 2d, at 479. The court found "that the Blue Shield Plans are combinations of physicians, operating under the direction and control of their physician members." *Ibid.*

"Blue Shield Plans are not insurance companies, though they are, to a degree, insurers. Rather, they are generally characterized as prepaid health care plans, quantity purchasers of health care services. [I]n a real and legal sense, the Blue Shield Plans are agents of their member physicians." *Id.*, at 480 (citations and footnote omitted).

With respect to the question whether the alleged Blue Shield combination was "in restraint of trade," the Court of Appeals agreed with the District Court that the rule of reason was applicable, but held that the District Court had erred in finding no liability. The Court of Appeals observed that psychologists and psychiatrists compete in the psychotherapy market, and that the decisions of Blue Shield "necessarily dictate, to some extent," who will be chosen to provide psychotherapy. *Id.*, at 485. Finding that Blue Shield's policy of denying reimbursement for the psychotherapeutic services of psychologists unless billed through physicians, was not merely a cost-containment device or simply "good medical practice," as claimed by Blue Shield, the court held that Blue Shield had violated the Sherman Act. *Ibid.*

Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1,[5] "to exclude and boycott clinical psychologists from receiving compensation under" the Blue Shield plans. App. 55. McCready further alleged that Blue Shield's failure to reimburse had been in furtherance of the alleged conspiracy, and had caused injury to her business or property for which she was entitled to treble damages and attorney's fees under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15.[6]

The District Court granted petitioners' motion to dismiss, holding that McCready had no standing under § 4 to maintain her suit.[7] In the District Court's view, McCready's standing to maintain a § 4 action turned on whether she had suffered injury "within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws." App. 17. Noting that the goal of the alleged boycott was to exclude clinical psychologists from a segment of the psychotherapy market, the court concluded that the "sector of the economy *competitively* endangered" by the charged violation extended "no further than that area occupied by the psychologists." *Id.*, at 18 (emphasis in original). Thus, while McCready clearly had suffered an injury by

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[5] That section provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[6] That section provides, in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[7] Petitioners have argued in this Court that under § 2 of the McCarran-Ferguson Act, 15 U. S. C. § 1012, their actions were exempt from the antitrust laws as part of the "business of insurance." In ruling on petitioners' motion to dismiss, the District Court concluded that respondent had adequately pleaded a boycott beyond the protection of the McCarran-Ferguson Act, 15 U. S. C. § 1013(b). Respondents point out that on a full factual record the issue was resolved against the petitioners in *VACP*, *supra*, at 483–484. The Court of Appeals did not address this question in the present case, however, and we do not reach it here.

being denied reimbursement, this injury was "too indirect and remote to be considered 'antitrust injury.'" *Ibid.*

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, holding that McCready had alleged an injury within the meaning of § 4 of the Clayton Act and had standing to maintain the suit. 649 F. 2d 228 (1981). The court recognized that the goal of the alleged conspiracy was the exclusion of clinical psychologists from some segment of the psychotherapy market. But it held that the § 4 remedy was available to any person "whose property loss is directly or proximately caused by" a violation of the antitrust laws, and that McCready's loss was not "too remote or indirect to be covered by the Act." *Id.*, at 231.[8] The court thus

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[8] Addressing the "target area" limitation on antitrust standing recognized in several Courts of Appeals, see n. 14, *infra*, the court concluded that the policies underlying that limitation were not implicated by McCready's claim. 649 F. 2d, at 231–232. The dissenting judge took a contrary view of the "target area" rule. He emphasized that McCready had not described her injury "as a design or goal of any antitrust violation," but "rather as a consequence thereof." *Id.*, at 232. He viewed this as the determinative factor in the proper application of the "target area" test to the facts of this case:

"In determining who has standing to sue, the courts must look at who the illegal act was aimed to injure. A bystander, who is not the intended victim of the antitrust violation but who is injured nonetheless, cannot sue under the antitrust laws. His injury is too remote." *Id.*, at 233.

In addition, the dissent argued that McCready was not within the sector of the economy "competitively endangered" by the alleged violation, agreeing with the District Court that "she operated in a market which was unrestrained so far as she was concerned." *Id.*, at 234. Finally, the dissent reasoned:

"The price of psychologists' services to her was not increased by any act of the defendants. The fact that her Blue Shield contract . . . would not reimburse her for those services had nothing to do with the price she paid for the services, which . . . were not artificially inflated by an antitrust violation. . . .

". . . There is not even a claim that her psychologists' bills are higher than they would have been had the conspiracy not existed." *Id.*, at 235–236.

remanded the case to the District Court for further proceedings. We granted certiorari. 454 U. S. 962 (1981).

II

Section 4 of the Clayton Act, 38 Stat. 731, provides a treble-damages remedy to "*[a]ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws," 15 U. S. C. § 15 (emphasis added). As we noted in *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979), "[o]n its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. *Pfizer Inc.* v. *India*, 434 U. S. 308, 313–314 (1978). See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486, and n. 10, (1977); *Perma Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 139 (1968); *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U. S. 556, 572–573, and n. 10 (1982). As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948).

Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy.[9]

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[9] In a related context we commented that "[i]n the face of [the congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress . . . ." *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957). See also *Radiant Burners, Inc.* v. *Peoples Gas Co.*, 364 U. S. 656, 659–660 (1961) *(per curiam)* (To state a claim under § 1 of the Sherman Act, "allega-

Two recent cases illustrate the point. *Pfizer Inc.* v. *India*, *supra*, afforded the statutory phrase "any person" its "naturally broad and inclusive meaning," *id.*, at 312, and held that it extends even to an action brought by a foreign sovereign. Similarly, *Reiter* v. *Sonotone Corp.*, *supra*, rejected the argument that the § 4 remedy is available only to redress injury to commercial interests. In that case we afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of goods that was attributable to a price-fixing conspiracy. 442 U. S., at 338. In sum, in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives. But drawing on statutory policy, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury. We treat these limitations in turn.[10]

A

In *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251 (1972), we held that § 4 did not authorize a State to sue in its *parens patriae* capacity for damages to its "general economy." Noting

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tions adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires").

[10] Permitting McCready to maintain this lawsuit will, of course, further certain basic objectives of the private enforcement scheme embodied in § 4. Only by requiring violators to disgorge the "fruits of their illegality" can the deterrent objectives of the antitrust laws be fully served. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 494 (1968). See *Pfizer Inc.* v. *India*, 434 U. S. 308, 314 (1978); *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746 (1977). But in addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct.

that a "large and ultimately indeterminable part of the injury to the 'general economy' . . . is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4," we concluded that "[e]ven the most lengthy and expensive trial could not . . . cope with the problems of double recovery inherent in allowing damages" for injury to the State's quasi-sovereign interests. *Id.*, at 264. See *Reiter* v. *Sonotone Corp.*, *supra*, at 342.

In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), similar concerns prevailed. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), had held that an antitrust defendant could not relieve itself of its obligation to pay damages resulting from overcharges to a direct-purchaser plaintiff by showing that the plaintiff had passed the amount of the overcharge on to its own customers. *Illinois Brick* was an action by an indirect purchaser claiming damages from the antitrust violator measured by the amount that had been passed on to it. Relying in part on *Hawaii* v. *Standard Oil Co.*, *supra*, the Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant. *Illinois Brick*, *supra*, at 730–731. The Court found that the splintered recoveries and litigative burdens that would result from a rule requiring that the impact of an overcharge be apportioned between direct and indirect purchasers could undermine the active enforcement of the antitrust laws by private actions. 431 U. S., 745–747. The Court concluded that direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote. *Id.*, at 735.

The policies identified in *Hawaii* and *Illinois Brick* plainly offer no support for petitioners here. Both cases focused on the risk of duplicative recovery engendered by allowing

every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. But permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.[11]

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[11] If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra*, at 493. Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system. See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 264 (1972); *Illinois Brick Co.* v. *Illinois, supra*, at 741–742. In addition, while "[d]ifficulty of ascertainment [should not be] confused with right of recovery," *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265 (1946), § 4 plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm. See *Hawaii* v. *Standard Oil Co., supra*, at 262–263, n. 14. But like the policy against duplicative recoveries, our cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the

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Analytically distinct from the restrictions on the § 4 remedy recognized in *Hawaii* and *Illinois Brick*, there is the conceptually more difficult question "of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4." *Illinois Brick Co.* v. *Illinois*, 431 U. S., at 728, n. 7 (emphasis added).[12] An antitrust violation may be expected to cause ripples of

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Court of Appeals observed, they could be "ascertained to the penny." 649 F. 2d, at 231.

[12] We addressed two issues of "remoteness" in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642 (1969). That case involved an alleged violation of § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13. Focusing on the substantive terms of § 2, we found no warrant in its "language or purpose" to engraft an "artificial" limitation on the reach of the remedy to bar what the court below had termed a "fourth level" injury. 395 U. S., at 648. We also rejected the claim that one form of damages claimed by the defendant was not the proximate result of the alleged violation. *Id.*, at 649.

The Courts of Appeals have developed a more substantial jurisprudence on the subject of "remoteness," formulating various "tests" as aids in analysis. Among the tests employed by the lower courts are those that focus on the "directness" of the injury, *e. g.*, *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (CA2 1955); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (CA6 1962); on its foreseeability, *e. g.*, *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 199 (CA9 1973); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 220 (CA9 1964); or on whether the injury is "arguably . . . within the zone of interests protected by the [antitrust laws]," *e. g.*, *Malamud* v. *Sinclair Oil Corp.*, 521 F. 2d 1142, 1152 (CA6 1975). See also n. 14, *infra* ("target area" test). The Third Circuit has concluded that "§ 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems." *Bravman* v. *Basset Furniture Industries, Inc.*, 552 F. 2d 90, 99 (1977). The Third Circuit has thus rejected the definitional approach, opting instead for an analysis of the "factual matrix" presented by each case. *Ibid.* We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury.

harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *Id.*, at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Of course, neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause."[13] See *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 649 (1969); *Karseal Corp.* v. *Richfield Oil Corp.*, 221

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[13] The traditional principle of proximate cause suggests the use of words such as "remote," "tenuous," "fortuitous," "incidental," or "consequential" to describe those injuries that will find no remedy at law. See, *e. g.*, *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414, 419 (CA4 1966). And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool. See, *e. g.*, *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *id.*, at 351–352, 162 N. E., at 103 (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). It bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration. Cf. *Mer-*

F. 2d 358, 363 (CA9 1955). In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

(1)

It is petitioners' position that McCready's injury is too "fortuitous" and too "incidental" to and "remote" from the alleged violation to provide the basis for a § 4 action.[14] At the outset, petitioners argue that because the alleged conspiracy was directed by its protagonists at psychologists, and not at subscribers to group health plans, only psychologists might maintain suit. This argument may be quickly disposed of.

We do not think that because the goal of the conspirators was to halt encroachment by psychologists into a market that

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rill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U. S. 353, 377–378 (1982); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979).

[14] In so arguing, petitioners advert to the "target area" test of antitrust standing that prevails in the Courts of Appeals for the First, Second, and Fifth Circuits. See, *e. g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F. 2d 539, 546 (CA5 1980); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F. 2d 1, 18–19 (CA1 1979); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292 (CA2 1971). Petitioners place special reliance on the following frequently cited formulation of the "target area" principle:

"[I]n order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than being 'targets' themselves." *Id.*, at 1295.

physicians and psychiatrists sought to preserve for themselves, McCready's injury is rendered "remote." The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.[15] McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S., at 489, quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 125 (1969).

Petitioners next argue that even if the § 4 remedy might be available to persons other than the competitors of the conspirators, it is not available to McCready because she was not an economic actor in the market that had been restrained. In petitioners' view, the proximate range of the violation is limited to the sector of the economy in which a violation of the type alleged would have its most direct anticompetitive effects. Here, petitioners contend that that market, for purposes of the alleged conspiracy, is the market in group health care plans. Thus, in petitioners' view, standing to redress

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[15] Nor does the "target area" test applied by the Courts of Appeals "'imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages.'" See *Schwimmer* v. *Sony Corp. of America*, 637 F. 2d 41, 47–48 (CA2 1980), quoting *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d, at 220.

the violation alleged in this case is limited to participants in that market—that is, to entities, such as McCready's employer, who were purchasers of group health plans, but not to McCready as a beneficiary of the Blue Shield plan.[16]

Petitioners misconstrue McCready's complaint. McCready does not allege a restraint in the market for group health plans. Her claim of injury is premised on a concerted refusal to reimburse under a plan that was, in fact, purchased and retained by her employer for her benefit, and that as a matter of contract construction and state law permitted reimbursement for the services of psychologists without any significant variation in the structure of the contractual relationship between her employer and Blue Shield.[17] See n. 2, *supra*. As a consumer of psychotherapy ervices entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was "within that area of the economy . . . endangered by [that] breakdown of competitive conditions"

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[16] Petitioners borrow selectively from *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), in arguing that McCready's § 4 claim is "unrelated to any reduction in competition caused by the alleged boycott," because the injury she alleges "is the result of the terms of her insurance contract, and not the result of a reduction in competition." Brief for Petitioners 16. Extracting additional language from *Brunswick*, they argue that "McCready would have suffered the identical 'loss'—but no compensable 'injury' as long as her employer, which acted independently in an unrestrained market, continued to purchase a group insurance contract that did not cover the services of clinical psychologists." Brief for Petitioners 16–17 (footnote omitted).

[17] Nor do we think that her employer's decision to retain Blue Shield coverage despite its continued failure to reimburse for the services of a psychologist—or indeed, her employer's unexercised option to terminate that relationship—is an intervening cause of McCready's injury. Although her employer's decision to purchase the Blue Shield plan for her benefit was in some sense a factor that contributed independently to McCready's injury, her coverage under the Blue Shield plan may, at this stage of the litigation, properly be accepted as a given, and the proper focus in evaluating her entitlement to raise a § 4 damages claim is on Blue Shield's change in the terms of the plan to link reimbursement to a subscriber's choice of one group of psychotherapists over another.

resulting from Blue Shield's selective refusal to reimburse. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 129 (CA9 1973).

(2)

We turn finally to the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust defendants' course of conduct. Petitioners phrase their argument on this point in a manner that concedes McCready's participation in the market for psychotherapy services and rests instead on the notion that McCready's injury does not reflect the "anticompetitive" effect of the alleged boycott. They stress that McCready did not visit a psychiatrist whose fees were artificially inflated as a result of the competitive advantage he gained by Blue Shield's refusal to reimburse for the services of psychologists; she did not pay additional sums for the services of a physician to supervise and bill for the psychotherapy provided by her psychologist; and that there is no "claim that her psychologists' bills are higher than they would have been had the conspiracy not existed."[18] In promoting this argument, petitioners rely heavily on language in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*.

In *Brunswick*, respondents were three bowling centers who complained that petitioner's acquisition of several financially troubled bowling centers violated § 7 of the Clayton Act by lessening competition or tending to create a monopoly. In seeking damages, "respondents attempted to show that had petitioner allowed the [acquired] centers to close, respondents' profits would have increased." *Id.*, at 481. The Court of Appeals endorsed the legal theory upon which respondents' claim was based, *id.*, at 483, holding that "any loss 'causally linked' to 'the mere presence of the violator in the market'" was compensable under § 4, *id.*, at 487. We reversed, holding that the injury alleged by respondents was not of "'the type that the statute was intended to forestall.'"

[18] 649 F. 2d, at 236 (Widener, J., dissenting).

Id., at 487–488, quoting *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202 (1967). Indeed, the Court noted that respondents sought in damages "the profits they would have realized had competition been *reduced*." 429 U. S., at 488 (emphasis added).

We can agree with petitioners' view of *Brunswick* as embracing the general principle that treble-damages recoveries should be linked to the procompetition policy of the antitrust laws. But petitioners seek to take *Brunswick* one significant step farther. In a passage upon which petitioners place much reliance, we stated:

> "[F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S., at 125." *Id.*, at 489 (emphasis in original; footnote omitted).

Relying on this language, petitioners reason that McCready can maintain no action under § 4 because her injury "did not reflect the anticompetitive effect" of the alleged violation.

Brunswick is not so limiting. Indeed, as we made clear in a footnote to the relied-upon passage, a § 4 plaintiff need not "prove an actual lessening of competition in order to recover. [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Id.*, at 489, n. 14. Thus while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 po-

tentially offers redress, see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330 (1979), that is not the only form of injury remediable under § 4. We think it plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

McCready charges Blue Shield with a purposefully *anticompetitive scheme*. She seeks to recover as damages the sums lost to her as the consequence of Blue Shield's attempt to pursue that scheme.[19] She alleges that Blue Shield sought to induce its subscribers into selecting psychiatrists over psychologists for the psychotherapeutic services they required,[20] and that the heart of its scheme was the offer of a Hobson's choice to its subscribers. Those subscribers were compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice. In the latter case, the antitrust injury would have been borne in the first instance by the competitors of the conspirators, and inevitably—though indirectly—by the customers of the competitors in the form of suppressed competition in the psychotherapy market; in the former case, as it happened, the injury was borne directly by the customers of the competitors. McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. Although

[19] *Brunswick* held that a claim of injury arising from the preservation or enhancement of competition is a claim "inimical to the purposes of [the antitrust] laws," 429 U. S., at 488 Most obviously, McCready's claim is quite unlike the claim asserted by the plaintiff in *Brunswick* for she does not seek to label increased competition as a harm to her. Nevertheless, we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4.

[20] Or at the least, Blue Shield sought to compel McCready to employ the services of a physician in addition to those of a psychologist.

McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury "flows from that which makes defendants' acts unlawful" within the meaning of *Brunswick*, and falls squarely within the area of congressional concern.[21]

III

Section 4 of the Clayton Act provides a remedy to "[a]ny person" injured "by reason of" anything prohibited in the

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[21] JUSTICE REHNQUIST, dissenting, is of course correct in asserting that the "injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall," *post*, at 486. But JUSTICE REHNQUIST's dissent takes an unrealistically narrow view of those injuries with which the antitrust laws might be concerned, and offers not the slightest hint—beyond sheer *ipse dixit*—to help in determining what kinds of injury are not amenable to § 4 redress. For example, the dissent acknowledges that "a distributor who refused to go along with the retailers' conspiracy [to injure a disfavored retailer] and thereby lost the conspiring retailers' business would . . . have an action against those retailers," *post*, at 490. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal. If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

McCready and the banker and the distributor are in many respects similarly situated. McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan. Because McCready is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, McCready's participation in the market for psychotherapeutic services provides precisely that significance.

antitrust laws. We are asked in this case to infer a limitation on the rule of recovery suggested by the plain language of § 4. But having reviewed our precedents and, more importantly, the policies of the antitrust laws, we are unable to identify any persuasive rationale upon which McCready might be denied redress under § 4 for the injury she claims. The judgment of the Court of Appeals is

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Respondent's alleged "antitrust injury" in this case arises from a health insurance coverage dispute with her insurer, petitioner Blue Shield of Virginia. Respondent's complaint is that Blue Shield reimburses its subscribers for treatment by psychiatrists, but not by psychologists unless their services are supervised and billed by treating physicians. Respondent was treated by a clinical psychologist, but when she submitted claims to Blue Shield, she was denied reimbursement.

Respondent alleged in her complaint that Blue Shield's refusal to reimburse her for the costs she incurred in obtaining the services of a psychologist furthered a conspiracy by petitioners "to exclude and boycott clinical psychologists from receiving compensation under" Blue Shield's plan. App. 55. Blue Shield's refusal-to-reimburse policy is alleged to constitute a form of economic pressure on McCready and other Blue Shield subscribers to obtain the services of psychiatrists rather than psychologists. By employing this economic pressure on Blue Shield subscribers, petitioners are alleged to have placed clinical psychologists at a competitive disadvantage with regard to psychiatrists in the market for insurance-reimbursed psychological services.

The Court concludes that McCready's inability to obtain reimbursement for the psychological services she actually obtained permits her to maintain an action to enforce the anti-

trust laws pursuant to § 4 of the Clayton Act. According to the Court, one who suffers economic loss as a necessary step in effecting the end of a conspiracy has "standing" to sue pursuant to § 4. *Ante*, at 479, 483–484. I disagree.

Section 4 of the Clayton Act authorizes suits for treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15. It is not enough, however, for a plaintiff merely to allege that the defendant violated the antitrust laws and that he was injured. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 486–489 (1977). See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 263, n. 14 (1972). The injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, at 487–488.

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" 429 U. S., at 489 (citation omitted).

Although McCready alleges that she would have been reimbursed had it not been for the conspiracy, I do not think that she has made a sufficient allegation of "antitrust injury" within the meaning of *Brunswick*.

Standing alone, a refusal by an insurer to reimburse its insured does not constitute a violation of the Sherman Act. At most, such an action on the part of an insurer may amount to a breach of a contract or a violation of relevant state law regulating the insurance industry.[1] According to the Court,

[1] In addition to the antitrust claim, McCready's complaint asserts a claim for breach of contract under the principles of pendent jurisdiction.

however, what distinguishes this case from the typical insurance coverage dispute is either the *purpose* behind or the *effect* of Blue Shield's refusal to reimburse. If Blue Shield violated the antitrust laws by its nonreimbursement policy, it was only because that policy was used as a *means* of putting psychologists at a competitive disadvantage in relation to psychiatrists.

Two conceivable grounds therefore may be divined from the Court's opinion to support its conclusion that McCready has suffered "antitrust injury" when Blue Shield refused to reimburse her costs in obtaining the services of a psychologist. The first theory is that McCready may recover simply because petitioners' nonreimbursement policy was *intended* to put clinical psychologists at a competitive disadvantage. According to the Court, this must be so even if Blue Shield's refusal to reimburse her would be entirely legal under the antitrust laws in the absence of such a purpose to competitively injure third parties. Blue Shield's intent or purpose renders the discriminatory reimbursement policy illegal. Under this theory, it would seem to be irrelevant for the Court's purposes whether McCready obtained the services of a psychologist or a psychiatrist so long as the illegal intent is present and she suffered economic loss as a result.[2]

The second conceivable rationale is a flat rule that recovery is permitted by those persons who suffer economic loss as a necessary step in effecting a conspiracy to place third par-

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App. 57–58. She also alleges that Blue Shield's policy contravened state law. *Id.*, at 55–56.

[2] The Court explains that those subscribers, such as McCready, who did not yield to Blue Shield's coercive pressures suffer from Blue Shield's sanctions by way of increased costs in obtaining the services of a psychologist. Those subscribers who did yield to Blue Shield's pressure suffer antitrust injury indirectly because of suppressed competition in the psychotherapy market. *Ante*, at 483–484. I do not understand the Court to conclude that *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), would not bar recovery by a subscriber, as opposed to a psychologist, in the latter situation.

ties at a competitive disadvantage.[3] Under this theory, McCready may recover merely by demonstrating that she was a "tool" of petitioners' effort to disable psychologists from competing with psychiatrists in the market for insurance-reimbursed psychological services. She may recover because she did not yield to the economic pressure imposed on her.[4] The theory is that McCready may recover because her loss is linked to petitioners' efforts to enforce a "boycott" of third parties.

I believe that such reasoning is foreclosed by the Court's decision in *Brunswick*. In order to recover, a plaintiff must demonstrate that the nature of the injury *he suffered* is of the type that makes the challenged practice illegal. In *Brunswick*, the merger may well have violated § 7 of the Clayton Act in the abstract or even as to competitors not before the Court. Yet, we held that the plaintiffs in *Brunswick* could not recover because they did not suffer from the *anticompetitive* effects of the merger. We rejected the contention that it was sufficient to show merely that the defendant's merger violated § 7 and that there existed a causal link between that merger and an economic loss. 429 U. S., at 486–489. In-

[3] The Court suggests a third theory—that McCready has standing herself as a target of a concerted refusal to deal. See *ante*, at 484, n. 21; *infra*, at 490–491.

[4] In order to recover under this theory, it would seem that respondent must prove at trial that she actually refused to yield to the economic pressure created by Blue Shield's reimbursement policy. If she decided to obtain the services of a psychologist rather than a psychiatrist without knowing of Blue Shield's policy, it cannot be said that her "injury" was proximately related to petitioners' alleged anticompetitive conduct. If she discovered the policy only after she sought reimbursement, then it cannot be said that Blue Shield's policy had any effect on McCready's conduct as a consumer in the market for psychotherapeutic services. This, of course, is not to say that a person in all circumstances must have knowledge of a defendant's anticompetitive activities before one may challenge that activity. One may not be a victim of economic pressure, however, if one acted obliviously to that pressure.

stead, the required showing is that the type of harm suffered by the plaintiff is that which makes the challenged practice illegal. *Id.*, at 489.

Therefore, McCready may not recover merely by showing that she has suffered an economic loss resulting from a practice the legality of which depends upon its effect on a third party. McCready must show that the challenged practice is illegal with regard to its effect upon her. But petitioners' policy is alleged to be illegal not by virtue of its effect upon Blue Shield's subscribers but because of its effect upon psychologists. McCready alleges no anticompetitive effect upon herself. She does not allege that the conspiracy has affected the *availability* of the psychological services she sought and actually obtained. Nor does she allege that the conspiracy affected the *price* of the treatment she received.[5] She does not allege that her injury was caused by any reduction in competition between psychologists and psychiatrists, nor that it was the result of any *success*[6] Blue Shield achieved in its "boycott" of psychologists. She seeks recovery solely on the basis that Blue Shield's reimbursement policy *failed* to alter her conduct in a fashion necessary to foreclose psychologists from obtaining the patronage of Blue Shield's subscribers.

If the important consideration is whether the challenged practice is illegal with regard to its effect on the plaintiff, then it would be irrelevant for the plaintiff's purposes that the conspiracy might also adversely affect competition on another level of the market. For example, a group of retailers

[5] By excluding psychologists from the market, psychiatrists may well be able to increase their charges for psychotherapeutic services, which in turn, may raise the insurance rates charged by Blue Shield. McCready, however, alleges no such injury to herself on this theory.

[6] Because McCready obtained the services of a psychologist, it cannot be said that the psychologists were injured by the economic pressure Blue Shield placed on McCready and the class of subscribers she represents. See *ante*, at 475.

may threaten to refuse to do business with those distributors that continue to do business with a disfavored retailer. If the distributors agreed to cooperate with the conspiring retailers, then the disfavored retailer would have an action against the agreeing distributors and the conspiring retailers. See, *e. g.*, *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). I would think that a distributor who refused to go along with the retailers' conspiracy and thereby lost the conspiring retailers' business would also have an action against those retailers. Such an action would be based upon the conspirators' concerted refusal to deal with the distributor which *itself* would be unlawful under the antitrust laws. Such an action, unlike the instant case, would not depend upon the anticompetitive effect of the challenged practice upon a third party. The distributor would have an action not on the ground that he was caught in the middle of an attempted boycott of participants on another level of the market, but because *he* was boycotted. The boycott of the distributor puts him at a competitive disadvantage to those distributors who are unaffected by the retailers' conspiracy and to those distributors who agree to participate.[7]

McCready, however, does not allege that petitioners engaged in a concerted refusal to deal with *her*. As the Court is aware, *ante*, at 468–470, McCready has alleged that petitioners

[7] As pointed out by the Court, a concerted refusal to deal may take many forms. *Ante*, at 484, n. 21. I would agree that the bank could sue in the Court's hypothetical because, as conceded by the Court, the bank's ability to compete with other banks would be adversely affected. By contrast, my disagreement with the Court is that it permits McCready to sue solely because of an injury to a level of the market in which she does not participate. Moreover, McCready does not allege that petitioners' conspiracy adversely affected competition between psychologists and psychiatrists in such a manner as to adversely affect the price or supply of psychotherapeutic services available to her as a consumer. Thus, McCready's case is clearly distinguishable from that of the bank's in the Court's hypothetical.

violated the antitrust laws by conspiring to exclude clinical psychologists from the coverage of Blue Shield plans, and that this conspiracy foreseeably injured her. The Court apparently concludes, however, that McCready has also sufficiently alleged that petitioners have engaged in a concerted refusal to deal with *her*, and that this is the gravamen of her antitrust complaint: "McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan." *Ante*, at 484, n. 21. It may be that the Court today is merely holding that a boycottee has "standing" to sue under § 4. Were this the issue presented by this case, I have little doubt that the Court merely would have denied certiorari.

But McCready simply does not, and could not, claim standing as the target of a concerted refusal to deal. Neither Blue Shield nor the psychiatrists threatened to cease doing business with McCready if she obtained the services of a psychologist rather than a psychiatrist. McCready alleges only that under the Blue Shield policy she could not obtain reimbursement for services rendered by psychologists. If such a claim is sufficient to make out a concerted refusal to deal, then any consumer who could not obtain a product or service on the precise terms he desires could claim to be the victim of a "boycott." Most importantly, McCready alleges that Blue Shield's policy violates the antitrust laws only by virtue of its anticompetitive effect on *psychologists*. She does not allege that Blue Shield's policy is illegal in any way because of its effect on *subscribers*.

The Court, however, dismisses such concerns by stating in conclusory terms that "the injury [McCready] suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Ante*, at 484. I trust that the Court is not holding that a plaintiff may escape dismissal of the complaint merely by alleging that he suffered an economic loss "inextricably

intertwined" with an injury the defendants intended, but failed, to inflict upon a third party.[8] Although the Court may view itself as successfully deciding this case on its peculiar facts, it has wholly failed to provide any sort of reasoned basis for its decision. Especially in the area of antitrust law, labels do not suffice when analysis is necessary.

I would reverse the judgment of the Court of Appeals because McCready has not alleged that she has suffered antitrust injury, but at best injury attributable to a breach of contract on the part of Blue Shield.

JUSTICE STEVENS, dissenting.

Respondent is a consumer of psychotherapeutic services. The question is whether she has been injured in her "business or property by reason of anything forbidden in the antitrust laws."[1] The alleged antitrust violation is an agreement between petitioners Neuropsychiatric Society of Virginia and Blue Shield that Blue Shield would refuse to reimburse subscribers for payments made to clinical psychologists for charges that were not billed through a physician. The objective of the alleged conspiracy was to induce subscribers to patronize psychiatrists instead of psychologists.

For purposes of decision, I assume that the alleged agreement is unlawful. In analyzing the sufficiency of respondent's damage claim, it is helpful first to consider the situation

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[8] If McCready's injury were truly "inextricably intertwined" with any injury actually suffered by the psychologists, the risk of duplicative recovery and the practical problems inherent in distinguishing the loss suffered by her from the loss suffered by the psychologists may mean that either subscribers or psychologists, but not both, may recover. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977).

[1] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

in which the conspiracy would have its maximum impact on the relevant market. Given their objective, petitioners' conspiracy would be most effective if they made it perfectly clear to subscribers that they would not be reimbursed if they consulted psychologists instead of psychiatrists. For without this information, a subscriber's choice between a psychologist and a psychiatrist would not be affected by the conspiracy. Thus, I first assume that the Blue Shield insurance policy did not cover services performed by psychologists and that subscribers as a class were fully aware of this exclusion.

On this assumption, a Blue Shield subscriber who is a potential consumer in the relevant market has at least three options. He may: (1) forgo treatment entirely; (2) go to a psychiatrist; or (3) go to a psychologist.[2] If he exercises his first option, his illness may worsen but he will not have suffered any economic injury cognizable under the antitrust laws.[3] If he exercises his second option, his property will not be diminished because Blue Shield will reimburse him for his payment to the psychiatrist. If he exercises his third option, his property will be diminished to the extent of his unreimbursed payment to the psychologist, but he will have received in exchange psychotherapeutic services that pre-

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[2] In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, we held that antitrust injury was limited to "'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.*, at 489 (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 125). I would expect that the alleged violation in this case would be most likely to cause knowledgeable members of the class of potential consumers of psychotherapeutic services to exercise either the first or the second option. It is fair to assume that the third situation—the one in which respondent finds herself—would be "unlikely" to result.

[3] The subscriber may have to undergo more extensive treatment later if he forgoes treatment now and his illness worsens. Any consequential economic injury, however, would no more constitute antitrust injury than the economic injury suffered by a consumer who decides to forgo a purchase on the ground that the price of the goods or services was fixed at an artificially high level.

sumably were worth the payment.[4] The fact that he voluntarily elected to spend money for services not covered by his insurance policy would have no greater legal significance than a similar voluntary decision by a person who was not a Blue Shield subscriber.[5] It thus seems clear to me that whatever option the fully informed subscriber exercises, he would suffer no injury to his property by reason of the restriction of insurance coverage to psychotherapeutic services performed by psychiatrists.

This conclusion is reinforced by the fact that Blue Shield subscribers have the additional option of going to a psychologist while retaining their rights to reimbursement under the policy. According to respondent's complaint, Blue Shield did not refuse to reimburse all payments made by subscribers to psychologists, but only those payments not billed through a physician. Even if a fully informed subscriber's preference for psychologists over psychiatrists were protected by the antitrust laws, that preference was not denied by the antitrust violation alleged in this case.[6] The Hobson's choice de-

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[4] If treatment by a psychiatrist and treatment by a psychologist were fungible, then a subscriber who exercised this third option effectively would be paying twice for the psychotherapeutic service, once to the insurer in premiums and once to the psychologist in an unreimbursable payment. But the subscriber's exercise of this option presumably indicates that treatment by a psychologist is more valuable to him than treatment by a psychiatrist. If that be true, the subscriber is in the same situation as any policyholder who desires a service for which he has not purchased insurance.

[5] If the subscriber would purchase a service that was covered by the Blue Shield policy, such as a surgical operation, then he would be reimbursed by Blue Shield for that payment. If respondent's antitrust claim is that petitioners have engaged in an unlawful boycott, it therefore is manifest that respondent is not the boycottee. For petitioners have not refused to deal with respondent—they offer her the same coverage as any other subscriber or potential subscriber.

[6] Presumably, the charge (if any) of the referring physician would be reimbursable under the policy. In any event, the complaint does not claim damages based on any such unreimbursed charge.

scribed by the Court, *ante*, at 483, simply does not fit this case.

The availability of this fourth option would seem to indicate that respondent, in fact, was not fully aware of the scope of her policy's coverage. If her lack of understanding was caused by fraud or deception, she should be able to recover in a common-law action. If the misunderstanding was her own fault, that circumstance should not provide a basis for an antitrust recovery that would not be available if she had been fully informed.

Nor is the deficiency in respondent's complaint cured if the assumption about the insurance coverage is reversed. Although her antitrust claim would be more credible if Blue Shield excluded coverage of services performed by psychologists, respondent alleged in the second count of her complaint that the insurance policy, properly construed under applicable principles of Virginia law, provided coverage for services performed by psychologists, but that Blue Shield nevertheless refused to reimburse her for the payments she made to her psychologist. If a subscriber does not suffer antitrust injury when the insurance policy excludes coverage of services performed by psychologists, it would be anomalous to conclude that the availability of a breach-of-contract claim would in any way enhance his standing. The right to recover under the federal antitrust laws cannot be derived from a right to recover under state law.

Because respondent's complaint discloses no basis for concluding that she has suffered an injury to her property by reason of the alleged antitrust violation, I respectfully dissent.

PATSY *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1874. Argued March 2, 1982—Decided June 21, 1982

Petitioner filed an action in Federal District Court under 42 U. S. C. § 1983 for declaratory or injunctive relief or damages, alleging that respondent employer had denied her employment opportunities solely on the basis of her race and sex. The District Court granted respondent's motion to dismiss because petitioner had not exhausted available state administrative remedies. The Court of Appeals vacated, holding that a § 1983 plaintiff could be required to exhaust administrative remedies if certain specified conditions were met, and remanded the case to the District Court to determine whether exhaustion would be appropriate in the instant case.

Held: Exhaustion of state administrative remedies is not a prerequisite to an action under § 1983. Pp. 500–516.

(a) This conclusion is supported by the legislative histories of both § 1983 and 42 U. S. C. § 1997e (1976 ed., Supp. IV), which carves out a narrow exception to the general no-exhaustion rule established in this Court's prior decisions by creating a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. A judicially imposed exhaustion requirement in cases other than adult prisoners' cases would be inconsistent with Congress' decision to adopt § 1997e, would usurp policy judgments that Congress has reserved for itself, and would also be inconsistent with the detailed exhaustion scheme embodied in § 1997e. Pp. 502–512.

(b) Even if, as respondent argues, an exhaustion requirement would lessen the burden that § 1983 actions impose on federal courts, would further the goal of comity and improve federal-state relations, and would enable the state agency to enlighten the federal court's ultimate decision, these are policy considerations that alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. Moreover, difficult questions concerning the design and scope of an exhaustion requirement, which might be answered swiftly and surely by legislation, would create costly, remedy-delaying and court-burdening litigation if answered by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies. Pp. 512–515.

634 F. 2d 900, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in all but Part III–B of which WHITE, J., joined. O'CONNOR, J., filed a concurring opinion, in which REHNQUIST, J., joined, *post*, p. 516. WHITE, J., filed an opinion concurring in part, *post*, p. 517. POWELL, J., filed a dissenting opinion, in Part II of which BURGER, C. J., joined, *post*, p. 519.

Charles S. Sims argued the cause for petitioner. With him on the briefs were *Bruce J. Ennis, Jr.*, *E. Richard Larson*, *Steven R. Shapiro*, and *Joel M. Gora*.

Mitchell D. Franks argued the cause for respondent. With him on the brief was *Jeffrey H. Klink*.*

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*Briefs of *amici curiae* urging reversal were filed by *Jack Greenberg*, *James M. Nabrit III*, *Bill Lann Lee*, and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Ellen Josephson* and *Steven H. Steinglass* for the National Legal Aid and Defender Association.

Briefs of *amici curiae* urging affirmance were filed by *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* for Americans for Effective Law Enforcement, Inc.; and by *John C. Ross, Jr.*, for the Texas Municipal League et al.

Briefs of *amici curiae* were filed for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Malachy R. Murphy*, Deputy Attorney General, and *Thomas R. Bjorgen*, Assistant Attorney General, and the Attorneys General for their respective States or jurisdictions as follows: *Aviata F. Faalevad* of American Samoa, *Charles A. Graddick* of Alabama, *Wilson L. Condon* of Alaska, *Robert Corbin* of Arizona, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *David H. Leroy* of Idaho, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Warren R. Spannaus* of Minnesota, *William A. Allain* of Mississippi, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Richard H. Bryan* of Nevada, *Gregory H. Smith* of New Hampshire, *James R. Zazzali* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *William J. Brown* of Ohio, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Mark White* of Texas, *David L. Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Chauncey H. Browning, Jr.*, of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven F. Freudenthal* of Wyoming; and for the National Education Association et al. by *Michael H. Gottesman*, *Robert M. Weinberg*, *Jeremiah A. Collins*, *Richard C. Dinkelspiel*, *William L. Robinson*, and *Norman J. Chachkin*.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U. S. C. § 1983 (1976 ed., Supp. IV). Petitioner Georgia Patsy filed this action, alleging that her employer, Florida International University (FIU), had denied her employment opportunities solely on the basis of her race and sex. By a divided vote, the United States Court of Appeals for the Fifth Circuit found that petitioner was required to exhaust "adequate and appropriate" administrative remedies, and remanded the case to the District Court to consider the adequacy of the administrative procedures. *Patsy* v. *Florida International University*, 634 F. 2d 900 (1981) (en banc). We granted certiorari, 454 U. S. 813, and reverse the decision of the Court of Appeals.

I

Petitioner alleges that even though she is well qualified and has received uniformly excellent performance evaluations from her supervisors, she has been rejected for more than 13 positions at FIU.[1] She further claims that FIU has unlawfully filled positions through intentional discrimination on the basis of race and sex. She seeks declaratory and injunctive relief or, in the alternative, damages.[2]

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[1] Because this case is here on a motion to dismiss, we accept as true the factual allegations in petitioner's amended complaint. In her initial complaint, petitioner named FIU as the defendant. Relying on *Byron* v. *University of Florida*, 403 F. Supp. 49 (ND Fla. 1975), the District Court granted FIU's motion to dismiss, holding that the Board of Regents and not the individual university had the capacity to sue and be sued under Florida law. The District Court granted petitioner leave to amend, and she amended her complaint to name the Board of Regents "on behalf of" FIU.

[2] Petitioner requested the District Court to "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position consistent with those previously applied for and for

The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy* v. *Florida International University*, 612 F. 2d 946 (1980). The full court then granted respondent's petition for rehearing and vacated the panel decision.

The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required, and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is available within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required. *Id.*, at 912–913. The Court of Appeals remanded the case to the

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which she is qualified or in the alternative, to require the Defendants to pay to the Plaintiff the sum of $500,000 as actual and exemplary damages." Record 47. Petitioner also requested that the District Court "order further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions of discrimination complained of herein." *Id.*, at 48.

District Court to determine whether exhaustion would be appropriate in this case.

II

The question whether exhaustion of administrative remedies should ever be required in a § 1983 action has prompted vigorous debate and disagreement. See, *e. g.*, Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Comment, 41 U. Chi. L. Rev. 537 (1974). Our resolution of this issue, however, is made much easier because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions.

Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not "fully" consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese* v. *Board of Education*, 373 U. S. 668, 671–673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry* v. *Barchi*, 443 U. S. 55, 63, n. 10 (1979); *Gibson* v. *Berryhill*, 411 U. S. 564, 574 (1973); *Carter* v. *Stanton*, 405 U. S. 669, 671 (1972); *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971); *Houghton* v. *Shafer*, 392 U. S. 639, 640 (1968); *King* v. *Smith*, 392 U. S. 309, 312, n. 4 (1968); *Damico* v. *California*, 389 U. S. 416 (1967). Cf. *Steffel* v. *Thompson*, 415 U. S. 452, 472–473 (1974) ("When federal claims are premised on [§ 1983]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated

categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression.

III

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals' exhaustion rule, which was based on *McKart* v. *United States*, 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978), we articulated four factors that should be considered. Two of these factors—whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent—are particularly relevant to our decision today.[3] Both concern legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court

[3] The other factors discussed in *Monell*—whether the decisions in question constituted a departure from prior decisions and whether overruling these decisions would frustrate legitimate reliance on their holdings—do not support overruling these decisions. *McNeese* was not a departure from prior decisions—this Court had not previously addressed the application of the exhaustion rule to § 1983 actions. Overruling these decisions might injure those § 1983 plaintiffs who had forgone or waived their state administrative remedies in reliance on these decisions.

should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.[4] Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area.

A

In determining whether our prior decisions misconstrued the meaning of § 1983, we begin with a review of the legislative history to § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983.[5] Although we recognize that the 1871 Congress did not expressly contemplate the exhaustion question, we believe that the tenor of the debates over § 1 supports our conclusion that exhaustion of administrative remedies in § 1983 actions should not be judicially imposed.

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[4] Congressional intent is important in determining the application of the exhaustion doctrine to cases in which federal administrative remedies are available, as well as to those in which state remedies are available. Of course, exhaustion is required where Congress provides that certain administrative remedies shall be exclusive. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress. See *McKart* v. *United States*, 395 U. S. 185, 193–195 (1969). With state administrative remedies, the focus is not so much on the role assigned to the state agency, but the role of the state agency becomes important once a court finds that deferring its exercise of jurisdiction is consistent with statutory intent.

[5] Some of the debates relating to § 2, which created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, aimed primarily at the Ku Klux Klan, are also relevant to our discussion of § 1.

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. As we recognized in *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U. S. 339, 346 (1880)), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"

At least three recurring themes in the debates over § 1 cast serious doubt on the suggestion that requiring exhaustion of state administrative remedies would be consistent with the intent of the 1871 Congress. First, in passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights. Representative Dawes expressed this view as follows:

> "The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution." Cong. Globe, 42d Cong., 1st Sess., 476 (1871) (hereinafter Globe).

See also *id.*, at 332 (remarks of Rep. Hoar); *id.*, at 375 (remarks of Rep. Lowe); *id.*, at 448–449 (remarks of Rep. Butler); *id.*, at 459 (remarks of Rep. Coburn).[6]

The 1871 Congress intended § 1 to "throw open the doors of the United States courts" to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, *id.*, at 376 (remarks of Rep. Lowe), and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary. For example, Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that the bill was similar in principle to an earlier act upheld by this Court in *Prigg* v. *Pennsylvania*, 16 Pet. 539 (1842):

> "[T]he Supreme Court decided . . . that it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress.*" Globe 692 (emphasis added).

Similarly, Representative Elliott viewed the issue as whether "the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domi-

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[6] Opponents of the bill also recognized this purpose and complained that the bill would usurp the States' power, centralize the government, and perhaps ultimately destroy the States. See, *e. g.*, Globe 337, 338 (remarks of Rep. Whitthorne); *id.*, at 352 (remarks of Rep. Beck); *id.*, at 361 (remarks of Rep. Swann); *id.*, at 365 (remarks of Rep. Arthur); *id.*, at 385 (remarks of Rep. Lewis); *id.*, at 429, 431 (remarks of Rep. McHenry); *id.*, at 454 (remarks of Rep. Cox); *id.*, at 510, 511 (remarks of Rep. Eldridge); Cong. Globe, 42d Cong., 1st Sess., App. 46 (1871) (remarks of Rep. Kerr) (hereinafter Globe App.); *id.*, at 216 (remarks of Sen. Thurman); *id.*, at 243 (remarks of Sen. Bayard).

ciled." *Id.*, at 389 (emphasis added). See, *e. g.*, *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 807 (remarks of Rep. Garfield); *id.*, at 609 (remarks of Sen. Pool); Globe App. 141 (remarks of Rep. Shanks).[7]

A second theme in the debates further suggests that the 1871 Congress would not have wanted to impose an exhaustion requirement. A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. See, *e. g.*, Globe 321 (remarks of Rep. Stoughton) ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminals"); *id.*, at 374 (remarks of Rep. Lowe) ("the local administrations have been found inadequate or unwilling to apply the proper corrective"); *id.*, at 459 (remarks of Rep. Coburn); *id.*, at 609 (remarks of Sen. Pool); *id.*, at 687 (remarks of Sen. Shurz); *id.*, at 691 (remarks of Sen. Edmunds); Globe App. 185 (remarks of Rep. Platt).[8]

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[7] Opponents criticized this provision on this very ground. For example, Representative Storm lamented:

"[Section one] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning." *Id.*, at 86.

See also Globe 416 (remarks of Rep. Biggs) ("for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding"); *id.*, at 337 (remarks of Rep. Whitthorne); *id.*, at 373 (remarks of Rep. Archer); Globe App. 216 (remarks of Sen. Thurman).

[8] This view was expressed in the Presidential message urging the passing of corrective legislation. See Globe 244 ("That the power to correct these evils is beyond the control of State authorities I do not doubt") (message of President Grant). The inability of state authorities to protect constitutional rights was also expressed in the findings of the House Judiciary Committee, which had been directed to investigate the situation. See

Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the factfinding processes of state institutions. See, *e. g.*, Globe 320 (testimony of Hon. Thomas Settle, Justice of the North Carolina Supreme Court, before the House Judiciary Committee) ("The defect lies not so much with the courts as with the juries"); *id.*, at 394 (remarks of Rep. Rainey); Globe App. 311 (remarks of Rep. Maynard). This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts. See, *e. g.*, Globe 322 (remarks of Rep. Stoughton); *id.*, at 459 (remarks of Rep. Coburn).[9] This perceived defect in the States' factfinding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior factfinding ability of the relevant administrative agency. See, *e. g.*, *McKart* v. *United States*, 395 U. S., at 192–196.

A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). For example, Senator Thurman noted:

> "I object to [§ 1], first, because of the centralizing tendency of transferring all mere private suits, as well as

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id., at 320. The resolution introduced by Senator Sherman instructing the Senate Judiciary Committee to report a bill expressed a similar view. See Globe App. 210 (state "courts are rendered utterly powerless by organized perjury to punish crime").

[9] Opponents viewed the bill as a declaration of mistrust for state tribunals. See, *e. g.*, Globe 361 (remarks of Rep. Swann); *id.*, at 397 (remarks of Rep. Rice); *id.*, at 454 (remarks of Rep. Cox); Globe App. 216 (remarks of Sen. Thurman). Representative McHenry found particularly offensive the removal of the factfinding function from the local institutions. See Globe 429.

> the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of." Globe App. 216.

See also Globe 578, 694–695 (remarks of Sen. Edmunds); *id.*, at 334 (remarks of Rep. Hoar); *id.*, at 514 (remarks of Rep. Farnworth); Globe App. 85 (remarks of Rep. Bingham) ("Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?").

This legislative history supports the conclusion that our prior decisions, holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983, did not misperceive the statutory intent: it seems fair to infer that the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under § 1 of the Civil Rights Act. We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here. Congress addressed the question of exhaustion under § 1983 when it recently enacted 42 U. S. C. § 1997e (1976 ed., Supp. IV). The legislative history of § 1997e provides strong evidence of congressional intent on this issue.

B

The Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), was enacted pri-

marily to ensure that the United States Attorney General has "legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons." H. R. Conf. Rep. No. 96–897, p. 9 (1980) (Conf. Rep.). In § 1997e, Congress also created a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983. Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law. Witnesses testifying before the Subcommittee that drafted the bill discussed the decisions of this Court holding that exhaustion was not required. See, *e. g.*, Hearings on H. R. 2439 and H. R. 5791 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., 20 (1977) (1977 Hearings); *id.*, at 47, 69, 77, 323; Hearings on H. R. 10 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st Sess., 48 (1979) (1979 Hearings). During these hearings, Representative Kastenmeier, Chairman of this Subcommittee, stated:

> "Another thing that I think requires some discussion within the committee, and is a point of argument, . . . is whether there ought to be an exhaustion of remedies requirement.
>
> ". . . In fact, I think it has been pointed out that if [we] were to require it, particularly in 1983, that would constitute regression from the current state of the law. It would set the law back, because presently it is clearly

> held, that is the Supreme Court has held, that in 1983 civil rights suits the litigant need not necessarily fully exhaust State remedies." 1977 Hearings 57–58.

See also *id.*, at 272 (remarks of Rep. Drinan) (Representative Railsback "grounds his bill on doing something which the Supreme Court has consistently refused to do, namely require exhaustion of remedies"); 1979 Hearings 26 (remarks of Rep. Kastenmeier) (adopting § 1997e "was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983").

The debates over adopting an exhaustion requirement also reflect this understanding. See, *e. g.*, 124 Cong. Rec. 11988 (1978) (remarks of Rep. Volkmer and Rep. Kastenmeier); *id.*, at 15445 (remarks of Rep. Ertel); *id.*, at 23180 (remarks of Rep. Wiggins) ("it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action"); 125 Cong. Rec. 12496 (1979) (remarks of Rep. Butler) ("Under existing law there is no requirement that a complainant first ask the State prison system to help him"). With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures. See, *e. g.*, Conf. Rep. 9; 124 Cong. Rec. 11976 (1978) (remarks of Rep. Kastenmeier); *id.*, at 11976, 11983 (remarks of Rep. Railsback); *id.*, at 15442 (remarks of Rep. Kastenmeier); *id.*, at 15445 (remarks of Rep. Ertel); *id.*, at 23176 (remarks of Rep. Kastenmeier); *id.*, at 23179–23180 (remarks of Rep. Butler); *id.*, at 23180 (remarks of Rep. Ertel). Implicit in this decision is Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits.

A judicially imposed exhaustion requirement would also be inconsistent with the extraordinarily detailed exhaustion

scheme embodied in § 1997e. Section 1997e carves out a narrow exception to the general no-exhaustion rule to govern certain prisoner claims, and establishes a procedure to ensure that the administrative remedies are adequate and effective. The exhaustion requirement is expressly limited to § 1983 actions brought by an adult convicted of a crime. 42 U. S. C. § 1997e(a)(1) (1976 ed., Supp. IV).[10] Section 1997e(b)(1) instructs the Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy, and effective system" of administrative remedies, and § 1997e(b)(2) specifies certain minimum standards that must be included.[11] A court may require exhaustion of administrative remedies only if "the Attorney General has certified or the court has determined that such administrative

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[10] Representative Kastenmeier explains why juveniles were not included in § 1997e:

"I think very candidly we should admit that the first reluctance to resort to this mechanism embodied in [§ 1997e] was resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions back into—temporarily in any event—back into the State system. Therefore, to the extent that it is even so viewed, notwithstanding the limited form of [§ 1997e], that it should also extend to juveniles was rejected." 1979 Hearings 26.

[11] Section 1997e(b)(2) states:

"The minimum standards shall provide—

"(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

"(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

"(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

"(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

"(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution."

remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." § 1997e(a)(2). Before exhaustion may be required, the court must further conclude that it "would be appropriate and in the interests of justice." § 1997e(a)(1).[12] Finally, in those § 1983 actions meeting all the statutory requirements for exhaustion, the district court may not dismiss the case, but may only "continue such case for a period of not to exceed ninety days in order to require exhaustion." *Ibid.* This detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases.

Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. See, *e. g.*, Conf. Rep. 9; H. R Rep. No. 96-80, p. 4 (1979); 1979 Hearings 4 (remarks of Rep. Railsback); 124 Cong. Rec. 11976 (1978) (remarks of Rep. Railsback); 125 Cong. Rec. 12492 (1979) (remarks of Rep. Drinan); 126 Cong. Rec. 10780 (1980) (remarks of Rep. Kastenmeier). To further this purpose, Congress provided for the deferral of the exercise of federal jurisdiction over certain § 1983 claims only on the condition that the state prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance

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[12] The Committee Reports state that Congress did not intend that every § 1983 action brought by an adult prisoner in institutions with appropriate grievance procedures be delayed pending exhaustion:

"It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to [§ 1983] raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system." Conf. Rep. 15.

See also H. R. Rep. No. 96-80, p. 25 (1979); S. Rep. No. 96-416, p. 34 (1979).

procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

In sum, the exhaustion provisions of the Act make sense, and are not superfluous, only if exhaustion could not be required before its enactment and if Congress intended to carve out a narrow exception to this no-exhaustion rule. The legislative history of § 1997e demonstrates that Congress has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983.

C

Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts;[13] would further the goal of comity and improve federal-state relations by postponing federal-court review until after the state administrative agency had passed on the issue;[14] and would enable the agency, which presumably has expertise in the area at issue to enlighten the federal court's ultimate decision.

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[13] Of course, this burden alone is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction. See *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 344 (1976); *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145, 150–151 (1965). In any event, it is by no means clear that judicial discretion to impose an exhaustion requirement in § 1983 actions would lessen the caseload of the federal courts, at least in the short run. See *infra*, at 513–514, and n. 18.

[14] The application of these federalism principles to actions brought pursuant to § 1983 has prompted criticism by several commentators. See, *e. g.*, Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25 Loyola L. Rev. 659 (1979); Note, 39 N. Y. U. L. Rev. 838 (1964).

As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent. See *supra*, at 501–502, and n. 4. Furthermore, as the debates over incorporating the exhaustion requirement in § 1997e demonstrate, the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them.[15] The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable. Cf. *Diamond* v. *Chakrabarty*, 447 U. S. 303, 317 (1980); *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145, 150, 153 (1965).

Beyond the policy issues that must be resolved in deciding *whether* to require exhaustion, there are equally difficult questions concerning the design and scope of an exhaustion requirement. These questions include how to define those categories of § 1983 claims in which exhaustion might be de-

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[15] For example, there is serious disagreement over whether judicial or administrative procedures offer § 1983 plaintiffs the swiftest, least costly, and most reliable remedy. See, *e. g.*, 1977 Hearings 263–264; *id.*, at 232–233; Note, 68 Colum. L. Rev. 1201, 1207 (1968). Similarly, there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise, and over whether the symbolic and institutional function of federal courts in defining, legitimizing, and enforcing constitutional claims outweighs the educational function that state and local agencies can serve. See, *e. g.*, Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 23 (1980); Note, 68 Colum. L. Rev., *supra*, at 1208. Finally, it is uncertain whether the present "free market" system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a *McKart*-type standard under which plaintiffs have no initial choice. See, *e. g.*, Note, 8 Ind. L. Rev. 565 (1975). Cf. 1977 Hearings 21, 34, 51; Hearings on S. 1393 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., 442 (1977).

sirable; how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted;[16] what tolling requirements and time limitations should be adopted;[17] what is the res judicata and collateral estoppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.[18]

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[16] Section 1997e resolved this problem by directing the Attorney General to promulgate minimum standards and to establish a procedure by which prison administrative remedies could be reviewed and certified. §§ 1997e(b) and (c). If a procedure has not been certified, the court is directed to compare the procedure with the Attorney General's standards and to continue the case pending exhaustion only if the procedure is in substantial compliance with the standards of the Attorney General. § 1997e(a)(2).

[17] Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, see *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980), a judicially imposed exhaustion requirement might result in the effective repeal of § 1983. Congress avoided this problem in § 1997e by directing the court to merely continue the case for a period not to exceed 90 days.

[18] The initial bill proposing to include an exhaustion requirement in § 1997e provided:

"Relief shall not be granted by a district court in an action brought pursuant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain,

The very variety of claims, claimants, and state agencies involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted § 1997, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondent and adopted by the Court of Appeals. See n. 18, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.[19]

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speedy, and efficient State administrative remedy as is available." H. R. 5791, 95th Cong., 1st Sess., § 4 (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, *e. g.*, 1977 Hearings 34–35, 51, 164–165, 169–170, 263–264, 323; 1979 Hearings 48–49.

[19] The question was posed from the bench at oral argument whether the Eleventh Amendment might bar this suit on the ground that the Board of Regents is an arm of the State for purposes of the Eleventh Amendment. Tr. of Oral Arg. 20. Cf. *Alabama* v. *Pugh*, 438 U. S. 781 (1978). Compare *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911), with *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981). The District Court dismissed this action on the pleadings, and no Eleventh Amendment issue had been raised. The Board of Regents first raised this issue in its brief to the original panel on appeal, but did not argue it in its brief on rehearing en banc. Neither the original panel nor the en banc court addressed this issue. Although the State mentioned a possible Eleventh Amendment defense in its response in opposition to the

IV

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring.

As discussed in JUSTICE POWELL's dissenting opinion, as well as in the opinion of the court below, considerations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. At the very least, prior state adminis-

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petition for certiorari, it did not brief the issue or press it at oral argument. Indeed, the Assistant State Attorney General urged that we affirm the Court of Appeals solely on its exhaustion holding. Tr. of Oral Arg. 24, 27.

We have noted that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised by the State for the first time on appeal. *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974). However, because of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion. *Cf. Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 279 (1977). Where, as here, the Board of Regents expressly requested that we address the exhaustion question and not pass on its potential Eleventh Amendment immunity, and, as a consequence, the parties have not briefed the issue, we deem it appropriate to address the issue that was raised and decided below and vigorously pressed in this Court. Nothing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. The District Court is in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the Eleventh Amendment issue, and at this stage it has the discretion to permit amendments to the pleadings that might cure any potential Eleventh Amendment problems.

trative proceedings would resolve many claims, thereby decreasing the number of § 1983 actions filed in the federal courts, which are now straining under excessive caseloads. However, for the reasons set forth in the Court's opinion, this Court already has ruled that, in the absence of additional congressional legislation, exhaustion of administrative remedies is not required in § 1983 actions. Perhaps Congress' enactment of the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed. and Supp. IV), which creates a limited exhaustion requirement for prisoners bringing § 1983 suits, will prompt it to reconsider the possibility of requiring exhaustion in the remainder of § 1983 cases. Reluctantly, I concur.

JUSTICE WHITE, concurring in part.

I fully agree with the Court that our frequent and unequivocal statements on exhaustion cannot be explained or distinguished away as the Fifth Circuit attempted to do. For nearly 20 years and on at least 10 occasions, this Court has clearly held that no exhaustion of administrative remedies is required in a § 1983 suit. *Ante*, at 500. Whether or not this initially was a wise choice, these decisions are *stare decisis*, and in a statutory case, a particularly strong showing is required that we have misread the relevant statute and its history. I have no difficulty in concluding that on the issue of exhaustion, unlike the question of municipal immunity faced in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court has not previously misapprehended the meaning of the 1871 debates in rejecting an exhaustion rule in *McNeese* v. *Board of Education*, 373 U. S. 668, 671–673 (1963), and adhering to that position ever since. Our precedents and the legislative history are sufficient to support reversal, and I accordingly join the judgment and all but Part III–B of the opinion of the Court.

In Part III–B, the Court unnecessarily and unwisely ventures further to find support where none may be had. The wisdom of a general no-exhaustion rule in § 1983 suits was

not at issue when Congress considered and passed the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). As JUSTICE POWELL persuasively points out in his dissenting opinion, and as reflected in the title of the Act, congressional attention was narrowly focused on procedures concerning the legal rights of prisoners and other institutionalized persons. Unsurprisingly, the legislation which emerged addressed only the specific problem under investigation; it indicates neither approval of a no-exhaustion rule nor an intent to preclude us from reconsidering the issue.

As the Court acknowledges, *ante*, at 513, the policy arguments cut in both directions. The Court concludes that "the very difficulty of these policy considerations, and Congress' superior institutional competence . . . suggest that legislative not judicial decisions are preferable." To be sure, exhaustion is a statutory issue and the dispositive word on the matter belongs to Congress. It does not follow, however, that, were the issue not foreclosed by earlier decisions, we would be institutionally incompetent to formulate an exhaustion rule. The lack of an exhaustion requirement in § 1983 actions is itself an exception to the general rule, judicially formulated, that exhaustion of administrative remedies is required in a civil action. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *McKart* v. *United States*, 395 U. S. 185 (1969). Unlike other statutory questions, exhaustion is "a rule of judicial administration," *Myers* v. *Bethlehem Shipping Corp.*, *supra*, at 50, and unless Congress directs otherwise, rightfully subject to crafting by judges. Our resolution of this case as governed by *stare decisis*, reinforced by the legislative history of § 1983, should not be taken as undercutting the general exhaustion principle of long standing. The result today is also fully consistent with our decisions that a defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court, *Huffman*

v. *Pursue, Ltd.*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Sims*, 442 U. S. 415 (1979), and that a federal action should be stayed pending determination of state-law issues central to the constitutional dispute. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). On this understanding, I join all but Part III–B of the opinion of the Court.*

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins as to Part II, dissenting.

The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional. I con-

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*In my view, this case does not present a serious Eleventh Amendment issue. The Florida statute authorizing suits against the Board of Regents, Fla. Stat. § 240.205 (1981), is clear on its face. I see no reason to read a broad waiver to sue and be sued in "all courts of law and equity" as meaning all but federal courts. Nor am I aware of anything in Florida law that suggests a more limited meaning was intended than indicated by the unequivocal terms of the statute. Certainly, none of our cases have gone so far as to hold that federal courts must be expressly mentioned for an effective Eleventh Amendment waiver.

The statutes at issue in cases recited by JUSTICE POWELL, *post*, at 522–523, n. 5, presented more equivocal embodiments of state intent. For example, in *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981) *(per curiam)*, the authorization to sue and be sued was limited to contract actions and, unlike the instant provision, did not extend to "all courts of law and equity." The same is true of the interstate compact involved in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959). The decision in *Kennecott Copper Corp.* v. *Tax Comm'n*, 327 U. S. 573 (1946), which involved a statute providing for suit in "any court of competent jurisdiction," turned on the incongruity of federal courts' interpreting state tax laws and the fact that "Utah employs explicit language to indicate, in other litigation, its consent to suits in federal courts." *Id.*, at 579.

Thus, while I do not object to the Court's leaving the Eleventh Amendment issue for further consideration by the lower courts—at least where, as here, there is no logical priority in resolving Eleventh Amendment immunity before exhaustion—I find the issue sufficiently clear to be answered here and now. The statute means what it says.

sider this holding to be a serious departure from established constitutional doctrine.

I dissent also from the Court's rejection of the rule of "flexible" exhaustion of state administrative remedies developed and stated persuasively by the Court of Appeals for the Fifth Circuit, sitting en banc. In disagreeing with the 17 judges of the Court of Appeals who adopted the flexible exhaustion principle, this Court places mistaken reliance on the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). I disagree with both portions of the Court's holding and therefore dissent.

I. The Eleventh Amendment.[1]

A

In this "reverse discrimination" action, petitioner, an employee of the Florida International University, brought suit under 42 U. S. C. § 1983 (1976 ed., Supp. IV) against the Board of Regents of the State of Florida.[2] She did not name the individual Regents as defendants. She sued for $500,000 in damages, and for injunctive and other equitable relief. See *ante*, at 498–499, n. 2. The Board filed a motion to dismiss arguing that petitioner's suit was premature in light of her failure to exhaust available administrative remedies. The District Court agreed and granted the motion to dismiss.

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[1] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] As the Court notes, see *ante*, at 498, n. 1, petitioner originally named the Florida International University as defendant. Because the Florida International University lacks the capacity to sue or be sued, the District Court found that it was not a proper defendant. Petitioner was permitted to amend her complaint, and she simply substituted the Board of Regents.

In addition to racial discrimination, petitioner also claimed that she had been discriminated against on the basis of her sex.

On petitioner's appeal, the Board added the bar of the Eleventh Amendment to its defense.[3] It argued that as an instrumentality of the State, the Board could not be subjected to suit in federal court absent a waiver of immunity.[4]

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[3] The Court repeatedly has held that the defense of the Eleventh Amendment may be raised for the first time on appeal. See *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court").

The Board's brief on appeal was divided into three parts. Part III was devoted to the argument that "the Eleventh Amendment precludes subject matter jurisdiction over plaintiff's complaint." Brief for Defendant-Appellee in No. 79-2965 (CA5), p. 17. A lengthy statutory addendum was attached in support of the arguments advanced in this section of the brief. After the case was scheduled for rehearing en banc, the parties filed short—*i. e.*, 4- and 10-page—supplemental briefs to be considered in addition to the main briefs already submitted to the Court of Appeals. The supplemental briefs did not add to the discussion of the Eleventh Amendment issue. But the question was placed before the Court of Appeals en banc, as it had been placed before the panel, through the thorough discussion in the main briefs.

This Court's explanation for not addressing the Eleventh Amendment issue is that it was not considered below. See *ante*, at 515–516, n. 19. But contrary to the implication in the Court's explanation, the issue—as shown here—was urged by the Board and argued here.

[4] The Board of Regents of the Division of Universities of the Department of Education is established by the Florida Education Code as a part of the State University System. Fla. Stat. § 240.2011 (1981). The Board consists of the Commissioner of Education and 12 citizens appointed by the Governor. § 240.207. The Board has general supervisory authority over the State University System. § 240.209. Among its duties are the appointment of university presidents, the review of budget requests of each university in the state system, the preparation of an aggregated budget for the State University System, the development of a master plan, and the establishment of a systemwide personnel classification and pay plan. *Ibid.*

The Board is an agency of the State of Florida. § 216.011. See *Relyea* v. *State*, 385 So. 2d 1378 (Fla. App. 1980). It may claim the defense of sovereign immunity in suits under state law. See *ibid.*

Numerous Courts of Appeals have held state universities or state Boards of Regents immune from suit in federal court by reason of the Elev-

And it asserted that there had been no waiver. Although the Board of Regents was created as a body corporate with power "to sue and be sued . . . to plead and be impleaded in all courts of law and equity," Fla. Stat. § 240.205(4)(1) (1981), it is well established that language such as this does not operate to waive the defense of the Eleventh Amendment.[5] In

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enth Amendment. See, *e. g.*, *Rutledge* v. *Arizona Board of Regents*, 660 F. 2d 1345, 1349 (CA9 1981); *Brennan* v. *University of Kansas*, 451 F. 2d 1287 (CA10 1971); *Ronwin* v. *Shapiro*, 657 F. 2d 1071 (CA9 1981).

[5] See, *e. g.*, *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276–277 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred. . . . And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts"); *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946) (language in state statute providing for suit in "any court of competent jurisdiction" will not be understood as a waiver of the Eleventh Amendment); *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945) (same); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, 54 (1944) ("a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found"); *Jagnandan* v. *Giles*, 538 F. 2d 1166, 1177 (CA5 1976). Cf. *Edelman* v. *Jordan*, *supra*, at 673 ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction' "). It is difficult to reconcile the Court's consistent requirement of an express waiver with the approach advocated by JUSTICE WHITE. See *ante*, at 519, n.

At oral argument here the Assistant Attorney General of Florida stated that the Florida Legislature had not waived the Eleventh Amendment and had waived the defense of sovereign immunity "only in selected tort cases." Tr. of Oral Arg. 26. See *Bragg* v. *Board of Public Instruction*, 36 So. 2d 222 (Fla. 1948) ("The mere fact that the Board of Public Instruction is created as a body corporate with power to sue and be sued does not affect its immunity from tort"); *Relyea* v. *State*, *supra* (Board of Regents retains defense of sovereign immunity); Fla. Stat. § 111.071(1)(b)(4) (1981) (provision for payment by the State of civil rights judgments against state officers—including judgments under 42 U. S. C. § 1983 (1976 ed., Supp. IV)—does not waive sovereign immunity "or any other defense or immunity" to such lawsuits). Cf. *Long* v. *Richardson*, 525 F. 2d 74, 79 (CA6 1975)

reply, petitioner argued that whether the statute creating the Board amounted to a waiver—and petitioner believed that it did—the Eleventh Amendment simply was irrelevant to the equitable claims she had lodged against the State. See Reply Brief for Petitioner 3–4.

Neither the Court of Appeals panel nor the Court of Appeals en banc addressed the Board's Eleventh Amendment defense. They directed their attention solely to the question of exhaustion of administrative remedies. The panel held that there was no exhaustion requirement in § 1983 suits and remanded to the District Court for consideration of the Board's Eleventh Amendment argument. *Patsy* v. *Florida International University*, 612 F. 2d 946 (1980). The Court of Appeals, sitting en banc, reversed holding that § 1983 plaintiffs must exhaust available and reasonable administrative remedies. *Patsy* v. *Florida International University*, 634 F. 2d 900 (1981). Again the court did not consider the Board's Eleventh Amendment defense.

The Eleventh Amendment question was raised before this Court, at the first opportunity after the Court of Appeals' decision, in the Board's response to the petition for writ of certiorari. The Board argued, as it had on appeal, that it was an arm of the State and that it had not waived its immunity from suit in federal court.[6] Again petitioner answered that

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(state university's immunity from suit under state law disposes of Eleventh Amendment question).

[6] See Brief in Opposition 23 ("Should this Court grant the writ, the Board respectfully submits that review should be limited to the jurisdictional issues discussed below and this Court should vacate the Fifth Circuit's decision with instructions to dismiss [petitioner's] suit for lack of jurisdiction").

The Court, *ante*, at 516, n. 19, attaches importance to the Assistant Attorney General's statement at oral argument that the Board wanted the exhaustion issue decided. This must be viewed, however, in light of the Board's unsuccessful attempt to have this Court *first* decide the Eleventh Amendment issue. Moreover, a party's request—short of a binding waiver—cannot relieve this Court of its duty to resolve a jurisdictional question.

at most the Eleventh Amendment defense would bar her claim for damages. And, even as to this claim, petitioner now argued that the Amendment would not bar damages if the Board could meet the claim out of its "own funds"—*e. g.*, from gifts and bequests—rather than from the state treasury. These arguments were repeated at oral argument.[7]

B

The Court views the jurisdictional question presented by the Eleventh Amendment as if it were of little or no importance. Its entire discussion of the question is relegated to a conclusory note at the end of the opinion. See *ante*, at 515–516, n. 19. The Court concedes that the Amendment and the bar of sovereign immunity are "jurisdictional," but only in the sense that the State may raise the claim at any point in the proceedings. The statement is then made that the Amendment is not jurisdictional "in the sense that it must be raised and decided by this Court on its own motion." *Ibid.*[8] The Court cites to no authority in support of this statement,[9] and

[7] Tr. of Oral Arg. 25–28, 40–41. At oral argument, the Board's counsel stated that the Eleventh Amendment question had not been addressed in its main briefs to this Court "because of the grant of certiorari." *Id.*, at 27.

[8] In view of the Board's repeated efforts to raise the Eleventh Amendment question, and its specific request that this Court vacate the decision of the Court of Appeals for lack of jurisdiction, see n. 6, *supra*, it is hardly correct to say that the Court must now raise the question of jurisdiction on its own motion. Cf. *Sosna* v. *Iowa*, 419 U. S. 393, 396, n. 2 (1975). In any event, "we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 278 (1977).

[9] The Court cites, with a "compare" signal, to *Mt. Healthy City Bd. of Ed.* v. *Doyle*, *supra*, at 279. The *Mt. Healthy* Court in no way suggested that the Eleventh Amendment and the principle of sovereign immunity embodied in Art. III were less than jurisdictional. Indeed, the Court found it necessary to resolve the Eleventh Amendment question in that case prior to reaching the merits.

On the contrary, the Court consistently has viewed the Amendment as jurisdictional. In *Sosna* v. *Iowa*, *supra*, at 396, n. 2, the Court raised the

it would be surprising if any existed. The reason that the Eleventh Amendment question may be raised at any point in the proceedings is precisely because it places limits on the basic authority of federal courts to *entertain* suits against a State. The history and text of the Eleventh Amendment, the principle of sovereign immunity exemplified by it, and the well-established precedents of this Court make clear that today's decision misconceives our jurisdiction and the purpose of this Amendment.

A basic principle of our constitutional system is that the federal courts are courts of limited jurisdiction. Their authority extends only to those matters within the judicial power of the United States as defined by the Constitution. In language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Art. III, suits "commenced or prosecuted against one of the United States." When an Amendment to the Constitution states in plain language that "the judicial power of the United States shall not be construed to extend" to suits against a State, from what source does the Court today derive its jurisdiction? The Court's "back-of-the-hand" treatment of this threshold issue offers no answer. Questions of jurisdiction and of the legitimate exercise of power are fundamental in our federal constitutional system.[10]

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question of the Eleventh Amendment even though the State had asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned this defense. Unlike the Board of Regents in this case, the State of Iowa had not advanced the defense in this Court. Even so, the *Sosna* Court raised and addressed the question. These precedents are ignored by the Court today.

[10] "Because of their unusual nature, and because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court." C. Wright & A. Miller, Federal Practice and Procedure § 3522, p. 45 (1975).

C

The Eleventh Amendment was adopted as a response to this Court's assumption of original jurisdiction in a suit brought against the State of Georgia. *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). Relying upon express language in Art. III extending the judicial power to controversies between a State and citizens of another State, the Court found that it had jurisdiction. The decision is said to have created a shock throughout the country. See *Hans* v. *Louisiana*, 134 U. S. 1, 11 (1890). The Amendment was adopted shortly thereafter, and the Court understood that it had been overruled: "'the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state.'" *Ibid.*

In light of the history and wording of the Amendment, the Court has viewed the Amendment as placing explicit limits on the judicial power as defined by Art. III. See *Nevada* v. *Hall*, 440 U. S. 410, 421 (1979). But more than that, and beyond the express provisions of the Amendment, the Court has recognized that the Amendment stands for a principle of sovereign immunity by which the grant of authority in Art. III itself must be measured.[11] Thus, in *Hans* v. *Louisiana*, *supra*, the Court held that the federal judicial power did not extend to a suit against a nonconsenting State by one of its own citizens. Although the Eleventh Amendment by its terms does not apply to such suits, the Court found that

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[11] "[T]he Eleventh Amendment was introduced to clarify the intent of the Framers concerning the reach of the federal judicial power. . . . The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding. . . . Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally . . . ." *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 291–292 (1973) (MARSHALL, J., concurring in result).

explicit limitation on federal jurisdiction—or under Art. III, the analysis must be the same. Absent consent, the "judicial power of the United States," as defined by Art. III and the Eleventh Amendment, simply does not extend to suits against one of the States by a citizen of that State:[13]

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ex parte New York, supra*, at 497 (emphasis added).

The Court does not distinguish these unquestioned precedents. They are wholly and inexplicably ignored. Quite

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[13] Unlike other limitations on federal jurisdiction, the limitation imposed by the Eleventh Amendment and the doctrine of sovereign immunity may be waived by consent unequivocally expressed. This was the understanding of the doctrine at the time the Constitution was adopted, see n. 11, *supra*, and the Court has interpreted the "judicial power of the United States" as used in the Eleventh Amendment and Art. III accordingly. But the fact that the State or the United States may consent to federal jurisdiction, does not render the Eleventh Amendment or the doctrine of sovereign immunity embodied in Art. III "quasi" jurisdictional. Quite simply, where there has not been consent, there is no jurisdiction. See *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit"); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void").

the language of the Amendment was but an illustration of a larger principle: Federal jurisdiction over suits against a State, absent consent, "was not contemplated by the Constitution when establishing the judicial power of the United States." *Id.*, at 15.[12] See *Smith* v. *Reeves*, 178 U. S. 436 (1900).

Similarly, in *Ex parte New York*, 256 U. S. 490 (1921), the Court found that despite the Eleventh Amendment's specific reference to suits in "law or equity," the principle of sovereign immunity exemplified by the Amendment would not permit the extension of federal admiralty jurisdiction over a nonconsenting State. The Court applied the same approach in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), in which the Court refused to take jurisdiction over a suit against a State by a foreign state. On its face, Art. III provided jurisdiction over suits "between a State . . . and foreign States." Nor did the Eleventh Amendment specifically exempt the States from suit by a foreign state. Nevertheless, the Court concluded that the judicial power of the United States, granted by Art. III, did not extend so far: "We think that Madison correctly interpreted Clause one of § 2 of Article III of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State's consent but not otherwise." *Id.*, at 330.

In this case a resident of the State of Florida has sued a Board exercising a major function of the State's sovereign authority. As prior decisions have held, whether this case is viewed only under the Eleventh Amendment—with its

[12] The *Hans* Court quoted at some length from the constitutional debates concerning the scope of Art. III. In the eighty-first number of the Federalist, for example, Hamilton sought to dispel the suggestion that Art. III extended federal jurisdiction over suits brought against one of the States: "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.'" As quoted in 134 U. S., at 13 (emphasis in original).

simply the Court today disregards controlling decisions and the explicit limitation on federal-court jurisdiction in Art. III and the Eleventh Amendment. The Court does recognize that the Eleventh Amendment is jurisdictional "in the sense" that the State may raise the bar of the Amendment for the first time on appeal. Yet the Court misses the point of this statement. The reason that the bar of the Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional:

> "The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued . . . in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 467 (1945).[14]

Despite these precedents, and apparently because of an unexplained anxiety to reach the exhaustion issue decided by the Court of Appeals, this Court remands the issue of *its own* jurisdiction to the courts below.

D

I believe that the Eleventh Amendment question must be addressed and that the answer could hardly be clearer. This is an action under § 1983.[15] Petitioner seeks relief from the

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[14] See *Edelman* v. *Jordan*, 415 U. S., at 678; *Sosna* v. *Iowa*, 419 U. S., at 396, n. 2; *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S., at 278. The Court has consistently viewed the Eleventh Amendment question as jurisdictional. See *Great Northern Life Insurance Co.* v. *Read*, 322 U. S., at 51 ("A state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment") (emphasis added); *Monaco* v. *Mississippi*, 292 U. S. 313, 320 (1934) (Question is "whether this Court has jurisdiction *to entertain* a suit brought by a foreign State against a State without her consent") (emphasis added).

[15] The States consented to a diminution of their sovereignty by ratifying the Fourteenth Amendment. In its exercise of the powers granted to it

Board of Regents of the State of Florida, a major instrumentality or agency of the State. Petitioner's argument that the statute incorporating the Board should be understood to waive the Eleventh Amendment is foreclosed by numerous decisions of this Court and is unsupported by State law. See, *e. g.*, *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981); n. 5, *supra*. Similarly, petitioner's suggestion that the Eleventh Amendment does not bar her equitable claims against the Board must be rejected. The Amendment applies to suits "in law *or* equity." All suits against an unconsenting State—whether for damages or injunctive relief—are barred. See *Cory* v. *White*, *ante*, p. 85.[16] Finally, the rule in *Ex parte Young*, 209 U. S. 123 (1908), permitting a federal court to order state *officials* to obey federal law in the future, is simply irrelevant to this case.[17] Petitioner did not sue the members of the Board of

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by § 5 of the Fourteenth Amendment, Congress may lift the bar of sovereign immunity. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). Thus, if petitioner had brought this suit under Title VII of the Civil Rights Act of 1964, there would have been no jurisdictional problem. But petitioner did not do so, and the Court has held that Congress has not removed the bar of sovereign immunity in § 1983 actions. See *Quern* v. *Jordan*, 440 U. S. 332 (1979).

[16] "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity." *Cory* v. *White*, *ante*, at 90–91.

[17] Under the theory of *Ex parte Young* the Eleventh Amendment does not bar suits against state officers because when a state officer "comes into conflict with the superior authority of [the] Constitution, . . . he is . . . stripped of his official or representative character." 209 U. S., at 159–160. The rationale of that decision has no application to suits against the State or its agencies. Although an individual official may be viewed as acting on his own and without state authority when acting against federal law, the State—or an agency of the State—cannot act other than in its official state capacity. Similarly, an action for damages against the State, or an arm of the State, seeks damages that must be paid from the State's own coffers—whether the damages come directly from the State's general fund

Regents. She sued the Board itself, an arm of the State of Florida.

In my view, the Eleventh Amendment—and the principle of sovereign immunity exemplified by the Amendment and embodied in Art. III—clearly bars the suit in this case. The Court's refusal to address the question of its own jurisdiction violates well-established precedents of this Court as well as the basic premise that federal courts are courts of limited jurisdiction. Even had the parties neglected to address the Eleventh Amendment question, it would have been our responsibility to consider it on our own motion. In fact, the question has been fully briefed to the Court of Appeals and

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or from some other state fund. See *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946) (segregated funds of the State Tax Commission are state moneys subject to the Eleventh Amendment).

Moreover, the fact that the Board is a corporate entity under state law does not permit application of the rule in *Ex parte Young* to the Board itself—as if the Board were an official. This Court repeatedly has held the Eleventh Amendment to bar suit against such state corporate agencies. See *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981); *Great Northern Insurance Co.* v. *Read, supra; Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945); *Kennecott Copper Corp.* v. *State Tax Comm'n, supra.*

Hopkins v. *Clemson Agricultural College*, 221 U. S. 636 (1911), is not to the contrary. In that case suit was brought against a state college *in state court* to recover damages caused by the college's construction of a dyke. Although the Court discussed the Eleventh Amendment in some detail, there was simply no Eleventh Amendment question in that case. It was clear before *Hopkins* that the Eleventh Amendment did not apply to bar review in this Court of any federal question presented in a suit against a State in *state* court. See *Chandler* v. *Dix*, 194 U. S. 590, 592 (1904). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). Moreover, the *Hopkins* Court did not consider the college's activities in that case to be governmental. 221 U. S., at 647. In short, no Eleventh Amendment question was presented to the Court. The opinion in *Hopkins* has never been cited by this Court for the proposition that the Eleventh Amendment is no bar to suit against a state corporate agency in federal court. See *Florida Dept. of Health* v. *Florida Nursing Home Assn., supra; Alabama* v. *Pugh*, 438 U. S. 781 (1978); *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964).

raised in this Court. See n. 8, *supra*. Cf. *Sosna* v. *Iowa*, 419 U. S. 393, 396, n. 2 (1975). I would dismiss this suit and vacate the decision of the Court of Appeals for lack of jurisdiction.

II. Exhaustion of Remedies.

In view of my belief that this case should be dismissed on jurisdictional grounds, I address the exhaustion question only briefly. Seventeen judges joined in the Court of Appeals' persuasive opinion adopting a rule of "flexible" exhaustion of administrative remedies in § 1983 suits. Other Courts of Appeals have adopted a similar rule. See, *e. g.*, *Eisen* v. *Eastman*, 421 F. 2d 560 (CA2 1969); *Secret* v. *Brierton*, 584 F. 2d 823 (CA7 1978). The opinion for the en banc court carefully reviewed the exhaustion doctrine in general and as applied to § 1983 actions. It found that the prior decisions of this Court did not clearly decide the question.[18] See *Barry* v. *Barchi*, 443 U. S. 55, 63, n. 10 (1979); *Gibson* v. *Berryhill*, 411 U. S. 564, 575, n. 14 (1973). And it concluded that the exhaustion of adequate and appropriate state administrative remedies would promote the achievement of the rights protected by § 1983.

I agree with the Court of Appeals' opinion. The requirement that a § 1983 plaintiff exhaust adequate state administrative remedies was the accepted rule of law until quite recently. See *Eisen* v. *Eastman*, *supra*, at 567. The rule rests on sound considerations. It does not defeat federal-court jurisdiction, it merely defers it.[19] It permits the States

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[18] "[I]n all the cases in which the Supreme Court has articulated its no-exhaustion rule, the state administrative remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." Developments in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1274 (1977).

[19] Cf. *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U. S. 100, 136 (1981) (BRENNAN, J., concurring in judgment) (exhaustion requirement in § 1983 cases can be justified by "a somewhat lesser showing . . . where . . . we are concerned not with the displacement of the § 1983 rem-

to correct violations through their own procedures, and it encourages the establishment of such procedures. It is consistent with the principles of comity that apply whenever federal courts are asked to review state action or supersede state proceedings. See *Younger* v. *Harris*, 401 U. S. 37 (1971).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that *Monroe* v. *Pape*, 365 U. S. 167, was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U. S. Courts, 238 (1961). In 1981, over 30,000 such suits were commenced.[20] Annual Report of the Director of the Administrative Office of the U. S. Courts 63, 68 (1981). The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal-court litigants, including others who assert that their constitutional rights have been infringed.

The Court argues that past decisions of the Court categorically hold that there is no exhaustion requirement in § 1983 suits. But as the Court of Appeals demonstrates, and as the Court recognizes, many of these decisions can be explained as applications of traditional exceptions to the exhaustion requirement. See *McNeese* v. *Board of Education*, 373 U. S. 668 (1963). Other decisions speak to the question in an offhand and conclusory fashion without full briefing and argument. See *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971) (unargued *per curiam*); *Damico* v. *California*, 389 U. S. 416 (1967) (unargued *per curiam*). Moreover, a cate-

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edy, but with the deferral of federal court consideration pending exhaustion of the state *administrative* process").

[20] Of the approximately 30,000 civil rights suits filed in fiscal year 1981, 15,639 were filed by state prisoners under § 1983. The remainder involved a variety of civil rights suits. Annual Report of the Director of the Administrative Office of the U. S. Courts 63, 68 (1981). See *Parratt* v. *Taylor*, 451 U. S. 527, 554, n. 13 (1981) (POWELL, J., concurring in result).

gorical no-exhaustion rule would seem inconsistent with the decision in *Younger* v. *Harris*, *supra*, prescribing abstention when state criminal proceedings are pending. At least where administrative proceedings are pending, *Younger* would seem to suggest the appropriateness of exhaustion. Cf. *Gibson* v. *Berryhill*, *supra*, at 574–575. Yet the Court today adopts a flat rule without exception.

The Court seeks to support its no-exhaustion rule with indications of congressional intent. Finding nothing directly on point in the history of the Civil Rights Act itself, the Court places primary reliance on the recent Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV). This legislation was designed to authorize the Attorney General to initiate civil rights actions on behalf of institutionalized persons. § 1997a. The Act also placed certain limits on the existing authority of the Attorney General to intervene in suits begun by institutionalized persons. See § 1997c. In addition, in § 1997e, the Act sets forth an exhaustion requirement but only for § 1983 claims brought by prisoners.

On the basis of the exhaustion provision in § 1997e, and remarks primarily by Representative Kastenmeier, the Court contends that Congress has endorsed a *general* no-exhaustion rule. The irony in this reasoning should be obvious. A principal concern that prompted the Department of Justice to support, and the Congress to adopt, § 1997e was the vast increase in § 1983 suits brought by state prisoners in federal courts. There has been a year-by-year increase in these suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 8.6% of the total federal district court civil docket. Although most of these cases present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not

be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal-court litigation. It was primarily this problem that prompted enactment of § 1997e.[21]

Moreover, it is clear from the legislative history that Congress simply was not addressing the exhaustion problem in any general fashion. The concern focused on the problem of prisoner petitions. The new Act had a dual purpose in this respect. In addition to requiring prior exhaustion of adequate state remedies, Congress wished to authorize the Attorney General to act when necessary to protect the constitutional rights of prisoners, but at the same time minimize the need for federal action of any kind by requiring prior exhaustion. Both sponsors of the Act in the Senate made this clear. Senator Hatch explained § 1997e as follows:

> "In actions relating to alleged violations of the constitutional rights of prisoners, such persons may be required to exhaust internal grievance procedures *before the Attorney General can become involved pursuant to [the Act]*." 126 Cong. Rec. 3716 (1980) (emphasis added).[22]

Senator Bayh, the author of the Act, described the exhaustion provision in similar terms:

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[21] The exhaustion requirement in § 1997e only becomes effective if the Attorney General or a federal district court determines that the available prison grievance procedures comply with standards set forth in subsection (b) of § 1997e. As of this date, the Department of Justice has not certified the inmate grievance procedures of even a single State.

[22] Senator Hatch offered the same explanation on several other occasions in the course of the debate. See 126 Cong. Rec. 9227 (1980) ("Section 7 would establish specific procedures that would be applicable before the Attorney General could enter into an action in behalf of an imprisoned or incarcerated person. Such person would first have had to fully exhaust all internal grievance mechanisms that existed in the institution in which he was confined"); *id.*, at 10005 ("Section 7(D) further clarifies that the administrative grievance procedures established in section 7 are only for the purposes of requiring prisoners to exhaust internal grievance mechanisms before the Attorney General can litigate on his behalf").

> "[I]n the event of a prison inmate's rights being alleged to be violated . . . then before the Justice Department could intervene or initiate suits, the prison inmate or class of inmates would have to pursue all of their administrative remedies within the State law before the Justice Department could intervene under the provisions of [the Act]." *Id.*, at 3970.

In short, in enacting the Civil Rights of Institutionalized Persons Act Congress was focusing on the powers of the Attorney General, and the particular question of prisoners' suits, not on the general question of exhaustion in § 1983 actions. Also revealing as to the limited purpose of § 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement. Thus, for example, in 1979, a bill was introduced into the Senate providing:

> "No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State." S. 1983, 96th Cong., 1st Sess., § 5 (1979).

The bill was never reported out of committee.

The requirement that plaintiffs exhaust available and adequate administrative remedies—subject to well-developed exceptions—is firmly established in virtually every area of the law. This is dictated in § 1983 actions by common sense, as well as by comity and federalism, where adequate state administrative remedies are available.

If the exhaustion question were properly before us, I would affirm the Court of Appeals.

UNITED STATES *v.* JOHNSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–1608. Argued February 24, 1982—Decided June 21, 1982

Payton v. *New York*, 445 U. S. 573, held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. Before *Payton* was decided, respondent was arrested on a federal charge by Secret Service agents who had entered his home without an arrest warrant. Subsequently, the Federal District Court denied respondent's pretrial motion to suppress incriminating statements he made after his arrest. This evidence was admitted at his trial and he was convicted. While his case was still pending on direct appeal, *Payton* was decided. On the strength of *Payton*, the Court of Appeals reversed the conviction, holding that *Payton* applied retroactively.

Held: A decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents. Hence, *Payton* is to be applied retroactively to respondent's case. Pp. 542–563.

(a) Respondent's case does not present a retrospectivity problem clearly controlled by existing precedent. Where a decision of this Court merely has applied settled principles to a new set of facts, it has been a foregone conclusion that the rule of the later case applies in earlier cases. Conversely, where the Court has declared a rule of criminal procedure to be "a clear break with the past," it almost invariably has found the new principle nonretroactive. Also, this Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish the defendant in the first place. Respondent's case does not fit any of these categories, as *Payton* did not apply settled precedent to a new set of facts, did not announce an entirely new and unanticipated principle of law, and did not hold either that the trial court lacked authority to convict Payton or that the Fourth Amendment immunized his conduct from punishment. Pp. 548–554.

(b) The retroactivity question presented here is fairly resolved by applying the *Payton* rule to all cases still pending on direct appeal at the time *Payton* was decided. To do so (1) provides a principle of decision-making consonant with this Court's original understanding in *Linkletter*

v. *Walker*, 381 U. S. 618, and *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to convictions not yet final when the rule was established; (2) comports with this Court's judicial responsibility "to do justice to each litigant on the merits of his own case," *Desist* v. *United States*, 394 U. S. 244, 259 (Harlan, J., dissenting), and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles," *Mackey* v. *United States*, 401 U. S. 667, 679 (separate opinion of Harlan, J.); and (3) furthers the goal of treating similarly situated defendants similarly. Pp. 554–556.

(c) There is no merit to the Government's arguments, based on *United States* v. *Peltier*, 422 U. S. 531, against adoption of the above approach to the retroactivity question in this case. Pp. 557–562.

626 F. 2d 753, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ. joined. BRENNAN, J., filed a concurring opinion, *post*, p. 563. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 564.

Elliott Schulder argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *Patty Merkamp Stemler*.

John F. Walter, by appointment of the Court, 454 U. S. 1028, argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Payton* v. *New York*, 445 U. S. 573 (1980), this Court held that the Fourth Amendment[1] prohibits the police from making a warrantless and nonconsensual entry into a sus-

[1] The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

pect's home to make a routine felony arrest. The question before us in the present case is whether the rule announced in *Payton* applies to an arrest that took place before *Payton* was decided.

I

Special Agents Hemenway and Pickering of the United States Secret Service suspected respondent Raymond Eugene Johnson and his codefendant, Oscar Joseph Dodd, of attempting to negotiate a misdelivered United States Treasury check.[2] Proceeding without an arrest warrant, on May 5, 1977, the two agents went to respondent's Los Angeles home and waited outside. Shortly thereafter, respondent and his wife arrived and entered the house.

The agents drew their weapons, approached the doorway and knocked, identifying themselves by fictitious names. When respondent opened the door, he saw the two agents with their guns drawn and their badges raised. Respondent permitted the agents to enter the house. While one agent stood with respondent in the living room, the other searched the premises. The agents then advised respondent of his constitutional rights and interrogated him. When respondent revealed his involvement in the taking of the misdelivered check, the agents formally arrested him. Respondent later signed a written statement admitting his involvement with the check.

Before trial, respondent sought to suppress his oral and written statements as fruits of an unlawful arrest not sup-

[2] On March 30, 1977, the United States Postal Service mistakenly delivered to Lena Kearney a Treasury check for $4,681.41, payable to Elihu Peterson. Kearney and her sister-in-law sought Dodd's assistance in cashing the check. Accompanied by respondent Johnson and another man, Dodd went to Kearney's residence to discuss methods of cashing the check. The three men eventually departed, taking the check with them.

After Kearney and her sister-in-law related the foregoing events to Special Agent Hemenway, he obtained a warrant for Dodd's arrest. He, however, did not obtain a warrant to arrest respondent. See 626 F. 2d 753, 754–755 (CA9 1980).

ported by probable cause. The United States District Court for the Central District of California found respondent's arrest to be proper and admitted the evidence. App. 7. A jury then convicted respondent of aiding and abetting obstruction of correspondence, in violation of 18 U. S. C. §§2 and 1702.[3] The imposition of respondent's sentence was suspended in favor of five years' probation.

By an unreported opinion filed December 19, 1978, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction. Acknowledging that "[i]t certainly would have been preferable had the agents obtained a warrant" for respondent's arrest before entering his residence, the court nonetheless ruled that "if probable cause exists for the arrest, [respondent's] constitutional rights were not violated by the warrantless arrest, even though there may have been time [for the agents] to have obtained a warrant for his arrest." App. to Pet. for Cert. 26a–27a.

On April 15, 1980, while respondent's petition for rehearing was still pending before the Ninth Circuit, this Court decided *Payton* v. *New York*, *supra*.[4] On September 2,

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[3] The jury acquitted respondent on a separate count of aiding and abetting the receipt of stolen Government property. See 18 U. S. C. §§ 2, 641. Respondent's codefendant Dodd was convicted on both counts. In an unreported decision, Dodd's conviction was affirmed summarily on appeal, and is not before us. See *United States* v. *Dodd*, No. 79-1030 (CA9 Feb. 4, 1980), rehearing denied, Mar. 5, 1980.

[4] The Court noted probable jurisdiction in *Payton* on December 11, 1978. 439 U. S. 1044. On March 5, 1979, the Ninth Circuit deferred decision on respondent's petition for rehearing and rehearing en banc pending this Court's decision in *Payton*. App. 8. The Court heard argument in *Payton* on March 26, 1979, but restored the case to the calendar for reargument. See 441 U. S. 930 (1979).

On August 20, 1979, the Ninth Circuit reaffirmed respondent's conviction, in the process amending its initial opinion and denying respondent's petition for rehearing. App. to Pet. for Cert. 14a. Respondent timely filed a second petition for rehearing and suggestion for rehearing en banc, which was still pending in the Court of Appeals when *Payton* was decided.

1980, the Ninth Circuit granted respondent's petition for rehearing, withdrew its prior opinion, and on the strength of *Payton*, now reversed the judgment of conviction. 626 F. 2d 753. "In light of the strong language by the Court in *Payton* emphasizing the special protection the Constitution affords to individuals within their homes," the Court of Appeals held that "the warrantless arrest of Johnson, while he stood within his home, after having opened the door in response to false identification by the agents, constituted a violation of his Fourth Amendment rights." *Id.*, at 757. The Government petitioned for rehearing, arguing that the principles of *Payton* should not apply retroactively to an arrest that had occurred before *Payton* was decided. The Court of Appeals disagreed, denied the petition for rehearing, and amended its opinion to clarify that *Payton* did apply retroactively. App. to Pet. for Cert. 12a.[5]

The Government sought review in this Court. We granted certiorari to consider the retrospective effect, if any, of the Fourth Amendment rule announced in *Payton*. 454 U. S. 814 (1981).[6]

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[5] In a decision issued three months before its initial ruling here, a different panel of the Ninth Circuit had anticipated *Payton*, holding that "absent exigent circumstances, police who have probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest." *United States* v. *Prescott*, 581 F. 2d 1343, 1350 (1978). Upon denial of the Government's petition for rehearing in respondent's case, the Court of Appeals made clear that its post-*Payton* reversal of respondent's conviction "rests chiefly upon basic principles common to our decision in *Prescott* and that of the Supreme Court in *Payton*." App. to Pet. for Cert. 13a. The court also noted that it had already held that its ruling in *Prescott* should apply retroactively. See *United States* v. *Blake*, 632 F. 2d 731 (1980).

[6] For the purposes of this case, the Government assumes the correctness of the Court of Appeals' ruling that, if applied to these facts, *Payton* would require exclusion of respondent's statements. Brief for United States 12–13, n. 6. We therefore need not examine the Court of Appeals' conclusion on that issue.

II

"[T]he federal constitution has no voice upon the subject" of retrospectivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). Before 1965, when this Court decided *Linkletter* v. *Walker*, 381 U. S. 618, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions." *Robinson* v. *Neil*, 409 U. S. 505, 507 (1973), citing *Norton* v. *Shelby County*, 118 U. S. 425, 442 (1886), and *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940).[7]

In *Linkletter*, however, the Court concluded "that the Constitution neither prohibits nor requires [that] retrospective effect" be given to any "new" constitutional rule. 381 U. S., at 629. Since *Linkletter*, the Court's announcement of a constitutional rule in the realm of criminal procedure has frequently been followed by a separate decision explaining whether, and to what extent, that rule applies to past, pending, and future cases. See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557 (1975).

Linkletter itself addressed the question whether the Fourth Amendment exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), should apply to state convictions that had become final before *Mapp* was decided.[8] At the outset, the *Linkletter* Court noted that cases still pending on direct review when *Mapp* was handed down had already received the

[7] The pre-1965 requirement that all constitutional rules receive full retroactive application derived from the Blackstonian notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter* v. *Walker*, 381 U. S. 618, 622–623 (1965), citing 1 W. Blackstone, Commentaries 69 (15th ed. 1809).

[8] "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied, all] before our decision in *Mapp* v. *Ohio*." *Linkletter* v. *Walker*, 381 U. S., at 622, n. 5. See also *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 409, n. 3 (1966).

benefit of *Mapp*'s rule. See 381 U. S., at 622, n. 4, citing *Ker* v. *California*, 374 U. S. 23 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); and *Stoner* v. *California*, 376 U. S. 483 (1964). This limited retrospective application of *Mapp* was consistent with the common-law rule, recognized in both civil and criminal litigation, "that a change in law will be given effect while a case is on direct review." 381 U. S., at 627, citing *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801).

To determine whether a particular ruling should also extend to cases that were already final, *Linkletter* directed courts to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U. S., at 629. Employing that test, the Court concluded that the *Mapp* rule should not apply to convictions that had become final before *Mapp* was decided.

The following Term, in *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966), the Court applied *Linkletter*'s analysis to hold the Fifth Amendment rule of *Griffin* v. *California*, 380 U. S. 609 (1965) (barring comment on a state defendant's failure to testify), nonretroactive to judgments of conviction made final before *Griffin* was decided. The Court again found no "question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced." 382 U. S., at 409, n. 3, citing *O'Connor* v. *Ohio*, 382 U. S. 286 (1965). Thus, after *Linkletter* and *Shott*, it appeared that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established.

In *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), and *Stovall* v. *Denno*, 388 U. S. 293 (1967), however, the Court departed from that basic principle. Those cases held that, in the interest of justice, the Court may balance three factors to determine whether a "new" constitutional rule should be ret-

rospectively or prospectively applied: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.*, at 297. See also *Johnson* v. *New Jersey*, 384 U. S., at 728. Because the outcome of that balancing process might call for different degrees of retroactivity in different cases, the Court concluded that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review." *Stovall* v. *Denno*, 388 U. S., at 300. See *Johnson* v. *New Jersey*, 384 U. S., at 732.

Because the balance of the three *Stovall* factors inevitably has shifted from case to case, it is hardly surprising that, for some, "the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U. S. 667, 676 (1971) (separate opinion of Harlan, J.). At one extreme, the Court has regularly given complete retroactive effect to new constitutional rules whose major purpose "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion). See also *id.*, at 653, n. 6; *Brown* v. *Louisiana*, 447 U. S. 323, 328–330 (1980) (plurality opinion); *Hankerson* v. *North Carolina*, 432 U. S. 233, 243 (1977); *Gosa* v. *Mayden*, 413 U. S. 665, 679 (1973) (plurality opinion); *Ivan V.* v. *City of New York*, 407 U. S. 203, 205 (1972).

At the other extreme, the Court has applied some standards only to future cases, denying the benefit of the new rule even to the parties before the Court. See, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, 490 (1972) (establishing basic requirements applicable only to "future revocations of parole"). Cf. *Johnson* v. *New Jersey*, 384 U. S., at 733, citing *England*

v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964), and *James* v. *United States*, 366 U. S. 213 (1961). As an intermediate position, the Court has applied a change in the law to all future litigants, but retroactively only to the parties at bar. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S., at 301; *DeStefano* v. *Woods*, 392 U. S. 631, 633 (1968); *Adams* v. *Illinois*, 405 U. S. 278, 284–285 (1972) (plurality opinion); *Michigan* v. *Payne*, 412 U. S. 47 (1973).

In a consistent stream of separate opinions since *Linkletter*, Members of this Court have argued against selective awards of retroactivity. Those opinions uniformly have asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule.[9]

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[9] See, *e. g.*, *Brown* v. *Louisiana*, 447 U. S. 323, 337 (1980) (POWELL, J., with whom STEVENS, J., joined, concurring in judgment); *Harlin* v. *Missouri*, 439 U. S. 459, 460 (1979) (POWELL, J., concurring in judgments); *Hankerson* v. *North Carolina*, 432 U. S. 233, 245 (1977) (MARSHALL, J., concurring in judgment); *id.*, at 246 (POWELL, J., concurring in judgment); *United States* v. *Peltier*, 422 U. S. 531, 543 (1975) (Douglas, J., dissenting); *Daniel* v. *Louisiana*, 420 U. S. 31, 33, and n. (1975) (Douglas, J., dissenting); *Michigan* v. *Tucker*, 417 U. S. 433, 461 (1974) (Douglas, J., dissenting); *Michigan* v. *Payne*, 412 U. S. 47, 58 (1973) (Douglas, J., dissenting); *id.*, at 59 (MARSHALL, J., dissenting); *Adams* v. *Illinois*, 405 U. S. 278, 286 (1972) (Douglas, J., with whom MARSHALL, J., concurred, dissenting); *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (separate opinion of Harlan, J.); *id.*, at 713 (Douglas, J., with whom Black, J., concurred, dissenting); *Williams* v. *United States*, 401 U. S. 646, 665 (1971) (MARSHALL, J., concurring in part and dissenting in part); *Coleman* v. *Alabama*, 399 U. S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Von Cleef* v. *New Jersey*, 395 U. S. 814, 817 (1969) (Harlan, J., concurring in result); *Jenkins* v. *Delaware*, 395 U. S. 213, 222 (1969) (Harlan, J., dissenting); *Desist* v. *United States*, 394 U. S. 244, 255 (1969) (Douglas, J., dissenting); *id.*, at 256 (Harlan, J., dissenting); *id.*, at 269 (Fortas, J., dissenting); *Fuller* v. *Alaska*, 393 U. S. 80, 82 (1968) (Douglas, J., dissenting); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (Douglas, J., with whom Black, J., joined, dissenting); *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967) (Douglas, J., dissenting); *id.*, at 303 (Black, J., dissenting); *Johnson*

In *Desist* v. *United States*, 394 U. S. 244, 256 (1969) (dissenting opinion), and *Mackey* v. *United States*, 401 U. S., at 675 (separate opinion), Justice Harlan presented a comprehensive analysis in support of that principle. In his view, failure to apply a newly declared constitutional rule at least to cases pending on direct review at the time of the decision violated three norms of constitutional adjudication.

First, Justice Harlan argued, the Court's "ambulatory retroactivity doctrine," *id.*, at 681, conflicts with the norm of principled decisionmaking. "Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a 'technique' that provided an 'impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected.'" *Id.*, at 676, citing *Jenkins* v. *Delaware*, 395 U. S. 213, 218 (1969). "The upshot of this confluence of viewpoints," 401 U. S., at 676, was that the coalitions favoring nonretroactivity had realigned from case to case, inevitably generating a welter of "incompatible rules and inconsistent principles," *Desist* v. *United States*, 394 U. S., at 258. See also *Michigan* v. *Payne*, 412 U. S., at 61 (MARSHALL, J., dissenting) ("principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity").

Second, Justice Harlan found it difficult to accept the notion that the Court, as a judicial body, could apply a "'new' constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule." *Desist* v.

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v. *New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., with whom Douglas, J., joined, dissenting); *Whisman* v. *Georgia*, 384 U. S. 895 (1966) (Douglas, J., dissenting); *Tehan* v. *United States ex rel. Shott*, 382 U. S., at 419 (Black, J., with whom Douglas, J., joined, dissenting); *Linkletter* v. *Walker*, 381 U. S., at 640 (Black, J., with whom Douglas, J., joined, dissenting).

United States, 394 U. S., at 258 (dissenting opinion). A legislature makes its new rules "wholly or partially retroactive or only prospective as it deems wise." *Mackey* v. *United States*, 401 U. S., at 677 (Harlan, J., dissenting). This Court, however,

> "announce[s] new constitutional rules . . . only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. . . . Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review." *Id.*, at 678–679.

Third, Justice Harlan asserted that the Court's selective application of new constitutional rules departed from the principle of treating similarly situated defendants similarly:[10]

> "[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who

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[10] Evenhanded justice for similarly situated litigants was the principal theme sounded by the dissenting opinions of Justices Black and Douglas. See cases cited in n. 9, *supra*. The views of these Justices diverged from those of Justice Harlan, however, on the question whether equal treatment also requires retroactive application of newly announced constitutional rules to all cases arising on collateral attack. Compare *Desist* v. *United States*, 394 U. S., at 255 (Douglas, J., dissenting), with *id.*, at 260–269 (Harlan, J., dissenting). See also *Adams* v. *Illinois*, 405 U. S., at 287, and n. 4 (Douglas, J., dissenting). Members of the Court continue to offer views on this troublesome question. Compare *Hankerson* v. *North Carolina*, 432 U. S., at 246, and n. (MARSHALL, J., concurring in judgment), with *id.*, at 248 (POWELL, J., concurring in judgment).

alone will receive the benefit of a 'new' rule of constitutional law." *Desist* v. *United States*, 394 U. S., at 258–259 (dissenting opinion).

Justice Harlan suggested one simple rule to satisfy all three of his concerns. "I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." *Id.*, at 258. "[A] proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." *Mackey* v. *United States*, 401 U. S., at 681 (separate opinion).

We now agree with Justice Harlan that "'[r]etroactivity' must be rethought," *Desist* v. *United States*, 394 U. S., at 258 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.

III

A

At the outset, we must first ask whether respondent's case presents a retrospectivity problem clearly controlled by existing precedent. Re-examination of the post-*Linkletter* decisions convinces us that in three narrow categories of cases, the answer to the retroactivity question has been effectively determined, not by application of the *Stovall* factors, but rather, through application of a threshold test.[11]

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[11] These cases therefore have not proved "readily susceptible of analysis under the *Linkletter* line of cases." *Robinson* v. *Neil*, 409 U. S. 505, 508 (1973). The dissent's accusation that these categories exclude the "most obvious" line of cases—those announcing rules relating to the truth-finding

First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. See, *e. g.*, *Dunaway* v. *New York*, 442 U. S. 200, 206 (1979) (reviewing application of the rule in *Brown* v. *Illinois*, 422 U. S. 590 (1975)); *Spinelli* v. *United States*, 393 U. S. 410, 412 (1969) ("further explicat-[ing]" the principles of *Aguilar* v. *Texas*, 378 U. S. 108 (1964)); *Desist* v. *United States*, 394 U. S., at 263 (Harlan, J., dissenting).

Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," *Desist* v. *United States*, 394 U. S., at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States* v. *Peltier*, 422 U. S. 531, 547, n. 5 (1975) (BRENNAN, J., dissenting) (collecting cases). In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course," *Williams* v. *United States*, 401 U. S., at 659 (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually

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function, *post*, at 567—misses our point. In those cases, the retroactivity decision *has* in fact turned on a traditional application of the *Stovall* factors, with the central issue in dispute often being the major purpose to be served by the new standard. Compare *Brown* v. *Louisiana*, 447 U. S. 323 (1980) (plurality opinion), with *id.*, at 337 (REHNQUIST, J., dissenting) (disagreeing over the "major purpose" of the unanimous six-person jury rule of *Burch* v. *Louisiana*, 441 U. S. 130 (1979)).

compelled a finding of nonretroactivity. See, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 672–673, 682–685 (plurality opinion); *Michigan* v. *Payne*, 412 U. S., at 55–57.[12]

Third, the Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place. The Court has invalidated inconsistent prior judgments where its reading of a particular constitutional guarantee immunizes a defendant's conduct from punishment, see, *e. g.*, *United States* v. *United States Coin & Currency*, 401 U. S. 715, 724 (1971) (penalty against assertion of Fifth Amendment privilege against self-incrimination), or serves "to prevent [his] trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of [that] trial," *Robinson* v. *Neil*, 409 U. S., at 509 (double jeopardy). In such cases, the Court has relied less on the technique of retroactive application than on the notion that the prior inconsistent judgments or sentences were void *ab initio*. See, *e. g.*, *Moore* v. *Illinois*, 408 U. S. 786, 800 (1972) (retroactive application of Eighth Amendment ruling in *Furman* v. *Georgia*, 408 U. S. 238 (1972)); *Ashe* v. *Swenson*, 397 U. S. 436, 437, n. 1 (1970) (retroactive application of double jeopardy ruling in *Benton* v. *Maryland*, 395 U. S. 784 (1969)). See also *Gosa* v. *Mayden*, 413 U. S., at 693 (MARSHALL, J., dissenting); *Michigan* v. *Payne*, 412 U. S., at 61 (MARSHALL, J., dissenting) (rulings are fully retroactive when the "Court

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[12] In the civil context, in contrast, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. See, *e. g.*, *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971). Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application. *Id.*, at 106–107. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 499 (1968).

has held that the trial court lacked jurisdiction in the traditional sense").

Respondent's case neatly fits none of these three categories. First, *Payton* v. *New York* did not simply apply settled precedent to a new set of facts. In *Payton*, the Court acknowledged that the "important constitutional question presented" there had been "expressly left open in a number of our prior opinions." 445 U. S., at 574 and 575, n. 1, citing *United States* v. *Watson*, 423 U. S. 411, 418, n. 6 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 113, n. 13 (1975); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–481 (1971); and *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958).

By the same token, however, *Payton* also did not announce an entirely new and unanticipated principle of law. In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," *Milton* v. *Wainwright*, 407 U. S. 371, 381, n. 2 (1972) (Stewart, J., dissenting), unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one," *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 498 (1968). Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, *e. g.*, *Desist* v. *United States*, 394 U. S. 244 (1969); *Williams* v. *United States*, 401 U. S. 646 (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, see, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 673 (plurality opinion); *Adams* v. *Illinois*, 405 U. S., at 283; *Johnson* v. *New Jersey*, 384 U. S., at 731, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. See, *e. g.*, *Gosa* v. *Mayden*, 413 U. S., at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"); *Stovall* v. *Denno*, 388 U. S., at 299–300. See also *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 107 (1971); *Cipriano*

v. *City of Houma*, 395 U. S. 701 (1969); *Milton* v. *Wainwright*, 407 U. S., at 381–382, n. 2 (Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon").

Payton did none of these. *Payton* expressly overruled no clear past precedent of this Court on which litigants may have relied. Nor did *Payton* disapprove an established practice that the Court had previously sanctioned. To the extent that the Court earlier had spoken to the conduct engaged in by the police officers in *Payton*, it had deemed it of doubtful constitutionality.[13] The Court's own analysis in *Payton* makes it clear that its ruling rested on both long-recognized principles of Fourth Amendment law and the weight of historical authority as it had appeared to the Framers of the Fourth Amendment.[14] Finally, *Payton* overturned no long-

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[13] At least since *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), the Court had acknowledged that the Fourth Amendment accords special protection to the home. *McDonald* v. *United States*, 335 U. S. 451, 456 (1948), stated that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." See also *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948). While ultimately declining to decide whether a warrant is necessary to effect a home arrest, *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–475 (1971) (footnote omitted), had declared "that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" See also *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 561 (1976) ("the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection").

[14] The *Payton* Court relied on the "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." 445 U. S., at 586, citing *Coolidge* v. *New Hampshire*, 403 U. S., at 477. The Court further recognized that the ex-

standing practice approved by a near-unanimous body of lower court authority.[15] *Payton* therefore does not fall into that narrow class of decisions whose nonretroactivity is effec-

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press language of the Fourth Amendment "has drawn a firm line at the entrance to the house" in "terms that apply equally to seizures of property and to seizures of persons." 445 U. S., at 590. After examining the common-law understanding of an officer's authority to arrest a suspect in his own home, *id.*, at 591–598, the Court concluded that "the weight of authority as it appeared to the Framers [of the Fourth Amendment] was to the effect that a warrant was required [before a home arrest], or at the minimum that there were substantial risks in proceeding without one." *Id.*, at 596.

[15] While the practice invalidated in *Payton* had found support in some state courts, those decisions evinced "by no means the kind of virtual unanimity," *id.*, at 600, required to make *Payton* a clear break with the past. In *Payton*, the Court noted that at the time of its decision, "'[o]nly 24 of the 50 States currently sanction warrantless entries into the home to arrest, . . . and there is an obvious declining trend." *Ibid.* In California, where the present respondent's case arose, the State Supreme Court had held more than a year before respondent's arrest that, under the Fourth Amendment and its state constitutional counterpart, warrantless arrests within the home were *per se* unreasonable in the absence of exigent circumstances. See *People* v. *Ramey*, 16 Cal. 3d 263, 275–276, 545 P. 2d 1333, 1340–1341, cert. denied, 429 U. S. 929 (1976).

Of the seven United States Courts of Appeals that had considered the question before *Payton*, five had expressed the view that warrantless home arrests were unconstitutional. 445 U. S., at 575, and n. 4. Three other Circuits had assumed, without expressly deciding, that such searches were unlawful. *Ibid.* After one of those decisions, in 1978, the Department of Justice instructed federal law enforcement agencies to follow the practice of procuring arrest warrants before entering a suspect's home to arrest him without exigent circumstances. Brief for United States 33, n. 20.

In the Ninth Circuit, where respondent was arrested, it has been said that "law enforcement officials knew that th[e] circuit's law was unsettled but that there was some drift toward a warrant requirement." *United States* v. *Blake*, 632 F. 2d, at 736. *United States* v. *Phillips*, 497 F. 2d 1131, 1135 (CA9 1974), had suggested in dictum that warrants are required before officers may enter a private dwelling to effect an arrest. In *United States* v. *Calhoun*, 542 F. 2d 1094, 1102 (CA9 1976), cert. denied *sub nom. Stephenson* v. *United States*, 429 U. S. 1064 (1977), it was observed that

tively preordained because they unmistakably signal "a clear break with the past," *Desist* v. *United States*, 394 U. S., at 248.

It is equally plain that *Payton* does not fall into the third category of cases that do not pose difficult retroactivity questions. *Payton* did not hold that the trial court lacked authority to convict or sentence Theodore Payton, nor did *Payton*'s reading of the Fourth Amendment immunize Payton's conduct from punishment. The holding in *Payton* did not prevent the defendant's trial from taking place; rather, it reversed the New York Court of Appeals' judgment and remanded for a new trial to be conducted without unconstitutionally obtained evidence.

B

Having determined that the retroactivity question here is not clearly controlled by our prior precedents, we next must ask whether that question would be fairly resolved by applying the rule in *Payton* to all cases still pending on direct appeal at the time when *Payton* was decided. Answering that question affirmatively would satisfy each of the three concerns stated in Justice Harlan's opinions in *Desist* and *Mackey*.

First, retroactive application of *Payton* to all previously nonfinal convictions would provide a principle of decisionmaking consonant with our original understanding of retroactivity in *Linkletter* and *Shott*. Moreover, such a principle would be one capable of general applicability, satisfying Justice Harlan's central concern: "Refusal to apply new constitutional rules to all cases arising on direct review . . . tends to cut this Court loose from the force of precedent, allowing us

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the Government had agreed that, absent exigent circumstances, a warrantless and nonconsensual entry into a suspect's home would be illegal. *United States* v. *Prescott*, 581 F. 2d, at 1350, then squarely held such arrests unconstitutional. See n. 5, *supra*.

to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis* . . . a force which ought properly to bear on the judicial resolution of any legal problem." *Mackey* v. *United States*, 401 U. S., at 680–681 (separate opinion).

Second, application of *Payton* to cases pending on direct review would comport with our judicial responsibilities "to do justice to each litigant on the merits of his own case," *Desist* v. *United States*, 394 U. S., at 259 (Harlan, J., dissenting), and to "resolve all cases before us on direct review in light of our best understanding of governing constitutional principles." *Mackey* v. *United States*, 401 U. S., at 679 (separate opinion of Harlan, J.). The Court of Appeals held that the circumstances of respondent's arrest violated *Payton*, and the Government does not dispute that contention. See n. 6, *supra*. It would be ironic indeed were we now to reverse a judgment applying *Payton*'s rule, when in *Payton* itself, we reversed a directly contrary judgment of the New York Court of Appeals. As Justice Harlan noted in *Desist:* "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced." 394 U. S., at 259.

Third, application of the Harlan approach to respondent's case would further the goal of treating similarly situated defendants similarly. The Government contends that respondent may not invoke *Payton* because he was arrested before *Payton* was decided. Yet it goes without saying that Theodore Payton also was arrested before *Payton* was decided, and he received the benefit of the rule in his case. Furthermore, at least one other defendant whose conviction was not final when *Payton* issued benefited from *Payton*'s rule, although he, too, was arrested before *Payton* was decided.[16]

[16] The New York Court of Appeals affirmed Payton's conviction along with that of Obie Riddick. See *Payton* v. *New York*, 445 U. S., at

An approach that resolved all nonfinal convictions under the same rule of law would lessen the possibility that this Court might mete out different constitutional protection to defendants simultaneously subjected to identical police conduct.[17]

578–579. This Court noted probable jurisdiction in Riddick's appeal, consolidated it with Payton's, then reversed both convictions. *Id.*, at 603.

In theory, the Court could have held Riddick's jurisdictional statement pending the disposition in Payton's case, then vacated and remanded the case for reconsideration in light of *Payton*. Such a course was taken in seven other nonfinal cases. See *Gonzalez* v. *New York*, 446 U. S. 902 (1980); *Brown* v. *Florida*, 446 U. S. 902 (1980); *Busch* v. *Florida*, 446 U. S. 902 (1980); *Vidal* v. *New York*, 446 U. S. 903 (1980); *Gordon* v. *New York*, 446 U. S. 903 (1980); *Gayle* v. *New York*, 446 U. S. 905 (1980); and *Dunagan* v. *Illinois*, 446 U. S. 905 (1980). Alternatively, the Court could have given all these cases plenary review.

Potential for unequal treatment is inherent in this process. As Justice Douglas "recalled," when the Court decided *Miranda* v. *Arizona*, 384 U. S. 436 (1966):

"[S]ome 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any relief. . . . Yet it was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes." *Desist* v. *United States*, 394 U. S., at 255 (dissenting opinion).

The dissent argues that "we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law." *Post*, at 566. But the dissent mischaracterizes both the problem and this Court's treatment of it. The problem is not merely the *appearance* of inequity, but the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied rule. As the persistently voiced dissatisfaction with the Court's "ambulatory retroactivity doctrine" has revealed, see n. 9, *supra*, until now this Court has not "resolved" this problem so much as it has chosen to tolerate it. The time for toleration has come to an end.

[17] We are aware, of course, that many considerations affect a defendant's progress through the judicial system, and that the speed of appellate review will differ from State to State, Circuit to Circuit, and case to case. Even under our approach, it may be unavoidable that some similarly

IV

Against adoption of this approach, the Government raises four arguments based on *United States* v. *Peltier*, 422 U. S. 531 (1975). None is persuasive.

The Government first cites *Peltier*'s holding: that the Fourth Amendment rule announced in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), should not apply retroactively to a case pending on appeal when *Almeida-Sanchez* was announced. By so holding, the Government suggests,

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situated defendants will be treated differently. Cf. *Williams* v. *United States*, 401 U. S., at 657, and n. 9 (plurality opinion).

The Government suggests an approach, however, that virtually ensures that such anomalies will occur. The Government concedes that the *Payton* rule should apply to any pre-*Payton* case arising in a Circuit where the United States Court of Appeals already had held authoritatively that *Payton*-type searches were unlawful. Brief for United States 22–26. When respondent was arrested, two Courts of Appeals had invalidated warrantless home arrests conducted in the absence of exigent circumstances. See *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970); *United States* v. *Shye*, 492 F. 2d 886 (CA6 1974). Thus, under the Government's theory, the statements of a suspect arrested in the District of Columbia, on the same day as respondent was arrested in Los Angeles and under identical circumstances, should be excluded while respondent's statements should not. Moreover, under the Government's reasoning, this Court would be obliged to reverse a ruling of the Court of Appeals for the Ninth Circuit excluding those statements, but not an identical ruling from the District of Columbia Circuit in a parallel case.

The dissent takes a different tack. Arguing that "inherent arbitrariness" arises whenever lines are drawn in this area, the dissent suggests that the "best way to deal with this problem" is to continue to make retroactivity decisions by picking and choosing from among similarly situated defendants. See *post*, at 568. By clinging to this view, the dissent, and not the Court, "is fooling itself." *Ibid.* This Court has no power to speed up or slow down the appellate process in the many tribunals throughout the country to ensure similar treatment of similarly situated defendants. The Court does, however, have the power to eliminate the obvious unfairness that results when it gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule.

Peltier declared a principle that controls the issue of retroactivity for all Fourth Amendment rulings.[18]

Upon examination, however, the retroactivity question posed here differs from that presented in *Peltier*. As the Government concedes, *Payton* overturned neither a statute nor any consistent judicial history approving nonconsensual, warrantless home entries. See Brief for United States 30, n. 18. Thus, its nonretroactivity is not preordained under the "clear break" principles stated above. In *Peltier*, in contrast, the Court noted that *Almeida-Sanchez* had invalidated a form of search previously sanctioned by "a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval." 422 U. S., at 541. See also *Almeida-Sanchez* v. *United States*, 413 U. S., at 278 (POWELL, J., concurring) ("While the question is one of first impression in this Court," the practice disapproved had "been consistently approved by the judiciary"); *id.*, at 298–299, n. 10 (WHITE, J., dissenting) (35 of 36 judges in 20 Court of Appeals cases had approved the invalidated practice).

Because *Almeida-Sanchez* had overturned a longstanding practice to which this Court had not spoken, but which a near-unanimous body of lower court authority had approved, it represented a "clear break" with the past. For that reason alone, under controlling retroactivity precedents, the nonretroactive application of *Almeida-Sanchez* would have been appropriate even if the case had involved no Fourth Amendment question. In that respect, *Peltier* resembles several earlier decisions that held "new" Fourth Amendment

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[18] The dissent shares this mistaken impression. In support of its claim, the dissent cites *Peltier*'s suggestion that every decision by this Court involving the exclusionary rule has been "accorded only prospective application." *Post*, at 564, citing 422 U. S., at 535. As *Peltier* recognized with discomfort, however, *Linkletter* itself—the first of the modern retroactivity cases—acknowledged the application of the *Mapp* exclusionary rule to cases that were pending on direct review at the time that *Mapp* was decided. See 422 U. S., at 535, n. 5.

doctrine nonretroactive, not on the ground that all Fourth Amendment rulings apply only prospectively, but because the particular decisions being applied "so change[d] the law that prospectivity [was] arguably the proper course." *Williams* v. *United States*, 401 U. S., at 659 (plurality opinion) (refusing to apply retroactively *Chimel* v. *California*, 395 U. S. 752 (1969), which overruled *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), and *Harris* v. *United States*, 331 U. S. 145 (1947)). See also *Desist* v. *United States*, 394 U. S. 244 (1969) (refusing to apply retroactively *Katz* v. *United States*, 389 U. S. 347 (1967), which overruled *Goldman* v. *United States*, 316 U. S. 129 (1942), and *Olmstead* v. *United States*, 277 U. S. 438 (1928)).

The Government bases its second argument on *Peltier*'s broad language: "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had *knowledge, or may properly be charged with knowledge*, that the search was unconstitutional under the Fourth Amendment" (emphasis added). 422 U. S., at 542. The Government reads this language to require that new Fourth Amendment rules must be denied retroactive effect in all cases except those in which law enforcement officers failed to act in good-faith compliance with then-prevailing constitutional norms.

The Government does not seriously suggest that the retroactivity of a given Fourth Amendment ruling should turn solely on the subjective state of a particular arresting officer's mind. Instead, it offers an "objective" test: that law enforcement officers "may properly be charged with knowledge" of all "settled" Fourth Amendment law. Under the Government's theory, because the state of Fourth Amendment law regarding warrantless home arrests was "unsettled" before *Payton*, that ruling should not apply retroactively even to cases pending on direct appeal when *Payton* was decided. See Brief for United States 14–19, 34–38.

Yet the Government's reading of *Peltier* would reduce its own "retroactivity test" to an absurdity. Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases. But as we have seen above, cases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real questions of retroactivity at all. Literally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application.

The Government's third claim is that *Peltier*'s logic suggests that retroactive application of Fourth Amendment decisions like *Payton*—even to cases pending on direct review—would not serve the policies underlying the exclusionary rule. Cf. 422 U. S., at 536–542. Yet viewed in the light of *Peltier*'s holding, this assertion also fails. *Peltier* suggested only that retroactive application of a Fourth Amendment ruling that worked a "sharp break" in the law, like *Almeida-Sanchez*, would have little deterrent effect, because law enforcement officers would rarely be deterred from engaging in a practice they never expected to be invalidated. See 422 U. S., at 541–542.

This logic does not apply to a ruling like *Payton*, that resolved a previously unsettled point of Fourth Amendment law. Because this Court cannot rule on every unsettled Fourth Amendment question, years may pass before the Court finally invalidates a police practice of dubious constitutionality. See, *e. g.*, *Desist* v. *United States*, 394 U. S., at 275 (Fortas, J., dissenting) (arguing that the "physical-trespass" wiretap rule of *Olmstead* v. *United States*, 277 U. S. 438 (1928), had been moribund for 17 years before it was formally overruled). Long before *Payton*, for example, this Court had questioned the constitutionality of warrantless home arrests. See n. 13, *supra*. Furthermore, the Court's

opinions consistently had emphasized that, in light of the constitutional protection traditionally accorded to the privacy of the home, police officers should resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant. See, *e. g.*, *Johnson* v. *United States*, 333 U. S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers").

If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior.[19] Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Desist* v. *United States*, 394 U. S., at 277 (Fortas, J., dissenting).

The Government finally argues that retroactive application of *Payton*, even to a case pending on direct appeal, would accomplish nothing but the discharge of a wrongdoer. Justice Harlan gave the answer to this assertion. "We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes

[19] The record in this case, for example, does not explain why respondent's arresting officers failed to obtain a warrant for his arrest, when they did obtain a warrant to arrest his codefendant. See n. 2, *supra*.

before us, we must grant the same relief or give a principled reason for acting differently." *Desist* v. *United States*, 394 U. S., at 258 (dissenting opinion). Applying *Payton* to convictions that were not yet final when *Payton* issued would accomplish the first step toward "turning our backs on the *ad hoc* approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle." *Jenkins* v. *Delaware*, 395 U. S., at 224 (Harlan, J., dissenting).

V

To the extent necessary to decide today's case, we embrace Justice Harlan's views in *Desist* and *Mackey*. We therefore hold that, subject to the exceptions stated below, a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.

By so holding, however, we leave undisturbed our precedents in other areas. First, our decision today does not affect those cases that would be clearly controlled by our existing retroactivity precedents. Second, because respondent's case arises on direct review, we need not address the retroactive reach of our Fourth Amendment decisions to those cases that still may raise Fourth Amendment issues on collateral attack.[20] Cf. n. 10, *supra*. Third, we express no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment.[21]

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[20] After *Stone* v. *Powell*, 428 U. S. 465 (1976), the only cases raising Fourth Amendment challenges on collateral attack are those federal habeas corpus cases in which the State has failed to provide a state prisoner with an opportunity for full and fair litigation of his claim, analogous federal cases under 28 U. S. C. § 2255, and collateral challenges by state prisoners to their state convictions under postconviction relief statutes that continue to recognize Fourth Amendment claims.

[21] The logic of our ruling, however, is not inconsistent with our precedents giving complete retroactive effect to constitutional rules whose purpose is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function. See, *e. g.*, *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977); *Ivan V.* v. *City of New York*, 407 U. S. 203 (1972). De-

Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S., at 106–107. See n. 12, *supra*.

Respondent's case was pending on direct appeal when *Payton* v. *New York* was decided. Because the Court of Appeals correctly held that the rule in *Payton* should apply to respondent's case, its judgment is affirmed.[2]

It is so ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion on my understanding that the decision leaves undisturbed our retroactivity precedents as ap-

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pending on the constitutional provision involved, additional factors may warrant giving a particular ruling retroactive effect beyond those cases pending on direct review. See *Hankerson* v. *North Carolina*, 432 U. S., at 248, n. 2 (POWELL, J., concurring in judgment).

Curiously, the dissent faults us not only for limiting our ruling to the only context properly presented by this case—the Fourth Amendment—but also for preserving, rather than overruling, clearly controlling retroactivity precedents. See *post*, at 568. The dissent then recasts those precedents in its own simplistic way, arguing that rules related to truth-finding automatically receive full retroactive effect, while implying that all other rules—including Fourth Amendment rules—should receive none.

There are, however, two problems with this. First, the Court's decisions regularly giving complete retroactive effect to truth-finding rules have in no way required that newly declared Fourth Amendment rulings be denied all retroactive effect. For the reasons already stated, retroactive application of Fourth Amendment rules at least to cases pending on direct review furthers the policies underlying the exclusionary rule. Second, and more important, the Fourth Amendment "rule" urged by the dissent is far from a "perfectly good" one. *Ibid.* As we already have shown, that "rule" condones obviously inequitable treatment of similarly situated litigants and judicial injustice to individual litigants.

[2] The question on which we granted certiorari encompassed one other issue: whether the Court of Appeals correctly concluded that its own decision in *United States* v. *Prescott*, 581 F. 2d 1343 (1978), applies retroactively to respondent's arrest. See n. 5, *supra*. Because we hold that the principles of our decision in *Payton* apply retroactively to respondent's case, we need not disturb the Court of Appeals' ruling regarding the retroactive application of its own prior decision.

plied to convictions final at the time of decision. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293 (1967).

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

In my view, this case is controlled by *United States* v. *Peltier*, 422 U. S. 531 (1975). *Peltier* established two propositions. First, retroactive application of a new constitutional doctrine is appropriate when that doctrine's major purpose is "'to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" *Id.*, at 535, quoting *Williams* v. *United States*, 401 U. S. 646, 653 (1971). Second, new extensions of the exclusionary rule do not serve this purpose and, therefore, will not generally be applied retroactively. There was surely nothing extraordinary about our ruling in *Payton* v. *New York*, 445 U. S. 573 (1980), that would justify an exception to this general rule.

Peltier was only the latest of a number of cases involving the question of whether rulings extending the reach of the exclusionary rule should be given retroactive effect. We noted there that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule . . . the Court has concluded that any such new constitutional principle would be accorded only prospective application." 422 U. S., at 535. We suggested that there were two reasons for this consistent pattern of decisions and that these two reasons were directly related to the justifications for the exclusionary rule.

That rule has traditionally been understood to serve two purposes: first, it preserves "judicial integrity"; second, it acts as a deterrent to unconstitutional police conduct. Neither of these purposes, however, is furthered by retroactive application of new extensions of the rule. First, "if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'impera-

tive of judicial integrity' is not offended by the introduction into evidence of that material." *Id.*, at 537. Second, a deterrence purpose can only be served when the evidence to be suppressed is derived from a search which the law enforcement officers knew or should have known was unconstitutional under the Fourth Amendment. *Id.*, at 542.

In focusing on the purpose of the exclusionary rule in order to decide the question of retroactivity, the Court was following settled principles. In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), which the majority agrees is the first of the modern retroactivity cases, the Court set forth a three-pronged model for analysis of the retroactivity question presented there:

> "[W]e must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*." *Id.*, at 636.

This three-prong analysis was consistently applied in the cases which followed, *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 419 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719, 727 (1966); *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). Indeed, in *Stovall*, the Court specifically announced that these three considerations—purpose of the new rule, reliance on the old rule, and effect on the administration of justice—were generally to guide resolution of all retroactivity problems relating to constitutional rules of criminal procedure. In each of these cases, the purpose of the new rule was the first consideration. That this was not accidental was made absolutely clear in *Desist* v. *United States*, 394 U. S. 244, 249 (1969): "Foremost among these factors is the purpose to be served by the new constitutional rule."* And as we went on

*See also 394 U. S., at 251: "It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

to say there, "[t]his criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule." *Ibid.*

Moreover, up until today's decision it was clear that these same principles governed the question of whether a new decision should retroactively apply to cases pending on appeal at the time of its announcement. *Peltier* itself was just this sort of a case: Peltier's case was on appeal at the time of the announcement of the decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). Indeed, we reversed the Court of Appeals' holding in that case that the "rule announced . . . in Almeida-Sanchez v. United States . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced." *United States* v. *Peltier*, 500 F. 2d 985, 986 (CA9 1974) (footnote omitted). I had thought that we long ago resolved the problem of the appearance of inequity that arises whenever we limit the retroactive reach of a new principle of law. As JUSTICE BRENNAN stated for the Court in *Stovall*, *supra*, at 301:

> "Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."

All of these principles are well settled and require reversal of the judgment of the Court of Appeals. The majority, in an intricate and confusing opinion disagrees. Two reasons for its disagreement seem to be presented.

First, the majority discerns no consistent reading of our precedents that would control this case. *Ante*, at 554 ("Having determined that the retroactivity question here is not clearly controlled by our prior precedents . . ."). Given the clarity with which we have previously set out the applicable

principles and the consistent application of those principles in cases involving extensions of the exclusionary rule, this is surely a strange conclusion. Eschewing the straightforward reading of the cases set forth above, which looks primarily to the substantive purpose of the relevant rule of law, the majority replaces it with an exceedingly formal set of three categories. *Ante*, at 549–551. Because these categories turn out to be dicta only, they merit little comment. Suffice it to say that their inadequacy is obvious from even a moment's reflection: That category to which the majority agrees "the Court has regularly given complete retroactive effect" is nowhere included in this formal scheme—cases announcing new constitutional rules whose major purpose "'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" *Ante*, at 544, quoting *Williams* v. *United States*, 401 U. S., at 653 (plurality opinion). It is little wonder that the majority finds this case difficult, when it has failed to learn the most obvious lessons of the previous cases.

Second, the majority seems to think that the problems of principle that Justice Harlan struggled with in his dissent in *Desist* v. *United States*, *supra*, are unanswerable under any rule that fails to give the benefits of a new constitutional ruling to all criminal defendants whose cases are pending on appeal at the time of the announcement. These problems are not new and were, I believe, adequately answered by JUSTICE BRENNAN in *Stovall*. The majority's approach, however, does not resolve these theoretical problems; it simply draws what is necessarily an arbitrary line in a somewhat different place than the Court had previously settled upon. Anything less than full retroactivity will necessarily appear unjust in some instances; it will provide different treatment to similarly situated individuals. The majority recognizes that the vagaries of the appellate process will cause this same problem to reappear under its proposed rule: "Even under

our approach, it may be unavoidable that some similarly situated defendants will be treated differently." *Ante*, at 556–557, n. 17. We had previously held that the best way to deal with this problem of inherent arbitrariness was to abide by the substantive principles outlined in *Stovall*. The majority makes no better suggestion today and is fooling itself if it believes that its proposal is a reasoned response to this problem of arbitrariness, rather than an exercise in line-drawing.

The insubstantiality of the majority's analysis and proposal is well illustrated by its conclusion. Despite the appearance of having resolved the difficult problem of the apparent injustice of any rule of partial retroactivity, the Court announces at the end that its decision today applies only to decisions "construing the Fourth Amendment" and asserts that it is not disturbing any of our retroactivity precedents. *Ante*, at 562. That is, it returns from its abstract procedural approach to the substantive rule of law at issue. There are two problems with this, however. First, there is no connection between the analysis and the conclusion. Second, and more important, we already had a perfectly good rule for resolving retroactivity problems involving the Fourth Amendment.

Accordingly, I dissent.

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES v. HOGAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 81-213. Argued March 24, 1982—Decided June 21, 1982

Section 1903(f) of the Social Security Act provides that federal reimbursement to States electing to provide Medicaid benefits to the "medically needy" is available only if the income of those persons, after deduction of incurred medical expenses, is less than 133⅓ percent of the state Aid to Families With Dependent Children (AFDC) payment level. Section 1903(f) specifically excepts from this rule the "categorically needy"—those receiving Supplemental Security Income (SSI) because of lack of income to meet their basic needs. As applied in Massachusetts, § 1903(f) results in a distribution of Medicaid benefits to recipients of SSI that is more generous than the distribution of such benefits to persons who are self-supporting. Appellees, each of whom (or his spouse) receives Social Security benefits in an amount that renders him ineligible for either SSI benefits or state supplementary payments, filed suit in Federal District Court, alleging that § 1903(f), as applied in Massachusetts, violates the equal protection component of the Fifth Amendment. Appellees asserted that, since 133⅓ percent of the Massachusetts AFDC payment level is for them lower than the SSI payment level, they are ineligible for Medicaid until their income, after deduction of incurred medical expenses, is less than that of SSI payment recipients, and that because of the Social Security benefits which they receive, appellees thus have less income available for nonmedical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance for support. The District Court entered judgment for appellees.

Held:

1. There is no merit to appellees' contention that the Social Security Act itself compels the conclusion that, if Medicaid services are provided to the "medically needy," those persons may not be forced to incur medical expenses that would reduce their remaining income below the applicable public assistance standard. The legislative history of the Medicaid provisions of the Act does not justify a departure from the literal and clear language of § 1903(f). Nor does § 1903(f)'s literal language conflict with any other provision of the Act. Moreover, adherence to that sec-

tion's language is consistent with its interpretation by the Secretary of Health and Human Services. Thus, the discrimination challenged in this case is required by the Social Security Act. Pp. 584–588.

2. As applied in Massachusetts, § 1903(f) does not violate constitutional principles of equal treatment. While powerful equities support appellees' claim of unfair treatment insofar as they receive less medical assistance and have less income remaining for their nonmedical needs than do SSI recipients, a belief that an Act of Congress may be inequitable or unwise is an insufficient basis on which to conclude that it is unconstitutional. The optional character of the congressional scheme—whereby participating States must provide Medicaid benefits to the categorically needy but may elect not to provide any benefits at all to the medically needy—does not itself violate constitutional principles of equality. Since a State may deny all benefits to the medically needy—while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not—it may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance. The fact that Massachusetts has provided Medicaid benefits to the medically needy does not force it to make immediate medical need the sole standard in its entire Medicaid program. Pp. 588–593.

501 F. Supp. 1129, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

George W. Jones argued the cause *pro hac vice* for appellant. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *William Kanter*, *Bruce G. Forrest*, *Lynne K. Zusman*, and *Robert P. Jaye*.

William H. Simon, by appointment of the Court, 454 U. S. 1051, argued the cause for appellees. With him on the brief were *Mark Coven*, *Gill Deford*, and *Gary Bellow*.*

**Francis X. Bellotti*, Attorney General of Massachusetts, and *Mitchell J. Sikora, Jr.*, and *Paul W. Johnson*, Assistant Attorneys General, filed a brief for the Commonwealth of Massachusetts as *amicus curiae* urging reversal.

Bruce K. Miller and *Dennis Caraher* filed a brief for the Massachusetts Association of Older Americans as *amicus curiae* urging affirmance.

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case are the meaning and validity of § 1903(f) of the Social Security Act, 81 Stat. 898, as amended, 42 U. S. C. § 1396b(f). As applied in Massachusetts, that provision results in a distribution of Medicaid benefits to recipients of Supplemental Security Income (SSI)—a class of aged, blind, or disabled persons who lack sufficient income to meet their basic needs—that is more generous than the distribution of such benefits to persons who are self-supporting. Appellees are members of the latter class. Because they must incur medical expenses—for which they are never reimbursed—before they become eligible for Medicaid, they have less income available for their nonmedical needs than the recipients of SSI. The District Court concluded that this discrimination was irrational and held that § 1903(f) was unconstitutional. *Hogan* v. *Harris*, 501 F. Supp. 1129 (Mass. 1980). We disagree and reverse.

The statutory provisions governing the Medicaid program are complex. See 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. IV). We first consider the history of the specific provisions at issue in this case, then relate the circumstances that gave rise to the present controversy, and finally address the two legal issues that are presented.

I

Section 1903(f) of the Social Security Act (Act) was enacted in 1968. To understand the present controversy, however, it is necessary to consider amendments to the Act made in 1965, 1967, and 1972.

A

The Medicaid program was established in 1965 in Title XIX of the Act "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U. S. 297, 301. Section 1902(a)(10) of the Act, 42

U. S. C. § 1396a(a)(10), sets forth the basic scope of the program, which has not changed significantly from its enactment in 1965. See 79 Stat. 345. Participating States are required to provide Medicaid coverage to certain individuals—now described as the "categorically needy"; at their option States also may provide coverage (and receive partial federal reimbursement) to other individuals—described as the "medically needy." See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 37.[1] These classes are defined by reference to other federal assistance programs.

In 1965, federal assistance programs existed for the aged, the blind, the disabled, and families with dependent children.[2] At that time, each of these programs was administered by the States, which established both the "standard of need" and the "level of benefits." See *Jefferson* v. *Hackney*, 406 U. S. 535; *Rosado* v. *Wyman*, 397 U. S. 397.[3] In establishing the Medicaid program, Congress required participating States to provide medical assistance to individuals who received cash payments under one of these assistance programs. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(A). The House Report explained: "These people are the most needy in the country and it is appropriate for

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[1] But see n. 18, *infra*.

[2] These programs were entitled: Old Age Assistance (OAA), 42 U. S. C. § 301 *et seq.* (1970 ed.); Aid to the Blind, § 1201 *et seq.*; Aid to the Permanently and Totally Disabled, § 1351 *et seq.*; and Aid to Families with Dependent Children (AFDC), § 601 *et seq.* See also 42 U. S. C. §§ 1381–1385 (1970 ed.). These programs are of course fundamentally different from Old Age, Survivors, and Disability Insurance (OASDI or Social Security), 42 U. S. C. § 401 *et seq.*

[3] In many States, the "level of benefits" did not raise an individual's income to the "standard of need." The standard of need determined eligibility for *some* benefits; often the benefits provided, however, were merely a fraction of the difference between the individual's income and the defined standard of need. See *Jefferson* v. *Hackney*. The standards of need also typically varied from program to program.

medical care costs to be met, first, for these people."[4] They are the "categorically needy."

Congress also provided that a participating State could offer Medicaid benefits to individuals who fell within one of the categories for which federal assistance was available but whose income made them ineligible for aid under those programs. These individuals were deemed "less needy"[5] and could receive assistance only if their income and resources were insufficient "to meet the costs of necessary medical or remedial care and services." 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(C). In 1965, no limit was placed on the extent to which federal reimbursement was available for optional coverage that States elected to provide to these persons who might become "medically needy."[6]

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[4] H. R. Rep. No. 213, 89th Cong., 1st Sess., 66 (1965) (1965 House Report).

[5] *Ibid.* See also S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 77 (1965) (1965 Senate Report).

[6] The 1965 Act contained certain requirements governing the comparative treatment of different beneficiaries under the Act. It provided that the medical assistance afforded to an individual who qualified under any categorical assistance program could not be different from that afforded to an individual who qualified under any other program. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(B)(i). In other words, the amount, duration, and scope of medical assistance provided to an individual who qualified to receive assistance for the aged could not be different from the amount, duration, and scope of benefits provided to an individual who qualified to receive assistance for the blind. "This will assure comparable treatment for all of the needy under the federally aided categories of assistance and will eliminate some of the unevenness which has been apparent in the treatment of the medical needs of various groups of the needy." 1965 House Report, at 66. See also 1965 Senate Report, at 77.

A similar "comparability" requirement among the aged, blind, disabled, and dependent applied to the optional distribution of benefits to the "medically needy." If a State elected to provide benefits to one group, it was obligated to provide benefits to the others, and "the determination of financial eligibility must be on a basis that is comparable as among the people who, except for their income and resources, would be recipients of money

Since States established the income limits for the categorical assistance programs, they also established the income limits for the "categorically needy" under the Medicaid program. In addition, participating States established the eligibility standards for the optional coverage provided to the "medically needy." In § 1902(a)(17) of the Act, 42 U. S. C. § 1396a (a)(17), however, Congress set forth certain requirements governing state standards for determining eligibility. In particular, Congress required States to "provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or any other type of remedial care recognized under State law." 79 Stat. 346; see 42 U. S. C. § 1396a(a)(17).[7]

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for maintenance under the other public assistance programs." 1965 House Report, at 67; see also 1965 Senate Report, at 77. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(C)(i). In addition, the benefits provided to each categorical group of the medically needy were required to be equal in amount, duration, and scope. 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(C)(ii).

In its provision for "comparability among the various categorical groups of needy people," 1965 House Report, at 67, the Act required comparability in the criteria used to determine eligibility for each group. 79 Stat. 346, as amended, 42 U. S. C. § 1396a(a)(17). See also 1965 House Report, at 67; 1965 Senate Report, at 77 ("Although States may set a limitation on income and resources which individuals may hold and be eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people"). Finally, the Act provided that the assistance provided to the "medically needy" could not be greater in amount, duration, or scope than the assistance provided to the "categorically needy." 79 Stat. 345, as amended, 42 U. S. C. § 1396a(a)(10)(B)(ii). "This was included in order to make sure that the most needy in a State receive no less comprehensive care than those who are not as needy." 1965 House Report, at 67; see also 1965 Senate Report, at 77.

[7] In its discussion of this portion of the statute, the 1965 House Report, at 68, explains:

"The bill also contains a provision designed to correct one of the weaknesses identified in the medical assistance for the aged program. Under

Most States promptly elected to participate in the Medicaid program.[8] Many of these States also chose to provide Medicaid coverage to the "medically needy." Within a year, Congress recognized that it was fiscally improvident to rely exclusively on the States to set income limits for both aspects

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the current provisions of Federal law, some States have enacted programs which contain a cutoff point on income which determines the financial eligibility of the individual. Thus, an individual with an income just under the specified limit may qualify for all of the aid provided under the State plan. Individuals, however, whose income exceeds the limitation adopted by the State are found ineligible for the medical assistance provided under the State plan even though the excess of the individual's income may be small when compared with the cost of the medical care needed. In order that all States shall be flexible in the consideration of an individual's income, your committee bill requires that the States standards for determining eligibility for and the extent of medical assistance shall take into account, except to the extent prescribed by the Secretary, the cost—whether in the form of insurance premiums or otherwise—incurred for medical care or any other type of remedial care recognized under State law. Thus, before an individual is found ineligible for all or part of the cost of his medical needs, the State must be sure that the income of the individual has been measured in terms of both the State's allowance for basic maintenance needs and the cost of the medical care he requires."

See also 1965 Senate Report, at 78–79. To this extent, the House Report mirrors the statutory language. In further describing this provision, however, the 1965 House Report, at 68, immediately continues:

"The State may require the use of all the excess income of the individual toward his medical expenses, or some proportion of that amount. In no event, however, with respect to either this provision or that described below with reference to the use of deductibles for certain items of medical service, may a State require the use of income or resources which would bring the individual below the test of eligibility under the State plan. If the test of eligibility should be $2,000 a year, an individual with income in excess of that amount shall not be required to use his income to the extent he has remaining less than $2,000. This action would reduce the individual below the level determined by the State as necessary for his maintenance."

See also 1965 Senate Report, at 79. This additional comment has no direct foundation in the statutory language of § 1902(a)(17). See 42 U. S. C. § 1396a(a)(17).

[8] See H. R. Rep. No. 544, 90th Cong., 1st Sess., 117 (1967) (1967 House Report).

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of the Medicaid program. See H. R. Rep. No. 2224, 89th Cong., 2d Sess., 1–3 (1966). It cautioned States "to avoid unrealistic levels of income and resources for title XIX eligibility purposes." *Id.*, at 3.

B

In 1967, Congress placed a limit on federal participation in the Medicaid program. Representative Mills introduced a bill, sponsored by the Johnson administration, that would have made significant changes in both the Medicaid program and the categorical assistance programs. H. R. 5710, 90th Cong., 1st Sess. (1967). Under § 220 of H. R. 5710, a State participating in the Medicaid program would have been entitled to receive federal financial assistance for providing Medicaid benefits only to those persons whose income, after deduction of incurred medical expenses, was less than 150% of the highest of the State's categorical assistance standards of need.[9] Section 202 of the bill would have required States to revise annually the standards of need under each of the categorical assistance programs to reflect changes in the costs of living and, in some circumstances, to pay 100% of the standard of need established under the programs. In support of this provision, the Secretary of the Department of Health, Education, and Welfare explained that "33 States provide less support for needy children [under the AFDC program] than the standards the States themselves have set as necessary to meet basic human needs."[10]

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[9] This provision, of course, would have had no effect on the "categorically needy," since their income was necessarily less than 150% of the highest categorical assistance standard of need.

[10] President's Proposals for Revision in the Social Security System: Hearings on H. R. 5710 before the House Committee on Ways and Means, 90th Cong., 1st Sess., 118 (1967). In January 1965, there were 21 States that paid less than 75% of the standard of need established for a family of four under the State's AFDC program. *Id.*, at 119.

After extensive consideration, the House Ways and Means Committee reported out a substantially revised bill. H. R. 12080, 90th Cong., 1st Sess. (1967). The Committee Report described its primary proposed limitation on federal participation:

> "Your committee is proposing . . . that Federal sharing will not be available for families whose income exceeds 133⅓ percent of the highest amount ordinarily paid to a family of the same size (without any income and resources) in the form of money payments under the AFDC program. (AFDC income limits are, generally speaking, the lowest that are used in the categorical assistance programs)." 1967 House Report, at 119.

As noted, see n. 10, *supra*, the amount of benefits *paid* in many States was less than the qualifying standard of need.[11] The Committee Report explained the reasons for the move to limit federal participation in the Medicaid program. After noting that a few States had provided benefits beyond that anticipated by Congress, it stated:

> "Your committee expected that the State plans submitted under title XIX would afford better medical care and services to persons unable to pay for adequate care.

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[11] The proposed bill also provided another limit on federal participation. It included a provision that set "a figure of 133⅓ percent of the average per capita income of a State as the upper limit on Federal sharing when applied to a family of four under the title XIX program." 1967 House Report, at 119. It is noteworthy that these proposals were not an insignificant part of what was—admittedly—a complex bill. In setting forth at the outset the "principal purposes of the bill," the House Report provides:

"Fifth, to modify the program of medical assistance to establish certain limits on Federal participation in the program and to add flexibility in administration, the bill would—

"(*a*) Impose a limitation on Federal matching at an income level related to payments for families receiving aid to families with dependent children or to the per capita income of the State, if lower." *Id.*, at 5.

> It neither expected nor intended that such care would supplant health insurance presently carried or presently provided under collective bargaining agreements for individuals and families in or close to an average income range. Your committee is also concerned that the operation of some State plans may greatly reduce the incentives for persons aged 65 or over to participate in the supplementary medical insurance program [Medicare] of title XVIII of the Social Security Act, which was also established by the Social Security Amendments of 1965. The provisions of the bill are directed toward eliminating, insofar as Federal sharing is concerned, these clearly unintended and, in your committee's judgment, undesirable actual and potential effects of the legislation." *Id.*, at 118.

In States that paid less than 75% of the AFDC standard of need, the House provision would have provided Medicaid benefits only to persons whose income, after deduction of incurred medical expenses, was less than the AFDC standard of need.[12]

The Committee proposal was severely criticized on the House floor.[13] It nevertheless was passed by the House and

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[12] If the House bill applied to both the categorically needy and the medically needy, it could have resulted in the denial of Medicaid benefits to certain categorically needy individuals who—although eligible for assistance under the State's standard of need—had an income that was higher than 133⅓ percent of the amount the State actually *paid* to a qualifying individual with no income. The House bill did not, however, alter § 1902(a)(10) of the Act, 42 U. S. C. § 1396a(a)(10), which required participating States to provide Medicaid benefits to all of the categorically needy.

[13] See 113 Cong. Rec. 23065 (1967) (remarks of Rep. King); *id.*, at 23077 (remarks of Rep. Burke); *id.*, at 23082 (remarks of Rep. Vanik); *id.*, at 23084 (remarks of Rep. Bingham); *id.*, at 23087 (remarks of Rep. Halpern); *id.*, at 23093 (remarks of Rep. Ryan); *id.*, at 23104 (remarks of Rep. Bingham); *id.*, at 23125 (remarks of Rep. Boland); *id.*, at 23128 (remarks of Rep. Kastenmeier). In particular, see *id.*, at 23131 (remarks of Rep.

sent to the Senate.[14] The Senate returned a substantially different bill and the matter was referred to conference.[15]

The Conference Committee adopted the House 133⅓-per-

Farbstein); *id.*, at 23083 (remarks of Rep. Gilbert); *id.*, at 23092 (remarks of Rep. Burton).

[14] Representative Mills defended the bill against criticism that its treatment of those with income above the categorical assistance limit was unfair. He noted that it was "only because of what we walked into with this program that the committee has seen fit to put limits on it," *id.*, at 23093, and added: "I do not think it is fair to tax people through the general funds of the Treasury to pay for the medical costs of those who undoubtedly have the means to buy insurance and to defray their own medical costs." *Ibid.* See also *id.*, at 23061–23062 (remarks of Rep. Byrnes); *id.*, at 23084–23085 (remarks of Rep. Hanley); *id.*, at 23090 (remarks of Rep. Stratton); *id.*, at 23090, 23091 (remarks of Rep. McCarthy); *id.*, at 23105 (remarks of Rep. Taft); *id.*, at 22783 (remarks of Rep. Quillen).

[15] In hearings before the Senate Finance Committee, an HEW official recommended that the administration's proposal be adopted. He criticized the House bill and noted that, in States such as Indiana and Texas, 133% of the AFDC payment amount was less than the AFDC standard of need. Social Security Amendments of 1967: Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., 280 (1967). He pointed out that such a standard could result in exclusion of some of the categorically needy, which he suggested probably had not been intended. *Ibid.* Senator Robert Kennedy also criticized the House proposal, noting that medically needy individuals would not be eligible for Medicaid in some States until their income, after deduction of incurred medical expenses, was less than the standards of need established for the categorically needy. *Id.*, at 784.

The Finance Committee subsequently proposed a bill that provided participating States with federal assistance for Medicaid expenditures made on behalf of any person whose income after the deduction of medical expenses was less than 150% of the OAA standard, which generally was the highest of the cash assistance standards. See S. Rep. No. 744, 90th Cong., 1st Sess., 177 (1967). The Senate bill also introduced a new formula for computing the amount of federal reimbursement under the Medicaid program that was designed to reduce federal matching funds for payments to the medically needy. *Id.*, at 176–177.

The proposals encountered resistance on the Senate floor. Senator Javits, speaking in support of an amendment offered by Senator Kuchel that

cent AFDC payment standard. H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 63 (1967). It added, however, an express exception for the categorically needy. *Ibid.* Opposition to the Conference proposal was voiced in both the House and the Senate.[16] The 133⅓-percent AFDC payment standard nevertheless was approved by Congress and enacted into law as § 1903(f) of the Social Security Act. See 81 Stat. 898, as amended, 42 U. S. C. § 1396b(f).[17]

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would have substituted the proposals of the administration, criticized the Finance Committee bill on the ground that it discriminated against the medically needy. See 113 Cong. Rec. 33168, 33169 (1967). In response, Senator Long acknowledged that the bill discriminated against the medically needy, but explained that it "encourages the State to concentrate its medical assistance for those who are most in need, those who qualify for public welfare assistance." *Id.*, at 33169, 33171. The Senate rejected the Kuchel amendment and adopted the Finance Committee bill.

[16] See *id.*, at 36380 (remarks of Rep. Burton); *id.*, at 36381 (remarks of Rep. Gilbert); *id.*, at 36385 (remarks of Rep. Reid); *id.*, at 36387 (remarks of Rep. Ryan); *id.*, at 36389 (remarks of Rep. Farbstein). In the Senate, Robert Kennedy complained that in Mississippi the 133⅓-percent limitation amounted to an income level, after medical expenses had been incurred, of $80 per month for a family of four. *Id.*, at 36784. Senator Mondale quoted the testimony in the Senate Hearings, see n. 15, *supra*, that in some States the 133⅓-percent AFDC payment amount was less than the standard of need established under even the AFDC program. 113 Cong. Rec. 36819 (1967).

[17] Title 42 U. S. C. § 1396b(f) provides:

"(f) Limitation on Federal participation in medical assistance

"(1)(A) Except as provided in paragraph (4), payment under the preceding provisions of this section shall not be made with respect to any amount expended as medical assistance in a calendar quarter, in any State, for any member of a family the annual income of which exceeds the applicable income limitation determined under this paragraph.

"(B)(i) Except as provided in clause (ii) of this subparagraph, the applicable income limitation with respect to any family is the amount determined, in accordance with standards prescribed by the Secretary, to be equivalent to 133⅓ percent of the highest amount which would ordinarily be paid to a family of the same size without any income or resources, in the form of money payments, under the plan of the State approved under Part A of subchapter IV of this chapter.

. . . . .

C

In 1972, Congress replaced three of the four state-administered categorical assistance programs with a new federal program entitled Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.* (1976 ed. and Supp. IV).[18] The SSI program establishes a federally

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"(2) In computing a family's income for purposes of paragraph (1), there shall be excluded any costs (whether in the form of insurance premiums or otherwise) incurred by such family for medical care or for any other type of remedial care recognized under State law.

. . . . .

"(4) The limitations on payment imposed by the preceding provisions of this subsection shall not apply with respect to any amount expended by a State as medical assistance for any individual—

"(A) who is receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV or XVI, or part A of subchapter IV, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or

"(B) who is not receiving such aid or assistance, and with respect to whom such benefits are not being paid, but (i) is eligible to receive such aid or assistance, or to have such benefits paid with respect to him, or (ii) would be eligible to receive such aid or assistance, or to have such benefits paid with respect to him if he were not in a medical institution, or

"(C) with respect to whom there is being paid, or who is eligible, or would be eligible if he were not in a medical institution, to have paid with respect to him, a State supplementary payment and is eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title, but only if the income of such individual (as determined under section 1382a of this title, but without regard to subsection (b) thereof) does not exceed 300 percent of the supplemental security income benefit rate established by section 1382(b)(1) of this title,

at the time of the provision of the medical assistance giving rise to such expenditure."

[18] The SSI program is funded and administered by the Federal Government. As its name indicates, it replaced the categorical assistance programs for the aged, the blind, and the disabled. The AFDC program continues to be administered by the States and is only partially funded by the Federal Government.

In some States the number of individuals eligible for SSI was significantly greater than the number of persons who had been eligible under the

guaranteed minimum income for the aged, blind, and disabled. See *Schweiker* v. *Wilson*, 450 U. S. 221, 223. Under the program, however, the States may (and in some cases must) raise that minimum standard and supplement the benefits provided by the Federal Government. See 42 U. S. C. § 1382e (1976 ed. and Supp. IV). Moreover, if supplemental payments are made to persons who would be eligible for SSI benefits except for the amount of their income, the State also may provide Medicaid benefits to those persons. See 42 U. S. C. § 1396a(a)(10)(C)(ii).[19]

II

The Commonwealth of Massachusetts has chosen to participate in the Medicaid program and to provide benefits—to the extent that federal financial assistance is available—to the "medically needy." The State also has elected to make supplementary payments to individuals who are eligible for SSI benefits or who would be eligible except for their income. Finally, the State has chosen to provide Medicaid benefits to those persons who receive supplemental payments. In Massachusetts, 133⅓ percent of the appropriate state AFDC

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state-administered categorical assistance programs. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 38. Since recipients of categorical welfare assistance are also entitled to Medicaid benefits, the expansion of general welfare accomplished by the SSI program increased Medicaid obligations for some States. To guarantee that States would not, for that reason, withdraw from the Medicaid program, Congress offered what has become known as the "§ 209(b) option." Under it, States may elect to provide Medicaid assistance only to those individuals who would have been eligible under the state Medicaid plan in effect on January 1, 1972. See *id.*, at 38–39. Thus, in some States, Medicaid is not automatically available for all of the "categorically needy." Massachusetts is not a § 209(b) State.

[19] There is a limit on federal participation in this aspect of the program. A State is entitled to federal financial assistance for providing Medicaid benefits to a state supplementary payment recipient only if his gross income is less than 300% of the applicable SSI income limitation. See 42 U. S. C. § 1396b(f)(4)(C); n. 17, *supra*.

payment amount is less in some cases than the combined federal SSI and state supplementary payment level.[20]

Appellees filed this suit in 1980 in federal court, contending that § 1903(f) of the Act—as applied in Massachusetts—violates the equal protection component of the Fifth Amendment.[21] Each of the appellees is either aged, blind, or disabled, but they are not categorically needy. For each appellee or his spouse was employed at one time and paid "Social Security" taxes. Each appellee (or his spouse) currently receives Social Security benefits (Federal Old-Age, Survivors, and Disability Insurance, 42 U. S. C. § 401 *et seq.* (1976 ed. and Supp. IV)) in an amount that renders him ineligible for either SSI benefits or state supplementary payments. Appellees challenged the fact that, since 133⅓ percent of the Massachusetts AFDC payment level is for them lower than the SSI payment level, they are ineligible for Medicaid until their income, after deduction of incurred medical expenses, is less than that of SSI payment recipients. By reason of the Social Security benefits that they receive, appellees thus have less income available for nonmedical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance for support.[22]

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[20] There is no statutory requirement that state AFDC payment amounts be comparable to state supplemental benefits.

[21] See *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Appellees also contended that certain state statutory provisions violated the Equal Protection Clause of the Fourteenth Amendment.

[22] Appellees alleged that federal and state provisions require an individual to apply for and to accept all Social Security benefits for which he is eligible as a condition of application for SSI and Medicaid benefits. See 42 U. S. C. § 1382(e)(2).

Appellees' grievances are best illustrated by the situation of appellee Hunter. The District Court found that Hunter had worked for 41 years and had paid Social Security taxes during that period. As a result, he received at the time of trial $534 per month in Social Security benefits, $20 of which apparently was disregarded in computing eligibility for SSI and state supplementary payments. As a result of his income, Hunter was in-

The District Court granted appellees' motion for partial summary judgment.[23] It ruled that the Massachusetts Medicaid program was unconstitutional insofar as it forced Social Security recipients to incur medical expenses that reduced their remaining income to an amount below SSI payment levels. The court later declared explicitly that § 1903(f) of the Act, 42 U. S. C. § 1396b(f), is unconstitutional as applied in Massachusetts. App. to Juris. Statement 25a. We noted probable jurisdiction. 454 U. S. 891.

III

In this Court, for the first time, appellees contend that the Social Security Act itself compels the conclusion that, if Medicaid services are provided to the "medically needy," those persons may not be forced to incur medical expenses that

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eligible for either SSI or state supplemental payments; the "standard of need" under those programs was $513 per month. If he had qualified, he of course would also have been eligible for Medicaid. Since the applicable AFDC payment amount in Massachusetts was $300, Hunter was ineligible for Medicaid until his income, after deduction of incurred medical expenses, was no higher than $400. Hunter regularly incurred over $200 each month in medical expenses; thus, by reason of his Social Security benefits, he had less income available for nonmedical needs ($400 per month) than he would have had on public assistance ($513 per month). In his case, a Social Security payment of $1 less each month ($534 less $20 less $1) would apparently have rendered him fully eligible for Medicaid. See *Hogan* v. *Harris*, 501 F. Supp. 1129, 1132 (Mass. 1980). In other words, if his gross income were reduced by $1, he would receive over $100 in additional medical benefits and have that additional amount of income available for nonmedical needs.

[23] The District Court certified a class "consisting of all (i) present and future Social Security recipients; (ii) who reside or will reside in Massachusetts; (iii) who are or will be disabled or 65 years old or older; (iv) who are or will be ineligible because of the amount of their incomes for Massachusetts Supplemental Security Income payments; and (v) who have or will have, as determined in accordance with the applicable Massachusetts Medicaid regulations, medical expenses not subject to payment by a third party which exceed the difference between their countable incomes under the Massachusetts Medicaid regulations and the applicable Massachusetts Supplemental Security Income standard." App. to Juris. Statement 23a–24a.

would reduce their remaining income below the applicable public assistance standard. Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm that court's judgment.[24] "Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue." *Blum* v. *Bacon*, *ante*, at 137. See *Harris* v. *McRae*, 448 U. S., at 306–307.

Appellees contend that a "fundamental Congressional purpose in the creation of the medically needy feature of Title XIX was to achieve equity between public assistance recipients and others similarly situated." Brief for Appellees 12. In support of this contention, appellees cite the requirement first imposed in 1965 that States "include reasonable standards *(which shall be comparable for all groups)* for determining eligibility for and the extent of medical assistance under the plan . . . ," 79 Stat. 346 (emphasis added), as amended, 42 U. S. C. § 1396a(a)(17), and note the statements in the legislative history that a State could not require an individual to use, for medical expenses, income "which would bring the individual below the test of eligibility under the State plan." See n. 7, *supra*.

Moreover, appellees contend that this "comparability requirement" was not changed by the enactment of § 1903(f) in 1968. Appellees argue that the separate bills passed in both the House and the Senate would have affected *both* the categorically and the medically needy.[25] Only when the Confer-

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[24] "It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum* v. *Bacon*, *ante*, at 137, n. 5. The statutory argument raised by the appellees, although not presented in the District Court, may be decided on the basis of the record developed in that court.

[25] See n. 12, *supra*. Since the limitation in the Senate bill was set at 150% of the OAA assistance standard, by definition it would not likely have

ence Committee accepted the House provision and added an exception for the categorically needy, appellees argue, did the 1968 modification potentially change the comparability requirement between the two groups. Appellees assert that such a change was not intended; rather, they argue that the exception for the categorically needy was added only to ensure that they would not be adversely affected by § 1903(f). Appellees assert that the medically needy were not similarly excepted from the 133⅓-percent rule in those States in which that figure was less than the applicable standard of need because, in 1967, those States did not have medically needy programs.

Thus, appellees urge that we construe § 1903(f) to require the medically needy to incur medical expenses until their income is 133⅓ percent of the AFDC payment amount or—to maintain comparability—100 percent of the combined SSI-state supplementary payment level *if that figure is higher*. Appellees argue that the legislative history of the 1965 and 1967 Amendments to the Social Security Act justifies a departure from the literal language of § 1903(f) and the Secretary's interpretation of that provision.

We cannot agree. Congress explicitly stated in § 1903(f) that federal reimbursement for benefits provided to the medically needy was available only if the income of those persons, after the deduction of incurred medical expenses, was less than 133⅓ percent of the state AFDC payment level. In specifically excepting the categorically needy from this rule, Congress recognized that this amount could be lower than categorical assistance eligibility levels. There is no basis in either the statute or the legislative history for appellees' argument that Congress implicitly "assumed" that those States in which 133⅓ percent of the AFDC payment level was less than the applicable standard of need simply would not provide assistance to the medically needy. Even if this were

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affected the categorically needy. In any event, appellees contend that both bills were consistent with a comparability requirement.

true in 1967, the Medicaid program then was less than two years old; Congress was aware that many States were in the process of adopting Medicaid programs.[26] To assume that Congress was unaware that § 1903(f)—which applied only to the medically needy—could operate in those States—which Congress knew existed—in which 133⅓ percent of the AFDC payment amount was less than the applicable standard of need is to demean the intelligence of the Congress. We are not prepared to interpret a statute on the basis of an unsupported assumption that Congress had little idea of what it was doing.[27]

The literal and clear language of § 1903(f) does not conflict with any other provision of the Act. In both § 1902(a)(10) and § 1902(a)(17), see 79 Stat. 345–346, Congress required comparability among the various "categories" for which federal assistance was available, but these provisions did not require that the medically needy be treated comparably to the categorically needy in all respects. See n. 6, *supra*.[28] In-

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[26] See 1967 House Report, at 117–118.

[27] Moreover, appellees' "congressional ignorance" argument rests on another unsupportable premise. Appellees assume that the House bill—which they admit was vigorously debated—had a "comparable" effect on the categorically and the medically needy. That bill, however, did not propose an amendment to § 1902(a)(10) of the Act, 42 U. S. C. § 1396a (a)(10), which required that Medicaid coverage be provided to *all* the categorically needy. It is much more likely—in light of § 1902(a)(10)—that the House assumed that its proposed limits on federal participation in the Medicaid program would affect only the medically needy. See Hearings on H. R. 12080, *supra* n. 15, at 280 (describing the possibility that the House bill would affect the categorically needy as a "drafting error"). This assumption was made explicit by the Conference Committee, which chose the House standard but added—with little discussion—a direct exception for the categorically needy.

[28] Relying on 42 U. S. C. §§ 1396a(a)(10)(C)(i) and 1396a(a)(17), courts have concluded that certain treatment of the medically needy must be comparable to that afforded to the categorically needy. See *Caldwell* v. *Blum*, 621 F. 2d 491 (CA2 1980), cert. denied, 452 U. S. 909; *Fabula* v. *Burk*, 598 F. 2d 869 (CA4 1979); *Greklek* v. *Toia*, 565 F. 2d 1259 (CA2 1977), cert. denied *sub nom. Blum* v. *Toomey*, 436 U. S. 962; *Aitchison*

deed, such a broad comparability requirement would be inconsistent with the fact that Congress provided in 1965 that the medically needy could be excluded entirely from the Medicaid program. Moreover, § 1903(f) is not inconsistent with the congressional intent, see n. 7, *supra*, that medical expenses be considered in determining, where appropriate, an individual's eligibility for Medicaid. In § 1903(f) Congress determined that federal assistance would not be available for payments made to individuals whose income, after deduction of incurred medical expenses, was greater than 133⅓ percent of applicable state AFDC payments. Congress determined that, so long as an individual retained that level of income to meet basic needs, he need not receive reimbursement for medical expenses. That income level might appear unreasonably low, but it is the level that Congress chose. We find no inconsistency between § 1903(f) and § 1902(a)(17).

In sum, we see no reason to ignore the literal language of § 1903(f). Moreover, this analysis is consistent with the Secretary's interpretation of that statutory provision. "We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, *ante*, at 141. We hold that the discrimination challenged in this case is required by the Social Security Act.

IV

Appellees also contend—and the District Court held—that § 1903(f), as applied in Massachusetts, irrationally discriminates between the categorically and the medically needy.[29]

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v. *Berger*, 404 F. Supp. 1137 (SDNY 1975), aff'd, 538 F. 2d 307 (CA2 1976), cert. denied, 429 U. S. 890. Whatever the scope of the requirement of comparability between the categorically and the medically needy, it is clear that the Act does not require the income of medically needy persons—after the deduction of incurred medical expenses—to be at least comparable to that of the categorically needy.

[29] The discriminatory impact challenged in this case arises solely from the fact that Massachusetts has chosen to supplement SSI payments to an extent that exceeds 133⅓ percent of state AFDC payment levels. It is not

The unfairness of the statute stems from the fact that appellees receive less medical assistance, and have less income remaining for their nonmedical needs, than do SSI recipients. The unfairness is accentuated by the fact that the disfavored class consists largely of persons who worked and paid taxes to provide for their retirement while the favored class includes persons who may never have done so. Powerful equities unquestionably support the appellees' claim of unfair treatment.

A belief that an Act of Congress may be inequitable or unwise is of course an insufficient basis on which to conclude that it is unconstitutional. Moreover, the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected most harshly by its terms. *Califano* v. *Jobst*, 434 U. S. 47. In this case, Congress has differentiated between the categorically needy—a class of aged, blind, disabled, or dependent persons who have very little income—and other persons with similar characteristics who are self-supporting. Members of the former class are automatically entitled to Medicaid; members of the latter class are not eligible unless a State elects to provide benefits to the medically needy and unless their income, after consideration of medical expenses, is below state standards of eligibility.[30]

According to the congressional scheme, then, the medically needy may be excluded entirely from the Medicaid program. Before considering the constitutional constraints that may exist if a State chooses to provide benefits to that class, it is appropriate to confront the more basic question whether the

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disputed that 133⅓ percent of the Massachusetts AFDC payment level is higher than federal SSI benefit levels. See 45 Fed. Reg. 31782 (1980); 46 Fed. Reg. 27076 (1981).

[30] Although the arguments in this case have focused on two classes, in fact there are three: (1) the categorically needy; and (2) all others, (a) some of whom have medical expenses that reduce their remaining income to a level that qualifies them as medically needy, and (b) some of whom are neither categorically needy nor medically needy.

optional character of the program for the medically needy is itself constitutionally permissible.

In establishing public assistance programs, Congress often has determined that the Federal Government cannot finance a program that provides meaningful benefits in equal measure to everyone. Both federal and state funds available for such assistance are limited. In structuring the Medicaid program, Congress chose to direct those limited funds to persons who were most impoverished and who—because of their physical characteristics—were often least able to overcome the effects of poverty. The legislative history of the 1965 Amendments makes clear that this group was not chosen for administrative convenience. "These people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people."[31] A decision to allocate medical assistance benefits only to the poor does not itself violate constitutional principles of equality; in terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same. It is rational to distribute public assistance benefits on the basis of the income and resources available to potential recipients.

In choosing to require coverage only for the categorically needy, Congress permitted States to exclude from the program many persons who—by reason of large medical expenses—often were just as much in need of medical assistance as the categorically needy. Yet Congress found these persons "less needy." 1965 House Report, at 66. By reason of the greater income available to them, as a class these persons generally are better able to provide for their medical needs. In the legislative history of the 1967 Amendments, see *supra*, at 577–580, and n. 14, Congress noted that these persons often are able to prepare for future medical expenses

[31] 1965 House Report, at 66.

through private insurance or through participation in the Medicare program.

In *Fullington* v. *Shea*, 404 U. S. 963, this Court affirmed a decision of a three-judge District Court holding that it was constitutional for the State of Colorado to provide benefits to the categorically needy but not to the medically needy. We decided *Fullington* summarily. It is clear that a decision to allocate scarce assistance benefits on the basis of an assumption that persons with greater incomes generally are better able to prepare for future medical needs is not inconsistent with constitutional principles of equal treatment. In other words, it is rational to define need on the basis of income, even though some persons with greater income—who have been unable or unwilling to save enough of their earnings to prepare for future medical needs—may actually be in greater need of assistance than those with less gross income. Although some "medically needy" persons have less income available for nonmedical expenses than those who receive categorical assistance, the broad legislative classification does not involve the type of arbitrariness that is constitutionally offensive.[32]

Appellees do not challenge the decision in *Fullington*. They do not contend that it is irrational to deny benefits entirely to the medically needy. Thus, they do not challenge the line drawn by Congress to separate the class that receives favored treatment from the class that does not. Appellees attack only the manner in which one of the separate

[32] See *Schweiker* v. *Wilson*, 450 U. S. 221, 238 ("This Court has granted a 'strong presumption of constitutionality' to legislation conferring monetary benefits, *Mathews* v. *De Castro*, 429 U. S., at 185, because it believes that Congress should have discretion in deciding how to expend necessarily limited resources"). The fact that the recipient of a governmental benefit—such as an indigent defendant who is represented by a public defender—may in some cases be better off after receiving the benefit than a wealthier person who did not qualify to receive it does not undermine the validity of the basis for determining eligibility.

classes is affected by the program. They argue that if medical benefits are made available to a class of persons who are not categorically needy, it is constitutionally impermissible to deny them benefits if their income, after the deduction of incurred medical expenses, is lower than that of an individual who receives public assistance.

In view of the unchallenged decision in *Fullington*, appellees' constitutional argument is self-defeating. The injury that they regard as inconsistent with constitutional principles of equal treatment could be avoided by denying them *all* Medicaid benefits, thus placing them in a worse position financially than they are in now. No interest in "equality" could be furthered by such a result. If a State may deny all benefits to the medically needy—while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not—a State surely may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance.

The validity of the distinction between the categorically needy and the medically needy is not undermined by § 1903(f), because the impact of that provision falls entirely on persons who are not within the categorically needy class. See n. 30, *supra*. The function of the 133⅓-percent AFDC payment rule is to place a limit on the availability of reimbursement for potential members of the "medically needy" class. That rule prevents some persons (although not the appellees) from qualifying as medically needy; it also determines the extent to which the medically needy are reimbursed for their medical expenses. Yet appellees do not challenge the fact that, among persons who do not receive public assistance, some are treated differently from others. In other words, they do not complain of any discrimination within the class (all persons who are not categorically needy)

in which the rule performs its entire function.[33] Nor do they argue that Congress chose an eligibility level that is unrelated to ability to provide for medical needs.

The fact that Massachusetts, unlike the State of Colorado in *Fullington*, has provided Medicaid benefits to the medically needy—and in doing so has defined eligibility for persons who are not categorically needy on the basis of incurred medical expenses—does not force it to make immediate medical need the sole standard in its entire Medicaid program. Massachusetts in essence has determined that those individuals whose gross income is greater than public assistance levels are ineligible for Medicaid, *unless medical expenses in any computation period reduce available income to 133⅓ percent of the state AFDC payment level.* By adding the qualifying clause, which the State of Colorado did not, Massachusetts did not offend any constitutional interest in equality. Accordingly, without endorsing the wisdom of the particular standard that Congress selected—a matter that is not for us to consider—we conclude that it violates no constitutional command. The judgment of the District Court is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[33] The fact that the amount of benefits payable to persons within the medically needy class is determined on the basis of income remaining *after* medical expenses have been incurred does not impeach the rationality of defining the basic distinction between the categorically needy and all others on the basis of income *before* medical expenses are considered.

SCHMIDT ET AL., DBA SCHMIDT & POLLARD *v.* OAKLAND UNIFIED SCHOOL DISTRICT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1444. Decided June 21, 1982

Held: In affirming the District Court's judgment upholding the constitutionality of the Oakland School District's affirmative-action plan requiring that in order to be considered "responsible" bidders, eligible to be awarded certain School District contracts, general contractors must use minority-owned businesses for at least 25 percent of the total bid, the Court of Appeals abused its discretion in declining to resolve a pendent state-law claim that the affirmative-action plan was invalid under California law. If the plan was invalid under state law, the Court of Appeals need not have reached the federal constitutional claim.

Certiorari granted; 662 F. 2d 550, vacated and remanded.

PER CURIAM.

California Educ. Code Ann. § 39640 (West Supp. 1982) requires school districts to award any contracts for work involving more than $12,000 to the "lowest responsible bidder." For projects over $100,000, the Oakland School District requires that to be considered responsible, general contractors must use minority-owned businesses for at least 25 percent of the dollar amount of the total bid. Petitioners submitted the low bid for an advertised project but were disqualified under the School District plan as not being responsible. They brought this action claiming damages and asserting that the affirmative-action plan violated not only the Federal Constitution but also state law. The Court of Appeals affirmed a judgment of the District Court upholding the plan on constitutional grounds. 662 F. 2d 550 (1981). Although the Court of Appeals acknowledged that under one of its prior decisions, the plan at issue might be invalid under state law, it declined to decide the state-law question since it was a sen-

sitive matter and petitioners could present it to the state courts.

If the affirmative-action plan is invalid under state law, the Court of Appeals need not have reached the federal constitutional issue. Nevertheless, the Court of Appeals declined to resolve the pendent state-law claim. Under *Hagans* v. *Lavine*, 415 U. S. 528, 546 (1974), and *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), this was an abuse of discretion in the circumstances of this case.

We accordingly grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

So ordered.

Reporter's Note

Orders commencing with June 21, 1982, begin with page 1127. The preceding orders in 457 U. S., from June 7 through June 17, 1982, were reported in Part 1, at 1101–1127. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 79-6180. RAYSOR *v.* STERN, ADMINISTRATOR, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, ET AL., 446 U. S. 942; and

No. 81-5333. RAYSOR *v.* GABBEY ET AL., 454 U. S. 1100. Motion for leave to file petition for rehearing denied.

JUNE 17, 1982

Miscellaneous Order

No. A-1086. ASSARSSON *v.* UNITED STATES. Application for stay of extradition and bail, presented to JUSTICE STEVENS, and by him referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

JUNE 21, 1982

Appeals Dismissed

No. 81-1589. HUNT *v.* COLLINS. Appeal from Sup. Ct. Ga. dismissed for want of properly presented federal question. Reported below: 248 Ga. 611, 287 S. E. 2d 216.

No. 81-1999. SEYMOUR NATIONAL BANK, AS GUARDIAN FOR O'SULLIVAN, ET AL. *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. ——, 428 N. E. 2d 203.

Certiorari Granted—Vacated and Remanded. (See also No. 81-1444, *ante*, p. 594.)

No. 81-1736. UNITED STATES *v.* SHARPE ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ross*, 456 U. S. 798 (1982). Reported below: 660 F. 2d 967.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In *United States* v. *Ross*, 456 U. S. 798, we addressed the question "whether, in the course of a legitimate warrantless

379-674 O - 83 - 24

search of an automobile, police are entitled to open containers found within the vehicle." *Id.*, at 817. We held that the scope of a legitimate warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. The issue presented in this case is whether a warrantless search was itself legitimate. Since our opinion in *United States* v. *Ross* sheds no light on the proper disposition of the case, I respectfully dissent.

No. 81-1496. SPIESS ET AL. *v.* C. ITOH & CO. (AMERICA), INC. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sumitomo Shoji America, Inc.* v. *Avagliano, ante*, p. 176. Reported below: 643 F. 2d 353.

No. 81-1761. ECKERD DRUGS, INC., ET AL. *v.* BROWN ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *General Telephone Co. of Southwest* v. *Falcon, ante*, p. 147. Reported below: 663 F. 2d 1268 and 669 F. 2d 913.

No. 81-1849. UNITED STATES *v.* CURRIE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Goodwin, ante*, p. 368. Reported below: 667 F. 2d 1251.

Miscellaneous Orders

No. A-1054. FLORIDA BUSINESSMEN FOR FREE ENTERPRISE ET AL. *v.* CITY OF HOLLYWOOD ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE REHNQUIST and JUSTICE STEVENS took no part in the consideration or decision of this application.

No. — - ——. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* TAXATION WITH REPRESENTATION OF WASHINGTON. Motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene as party appellants denied. Motion of American Legion for leave to intervene as a party appellee denied. Motion of Veterans of Foreign Wars of the United States for leave to intervene denied. JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would defer further consideration of these motions to the docketing and consideration of the jurisdictional statement.

No. A–1064. HOWELL & HOWELL, INC., ET AL. *v.* LOCAL UNION NO. 118, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES. Application for injunction pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

No. A–1084. BROOKS ET AL. *v.* WINTER, GOVERNOR OF MISSISSIPPI, ET AL. D. C. N. D. Miss. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

No. D–270. IN RE DISBARMENT OF MORITZ. Andrew Bruce Moritz, of San Diego, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on May 3, 1982 [456 U. S. 957], is hereby discharged.

No. 81–1044. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS. C. A. D. C. Cir. [Certiorari granted, 455 U. S. 1015.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80–1190. PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.; and

No. 80–1193. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* SWINT ET AL., 456 U. S. 273. Motion of respondents Louis Swint and Willie James Johnson for leave to proceed *in forma pauperis, nunc pro tunc,* denied.

No. 80–2128. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* HENSLEY, 456 U. S. 904. Motion of respondent for approval of attorney's fees denied without prejudice to applying for the relief in the United States Court of Appeals for the District of Columbia Circuit. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 81–1489. XEROX CORP. *v.* COUNTY OF HARRIS, TEXAS, ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. [Probable jurisdiction noted, 456 U. S. 913.] Motion of appellees for divided argument and for additional time for oral argument denied.

No. 81–6793. IN RE JONES. Petition for writ of habeas corpus denied.

No. 81–6602. IN RE SMILEY; and

No. 81–6611. IN RE SCOTT. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 81–731. ARKANSAS ELECTRIC COOPERATIVE CORP. *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Appeal from Sup. Ct. Ark. Probable jurisdiction noted. Reported below: 273 Ark. 170, 618 S. W. 2d 151.

No. 81–1839. MINNEAPOLIS STAR & TRIBUNE CO. *v.* MINNESOTA COMMISSIONER OF REVENUE. Appeal from Sup. Ct. Minn. Probable jurisdiction noted. Reported below: 314 N. W. 2d 201.

No. 81-2057. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL. Appeal from D. C. N. J. Probable jurisdiction noted. Reported below: 535 F. Supp. 978.

No. 81-1863. UNITED STATES ET AL. *v.* GRACE ET AL. Appeal from C. A. D. C. Cir. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 214 U. S. App. D. C. 375, 665 F. 2d 1193.

Certiorari Granted

No. 81-857. MARTINEZ, AS NEXT FRIEND OF MORALES *v.* BROCKETTE, TEXAS COMMISSIONER OF EDUCATION, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 648 F. 2d 425.

No. 81-1938. UNITED STATES *v.* BAGGOT. C. A. 7th Cir. Certiorari granted. Reported below: 662 F. 2d 1232.

No. 81-1966. BELKNAP, INC. *v.* HALE ET AL. Ct. App. Ky. Certiorari granted.

No. 81-1802. UNITED STATES *v.* KNOTTS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 662 F. 2d 515.

No. 81-1983. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CAMPBELL. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 665 F. 2d 48.

No. 81-2101. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. Motion of respondents Terri Lee Halderman et al. for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 673 F. 2d 647.

No. 81-1945. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ET AL. C. A. 9th Cir. Certiorari granted limited to the following questions: Whether petitioners' challenges to the provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code Ann. §§ 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for high-level nuclear waste, are ripe for judicial review, and whether §§ 25524.1(b) and 25524.2 are pre-empted by the Atomic Energy Act of 1954, 42 U. S. C. § 2011 *et seq.* Reported below: 659 F. 2d 903.

Certiorari Denied

No. 81-1552. BINDER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81-1679. CASSEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 969.

No. 81-1682. SCACCHETTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 643.

No. 81-1699. EARLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81-1703. LAMBERT *v.* WATTIGNY. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 408 So. 2d 1126.

No. 81-1749. WILSHIRE OIL COMPANY OF TEXAS *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 3d Cir. Certiorari denied. Reported below: 668 F. 2d 732.

No. 81-1791. GROUP LIFE & HEALTH INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 1042.

No. 81-1793. RAGUSA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 696.

No. 81-1804. RCA CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 664 F. 2d 881.

No. 81-1811. SLATER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 732.

No. 81-1821. SUPER EXCAVATORS, INC. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 674 F. 2d 592.

No. 81-1868. COUNCIL OF PUBLIC UTILITY MAILERS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1186.

No. 81-1897. ANTHONY *v.* UNITED STATES ET AL.; and ANTHONY *v.* WEST, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 10th Cir. Certiorari denied. Reported below: 667 F. 2d 870 (first case); 672 F. 2d 796 (second case).

No. 81-1907. REGILIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 669 F. 2d 1169.

No. 81-1934. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 889.

No. 81-1944. PACIFIC LEGAL FOUNDATION ET AL. *v.* STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 903.

No. 81-1967. CANNON ET AL. *v.* CONSOLIDATED RAIL CORP. ET AL.; and

No. 81-1992. UNITED TRANSPORTATION UNION *v.* CONSOLIDATED RAIL CORP. ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 535 F. Supp. 697.

No. 81-1968. LIBERATORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 669 F. 2d 391.

No. 81-1971. TRUSTEES OF THE FIRST BAPTIST CHURCH OF SILVER SPRING, MARYLAND *v.* SUPERVISOR OF ASSESSMENTS OF MONTGOMERY COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 50 Md. App. 751.

No. 81-1979. SLIWOO *v.* UNITED STATES; and
No. 81-6586. MAZZIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81-1982. SWOBODA, PERSONAL REPRESENTATIVE OF THE ESTATE OF SWOBODA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 326.

No. 81-1994. BULLOCK *v.* ADAMS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 379, 430 N. E. 2d 534.

No. 81-2000. THOMAS MERTON CENTER *v.* ROCKWELL INTERNATIONAL CORP. ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 460, 442 A. 2d 213.

No. 81-2002. STALLINGS *v.* FLETCHER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1223.

No. 81-2009. YEO *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 103 Mich. App. 418, 302 N. W. 2d 883.

No. 81-2028. ZISOOK ET AL. *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 321, 430 N. E. 2d 1037.

No. 81-2036. BENNETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 1114.

No. 81-2043. OIL TRANSPORT CO. ET AL. *v.* UNION OF TRANSPORTATION EMPLOYEES. C. A. 5th Cir. Certiorari denied. Reported below: 668 F. 2d 821.

No. 81-2047. BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS FOR TEXAS, ET AL. *v.* BRIGGS ET AL. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 623 S. W. 2d 508.

No. 81-2086. GREEN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 671 F. 2d 46.

No. 81-2092. BONKOWSKY *v.* BONKOWSKY. Sup. Ct. Ohio. Certiorari denied. Reported below: 69 Ohio St. 2d 152, 431 N. E. 2d 998.

No. 81-2133. WEINGARTNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81-2134. BENAVIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1255.

No. 81-2148. QUINTANA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 296.

No. 81-2175. BIGLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 174.

No. 81-2177. BELTEMPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 675 F. 2d 472.

No. 81-6089. PETSCHEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 2d 515.

No. 81-6296. JENNINGS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 431 A. 2d 552.

No. 81-6375. UDZIELA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 671 F. 2d 995.

No. 81-6380. LUPO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 652 F. 2d 723.

No. 81-6383. WILSON *v.* TILLMAN, JUDGE, CIRCUIT COURT OF ST. LOUIS CITY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 706.

No. 81-6408. DOE *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 97 N. M. 263, 639 P. 2d 72.

No. 81-6415. GREEN *v.* UNITED STATES PROBATION OFFICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81-6444. MEINSTER *v.* UNITED STATES; and
No. 81-6445. MYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 971.

No. 81-6448. LYONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 77.

No. 81-6472. CABALLERY *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 673 F. 2d 43.

No. 81-6491. STEEDMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 2d 69.

No. 81-6591. JENKINS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81-6592. DODSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 4 Ark. App. 1, 626 S. W. 2d 624.

No. 81-6600. SAWYER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 297 Pa. Super. 517, 441 A. 2d 449.

No. 81-6603. ADAMS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-6604. FISHER ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 962, 639 P. 2d 743.

No. 81-6608. WOODEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 81-6609. RAWLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 436.

No. 81-6614. HISHAW *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81-6617. WOODS, AKA EASON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 1200, 434 N. E. 2d 1202.

No. 81-6618. TAVARES *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 385 Mass. 140, 430 N. E. 2d 1198.

No. 81-6619. JOHNSON *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 693.

No. 81-6620. HOLSEY *v.* CIRCUIT COURT FOR WASHINGTON COUNTY. Ct. App. Md. Certiorari denied.

No. 81-6623. BENNETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 409 So. 2d 936.

No. 81-6627. JORDEN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81-6630. HOOVER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 81-6634. CRAWFORD *v.* LITTLE. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1200, 426 N. E. 2d 1286.

No. 81-6635. DARROCH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 305 N. C. 196, 287 S. E. 2d 856.

No. 81-6637. MOORE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 412 So. 2d 487.

No. 81-6638. RUDMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-6642. WILBURN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-6644. RODGERS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1326.

No. 81-6645. RITTER *v.* RITTER. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81-6649. BENTLEY *v.* RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1336.

No. 81-6650. ARMENTO *v.* SCURR, WARDEN, IOWA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 705.

No. 81-6653. SMITH *v.* INLAND STEEL CO. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 700.

No. 81-6656. MA *v.* FIRST NATIONAL CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 81-6668. KELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1312.

No. 81-6670. MCKINSTRY *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 81-6673. OCCHINO *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 675 F. 2d 220.

No. 81-6684. VAN ORMAN *v.* FIRST NATIONAL BANK OF SOUTH CENTRAL MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1225.

No. 81-6685. WILLIAMS *v.* PEPSI-COLA BOTTLING COMPANY OF ST. LOUIS, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81-6696. CARDENAS *v.* CANALE. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 183.

No. 81-6698. CROSS *v.* CITY OF TULSA. C. A. 10th Cir. Certiorari denied.

No. 81-6721. CAMOSCIO *v.* MASSACHUSETTS BOARD OF REGISTRATION IN PODIATRY ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 385 Mass. 1002, 430 N. E. 2d 1212.

No. 81-6730. QUITIQUIT *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 81-6748. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 2d 675.

No. 81-6750. JOHNSTON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 922.

No. 81-6757. CARRIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 300.

No. 81-6767. BUSSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 81-6786. BARNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 674 F. 2d 729.

No. 81-1988. CONSOLIDATED MOTOR INNS *v.* BVA CREDIT CORP. C. A. 11th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 666 F. 2d 189.

No. 81-2085. GUIDE PUBLISHING CO., T/A JOURNAL AND GUIDE *v.* THOMAS. Sup. Ct. Va. Motion of American Newspaper Publishers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 81-6422. GENSON *v.* RIPLEY ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81-6570. ARANGO *v.* FLORIDA. Sup. Ct. Fla.; and
No. 81-6598. KRIER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81-6570, 411 So. 2d 172; No. 81-6598, 249 Ga. 80, 287 S. E. 2d 531.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81-6594. POPE *v.* THONE, GOVERNOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 671 F. 2d 298.

Rehearing Denied

No. 81-160. MISSISSIPPI ET AL. *v.* PHILLIPS ET AL., 456 U. S. 960;
No. 81-181. JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF MISSISSIPPI ET AL. *v.* PHILLIPS ET AL., 456 U. S. 960; and
No. 81-6421. WESTOVER *v.* RICHENBERGER ET AL., 456 U. S. 964. Petitions for rehearing denied.

No. 27, Orig. OHIO *v.* KENTUCKY, 456 U. S. 958; and No. 81, Orig. KENTUCKY *v.* INDIANA ET AL., 456 U. S. 958. Petition of Dorothy Cole et al. for rehearing on denial of leave to intervene denied.

No. 80-1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES, 456 U. S. 107. Petition of Kenneth L. Bell for rehearing denied.

No. [illegible] APPLEBY *v.* WTIC-FM RADIO STATION ET AL. [illegible] 53. Motion for leave to file petition for rehearing [illegible].

JUNE 22, 1982

Dismissal Under Rule 53

[illegible] SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ROSOFSKY. D. C. E. D. N. Y. [Probable jurisdiction noted, 456 U. S. 959.] Appeal dismissed under this Court's Rule 53.

U.S. GOVERNMENT PRINTING OFFICE : 1983 O—379-674

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

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INDEX

(Vol. 457 U. S., Part 3)

ABSOLUTE IMMUNITY OF FEDERAL OFFICIALS FROM SUIT. See **Jurisdiction; President and Presidential Aides.**

ACCESS OF PRESS AND PUBLIC TO CRIMINAL TRIALS. See **Constitutional Law; Mootness.**

ADMIRALTY.

Jurisdiction of federal courts—Collision between pleasure boats.—A complaint alleging a collision between two pleasure boats on navigable waters states a claim within admiralty jurisdiction of federal courts, there being no requirement that maritime activity, necessary for such jurisdiction, be an exclusively commercial one. Foremost Ins. Co. v. Richardson, p. 668.

ALABAMA. See **Confessions.**

ARBITRATION. See **Norris-La Guardia Act.**

ARRESTS. See **Confessions.**

ATTACHMENT. See **Civil Rights Act of 1871.**

BOAT COLLISIONS. See **Admiralty.**

BOOK CENSORSHIP IN SCHOOL LIBRARIES. See **Constitutional Law.**

CANDIDATES FOR PUBLIC OFFICE. See **Constitutional Law.**

CENSORSHIP OF SCHOOL LIBRARY BOOKS. See **Constitutional Law.**

CIVIL RIGHTS ACT OF 1871.

Attachment—Creditors' conduct—Color of state law.—In petitioner debtor's federal-court action under 42 U. S. C. § 1983 alleging that respondent creditors had acted jointly with State to deprive petitioner of his property without due process when respondents had obtained a writ of attachment of petitioner's property in their state-court action on debt, which attachment was later dismissed for respondents' failure to comply with state statute, petitioner presented a valid claim under § 1983 arising from respondents' actions under color of state law insofar as he challenged state

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CIVIL RIGHTS ACT OF 1871—Continued.

statute as being procedurally unconstitutional but not insofar as he alleged only abuse by respondents of state law. Lugar v. Edmondson Oil Co., p. 922.

Private school—Discharge of employees—Color of state law.—A private school for maladjusted high school students who were mostly referred to school by city or state authorities, which school received public funds for at least 90% of its operating budget and was subject to state regulations and public contracts covering various matters but imposing few specific personnel requirements, did not act under color of state law in discharging petitioner teachers and a vocational counselor, who thus could not maintain action against school under 42 U. S. C. § 1983 for alleged violation of their constitutional rights. Rendell-Baker v. Kohn, p. 830.

CLOSING TRIAL TO PRESS AND PUBLIC DURING MINOR SEX-OFFENSE VICTIM'S TESTIMONY. See **Constitutional Law; Mootness.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Norris-La Guardia Act.**

COLLISIONS BETWEEN PLEASURE BOATS. See **Admiralty.**

COLOR OF STATE LAW. See **Civil Rights Act of 1871.**

COMMERCE CLAUSE. See **Constitutional Law.**

CONFESSIONS.

Illegal arrest—Causal connection with confession.—Where petitioner was arrested on a grocery-store robbery charge without a warrant or probable cause, was given *Miranda* warnings, fingerprinted, questioned, and placed in a lineup, and signed a confession after being told that his fingerprints matched those on grocery items handled by a participant in robbery and after a short visit with his girlfriend, confession should have been suppressed from evidence at state-court trial as fruit of an illegal arrest, there being no meaningful intervening event to break causal connection between illegal arrest and confession. Taylor v. Alabama, p. 687.

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871; Confessions; Mootness; President and Presidential Aides; Standing to Sue.**

Commerce Clause—Tender offers—Validity of Illinois statute.—Illinois statute imposing requirements on tender offerors seeking to acquire stock of "target company"—defined as a corporation of which Illinois shareholders owned 10% of class of securities subject to takeover offer or for which other specified conditions were met—is unconstitutional under Commerce Clause as imposing burdens on interstate commerce that are excessive in light of local interests statute purported to further. Edgar v. MITE Corp., p. 624.

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CONSTITUTIONAL LAW—Continued.

Due Process—Medicaid benefits—Transfer of nursing-home patients.—In an action by nursing-home Medicaid patients who alleged that their due process rights were violated when nursing home decided to transfer them to a lower level of care in another facility, resulting in administrative hearings and local and state officials' decisions to discontinue Medicaid benefits unless respondents accepted transfer, respondents failed to establish "state action" in nursing-home decisions to discharge or transfer Medicaid patients to lower levels of care and thus failed to prove any violation of rights secured by Fourteenth Amendment. Blum v. Yaretsky, p. 991.

Equal protection of the laws—Restrictions on candidacy for public offices—Validity of Texas law.—Provisions of Texas Constitution requiring any state or federal officeholder to complete his current term of office if it overlaps Texas Legislature's term before he may be eligible to serve in state legislature and providing that, if holders of certain state and county offices whose unexpired term exceeds one year become candidates for any other state or federal office, it shall constitute an automatic resignation from his current position, do not violate Equal Protection Clause of Fourteenth Amendment or First Amendment of Federal Constitution. Clements v. Fashing, p. 957.

Freedom of speech—School libraries—Censorship.—In respondent students' action for declaratory and injunctive relief against petitioner Board of Education's removal from high school and junior high school libraries of certain books that Board characterized as anti-American, anti-Christian, anti-Semitic, and "just plain filthy"—respondents alleging that Board's action violated their First Amendment rights—Court of Appeals' judgment reversing District Court's grant of summary judgment for petitioners, and remanding for a trial on merits, is affirmed. Board of Education v. Pico, p. 853.

Right of access to criminal trials—Closing trial during minor sex-offense victim's testimony—Validity of state statute.—A Massachusetts statute requiring, under all circumstances, exclusion of press and public during testimony of minor victim at sex-offense trial violates right of access to criminal trials under First Amendment; statute cannot be justified on basis of State's interests in protecting minor victims of sex crimes from further trauma and embarrassment or in encouraging such victims to come forward and testify in a truthful and credible manner. Globe Newspaper Co. v. Superior Court, p. 596.

CRIMINAL LAW. See **Confessions; Constitutional Law; Mootness.**

CUSTODIAL POLICE INTERROGATION. See **Confessions.**

DISCHARGE OF PRIVATE SCHOOL TEACHERS. See **Civil Rights Act of 1871.**

DUE PROCESS. See **Civil Rights Act of 1871; Constitutional Law; Standing to Sue.**

BEST COPY AVAILABLE

ELECTIONS. See **Constitutional Law.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1871; Norris-La Guardia Act.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law.**

EVIDENCE. See **Confessions.**

EXCLUDING PRESS AND PUBLIC DURING MINOR SEX-OFFENSE VICTIM'S TESTIMONY. See **Constitutional Law; Mootness.**

FEDERAL OFFICIALS' IMMUNITY FROM SUIT. See **Jurisdiction; President and Presidential Aides.**

FIFTH AMENDMENT. See **Confessions.**

FINGERPRINTS. See **Confessions.**

FIRST AMENDMENT. See **Constitutional Law; Mootness.**

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1871; Constitutional Law; Mootness; Standing to Sue.**

FREEDOM OF SPEECH. See **Constitutional Law.**

FRUITS OF ILLEGAL ARREST. See **Confessions.**

GOVERNMENT OFFICIALS. See **Constitutional Law; Jurisdiction; President and Presidential Aides.**

HIGH SCHOOL LIBRARY CENSORSHIP. See **Constitutional Law.**

ILLINOIS. See **Constitutional Law; Mootness.**

IMMUNITY OF FEDERAL OFFICIALS FROM SUIT. See **Jurisdiction; President and Presidential Aides.**

INDIGENTS. See **Constitutional Law; Standing to Sue.**

INJUNCTIONS. See **Norris-La Guardia Act.**

INTERSTATE COMMERCE. See **Constitutional Law.**

JUNIOR HIGH SCHOOL LIBRARY CENSORSHIP. See **Constitutional Law.**

JURISDICTION. See also **Admiralty.**

Supreme Court—President's immunity from damages liability—Mootness.—Where petitioner former President took collateral appeal to Court of Appeals from District Court's decision that he was not entitled to absolute immunity from damages liability in respondent's action for alleged wrongful discharge from Government employment, Supreme Court had jurisdiction to determine immunity question after Court of Appeals improperly dismissed appeal for lack of jurisdiction, and controversy was not.

JURISDICTION—Continued.

mooted by parties' agreement to liquidate damages entered into after filing of petition for certiorari and respondent's opposition thereto. Nixon v. Fitzgerald, p. 731.

LABOR UNIONS. See **Norris-La Guardia Act.**

LEGISLATORS. See **Constitutional Law.**

LIBRARY CENSORSHIP. See **Constitutional Law.**

LONGSHOREMEN UNIONS' REFUSAL TO HANDLE SOVIET UNION CARGO. See **Norris-La Guardia Act.**

MARITIME COLLISIONS. See **Admiralty.**

MASSACHUSETTS. See **Civil Rights Act of 1871; Constitutional Law; Mootness.**

MEDICAID. See **Constitutional Law; Standing to Sue.**

MOOTNESS. See also **Jurisdiction.**

Closing trial during minor sex-offense victim's testimony—Validity of trial court's order—Completion of trial pending appellate review.—Controversy arising from newspaper publisher's challenge to constitutionality of Massachusetts trial court's order excluding press and public from courtroom during testimony of minor victim at sex-offense trial is not rendered moot within meaning of Art. III by fact that exclusion order expired with completion of trial, resulting in acquittal, while controversy was pending before Massachusetts Supreme Judicial Court. Globe Newspaper Co. v. Superior Court, p. 596.

Tender offers—Action challenging validity of Illinois statute—Withdrawal of tender offer.—Where District Court granted declaratory and injunctive relief in corporation tender offeror's action challenging validity of Illinois statute which imposed restrictions as to tender offers, but corporation thereafter withdrew tender offer and decided not to make another offer, case is not moot since a state official indicated his intention to enforce statute against corporation and thus a reversal of District Court's judgment would expose corporation to civil and criminal liability for making an offer in violation of statute. Edgar v. MITE Corp., p. 624.

NATIONAL LABOR RELATIONS ACT. See **Norris-La Guardia Act.**

NAVIGABLE WATERS. See **Admiralty.**

NEEDY PERSONS. See **Constitutional Law; Standing to Sue.**

NEWS MEDIA'S RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law; Mootness.**

NEW YORK. See **Constitutional Law; Standing to Sue.**

NORRIS-LA GUARDIA ACT.

Injunction—Longshoremen unions' work stoppage—Political motivation.—Act's prohibition of injunctions against strikes arising from "labor dispute" applies to action by employers to enjoin, pending arbitration, longshoremen unions' refusal to handle cargo from or destined for Soviet Union, notwithstanding work stoppage was politically motivated as a protest of Soviet Union's intervention in Afghanistan; nor may strike be enjoined pending arbitration on asserted ground that underlying dispute—unions' protest against Soviet Union—was arbitrable under no-strike clause of collective-bargaining agreement. Jacksonville Bulk Terminals, Inc. v. Longshoremen, p. 702.

NURSING HOMES. See **Constitutional Law; Standing to Sue.**

PLEASURE-BOAT COLLISIONS. See **Admiralty.**

POLICE INTERROGATION. See **Confessions.**

POLITICALLY MOTIVATED STRIKES. See **Norris-La Guardia Act.**

PRESIDENT AND PRESIDENTIAL AIDES. See also **Jurisdiction.**

Damages liability—Absolute immunity.—President is entitled to absolute immunity from damages liability predicated on his official acts, and thus respondent could not recover damages from petitioner for alleged illegal discharge of respondent from Government employment. Nixon v. Fitzgerald, p. 731.

Damages liability—Qualified immunity.—Presidential aides—like executive officials in general—are not entitled to absolute immunity from damages liability predicated on performance of their duties, but are generally entitled only to qualified immunity; to establish entitlement to absolute immunity, a Presidential aide must show that responsibilities of his office embraced a function so sensitive as to require absolute immunity and that he was discharging protected function when performing act for which liability is asserted. Harlow v. Fitzgerald, p. 800.

PRESS AND PUBLIC'S RIGHT TO ATTEND CRIMINAL TRIALS. See **Constitutional Law; Mootness.**

PRIVATE SCHOOLS. See **Civil Rights Act of 1871.**

PUBLIC OFFICIALS. See **Constitutional Law; Jurisdiction; President and Presidential Aides.**

QUALIFIED IMMUNITY OF FEDERAL OFFICIALS FROM SUIT. See **President and Presidential Aides.**

RESIGNATION FROM PUBLIC OFFICE. See **Constitutional Law.**

RIGHT OF ACCESS TO CRIMINAL TRIALS. See **Constitutional Law; Mootness.**

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SCHOOLS. See **Civil Rights Act of 1871; Constitutional Law.**

SECURITIES REGULATION. See **Constitutional Law; Mootness.**

SEPARATION OF POWERS. See **President and Presidential Aides.**

SEX-OFFENSE TRIALS. See **Constitutional Law; Mootness.**

SOCIAL SECURITY ACT. See **Constitutional Law; Standing to Sue.**

STANDING TO SUE.

Medicaid benefits—Transfer of nursing-home patients—Due process rights.—In an action by respondent nursing-home Medicaid patients who alleged violation of due process rights when nursing home decided that they should be transferred to a lower level of care in another facility, resulting in administrative hearings and local and state officials' decisions to discontinue Medicaid benefits unless respondents accepted transfer, respondents have standing to challenge procedural adequacy of facility-initiated discharges and transfers to lower levels of care, but do not have standing to seek adjudication as to procedures for transfers to higher levels of care. Blum v. Yaretsky, p. 991.

STATE ACTION. See **Civil Rights Act of 1871; Constitutional Law.**

STATE LEGISLATORS. See **Constitutional Law.**

STRIKES. See **Norris-La Guardia Act.**

SUPREME COURT. See **Jurisdiction.**

TAKEOVER BIDS. See **Constitutional Law; Mootness.**

TEACHERS. See **Civil Rights Act of 1871.**

TENDER OFFERS. See **Constitutional Law; Mootness.**

TEXAS. See **Constitutional Law.**

TRANSFER OF NURSING-HOME MEDICAID PATIENTS. See **Constitutional Law; Standing to Sue.**

UNIONS. See **Norris-La Guardia Act.**

VESSEL COLLISIONS. See **Admiralty.**

VIRGINIA. See **Civil Rights Act of 1871.**

WATERS. See **Admiralty.**

WELFARE BENEFITS. See **Constitutional Law; Standing to Sue.**

WORDS AND PHRASES.

"Labor dispute." § 4, Norris-La Guardia Act, 29 U. S. C. § 104. Jacksonville Bulk Terminals, Inc. v. Longshoremen, p. 702.

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CUMULATIVE TABLE OF CASES REPORTED

(Vol. 457 U. S., Parts 1, 2, and 3)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Adams; Bullock *v.*	1134
Adams *v.* Estelle	1136
Aikens; U. S. Postal Service Bd. of Governors *v.*	1129
Alabama; Bennett *v.*	1134,1137
Alabama *v.* Bracewell	1114
Alabama *v.* Bryars	1114
Alabama *v.* Daniels	1114
Alabama *v.* Davis	1114
Alabama *v.* Hill	1114
Alabama *v.* Horsley	1114
Alabama *v.* Ritter	1114
Alabama; Taylor *v.*	687
Alabama *v.* Wright	1114
Albano; Eatough *v.*	1119
Allen; Rudolph *v.*	1122
Amalgamated. For labor union, see name of trade.	
Anderson *v.* Anderson	1106
Anguiano *v.* California	1109
Anthony *v.* United States	1133
Anthony *v.* West	1133
Appleby *v.* WTIC–FM Radio Station	1141
Arango *v.* Florida	1140
Archer *v.* Rushen	1107

BEST COPY AVAILABLE

Page
Arizona *v.* Maricopa County Medical Society 332
Arkansas; Baxter *v.* 1118
Arkansas; Dodson *v.* 1136
Arkansas Electric Cooperative Corp. *v.* Arkansas Pub. Serv. Comm'n 1130
Arkansas Public Service Comm'n; Arkansas Elec. Coop. Corp. *v.* 1130
Arkansas Public Service Comm'n; Williams *v.* 1123
Armento *v.* Scurr 1138
Army and Air Force Exchange Service *v.* Gorman 1102
Arthur Phillips & Co.; Chamberlain *v.* 1118
Assarsson *v.* United States 1127
Atkins *v.* Greer 1123
Atlanta & West Point R. Co.; Thornton *v.* 1118
Attorney General; Hernandez *v.* 1110
Attorney General of Tex.; Cory *v.* 85
Attorney Registration & Discip. Comm'n, Ill. Sup. Ct.; Zisook *v.* 1134
Avagliano *v.* Sumitomo Shoji America, Inc. 176
Avagliano; Sumitomo Shoji America, Inc. *v.* 176
Bacon; Blum *v.* 132
Baggot; United States *v.* 1131
Bainter *v.* Wyrick 1122
Baker *v.* Washington 1108
Baldwin *v.* Blackburn 1112
Ball *v.* Engle 1121
Bantim; Escobar *v.* 1102
Barksdale *v.* Blackburn 1109
Barnes; Jones *v.* 1104
Barney *v.* United States 1139
Baxter *v.* Arkansas 1118
Beach *v.* Florida Bar 1101
Becker *v.* Ross 1108
Belknap, Inc. *v.* Hale 1131
Bell; Perini *v.* 1141
Beltempo *v.* United States 1135
Benavidez *v.* United States 1135
Bennett *v.* Alabama 1134,1137
Bentley *v.* Rushen 1138
Berger *v.* United States 1120
Bevens; Stacy *v.* 1107
Bezak *v.* Ohio 1122
Bigley *v.* United States 1135
Big Sky Toyota *v.* Toyota Motor Distributors, Inc. 1106
Billingsley *v.* Vann 1109
Binder *v.* Immigration and Naturalization Service 1132
Birden *v.* New York 1123

BEST COPY AVAILABLE

Page
Black *v.* East Ohio Gas Co. 1109
Blackburn; Baldwin *v.* 1112
Blackburn; Barksdale *v.* 1109
Blaubergs; Dinnan *v.* 1106
Bliss Dairy, Inc.; United States *v.* 1103
Blue Shield of Virginia *v.* McCready 465
Blum *v.* Bacon 132
Blum *v.* Yaretsky 991
Boag *v.* Raines 1123
Board of Ed., Island Trees Union Free School Dist. No. 26 *v.* Pico 853
Board of Ed. of Chicago; Johnson *v.* 52
Board of Governors, FRS; Wilshire Oil Co. of Texas *v.* 1132
Board of Regents of Fla.; Patsy *v.* 496
Bobbitt, *In re* 1103
Boehm, *In re* 1103
Boise Southern Co. of DeRidder, La.; Brand *v.* 1120
Bolyea *v.* Florida 1118
Bond; Joseph *v.* 1102
Bonkowsky *v.* Bonkowsky 1135
Borg Warner Corp. *v.* National Labor Relations Bd. 1105
Bracewell; Alabama *v.* 1114
Bragg *v.* Leverette 1123
Brand *v.* Boise Southern Co. of DeRidder, La. 1120
Briggs; Bullock *v.* 1135
Brockette; Martinez *v.* 1131
Brooks *v.* United States 1124
Brooks *v.* Winter 1129
Brown *v.* Bryant 1109
Brown; Eckerd Drugs, Inc. *v.* 1128
Brown *v.* Federal Election Comm'n 1111
Brown; Porcher *v.* 1104
Brown; Texas *v.* 1116
Brown *v.* United States 1108
Bryant; Brown *v.* 1109
Bryars; Alabama *v.* 1114
Buckhana *v.* Illinois 1122
Bullard; Estelle *v.* 1116
Bullock *v.* Adams 1134
Bullock *v.* Briggs 1153
Burlington Northern Inc. *v.* Henry 1101
Burlington Northern Inc. *v.* United States 1104
Burlington Northern Inc. *v.* Wilson 1120
Bussey *v.* United States 1139
Butler *v.* Rose 1107

BEST COPY AVAILABLE

Page
BVA Credit Corp.; Consolidated Motor Inns *v.* 1140
Caballery *v.* U. S. Parole Comm'n 1136
California; Anguiano *v.* 1109
California; Forrester *v.* 1107
California *v.* Grace Brethren Church 393
California; Harris *v.* 1111
California; Hopper *v.* 1126
California; Johnson *v.* 1108
California; Rivera *v.* 1123
California; Rudman *v.* 1138
California *v.* Texas 164
California; Wilburn *v.* 1138
California *ex rel.* State Lands Comm'n *v.* United States 273
Calzarano *v.* U. S. Postal Service 1124
Camoscio *v.* Massachusetts Bd. of Registration in Podiatry 1139
Campbell, *In re* 1116
Campbell *v.* Civiletti 1110
Campbell; Schweiker *v.* 1131
Canale; Cardenas *v.* 1139
Cannon *v.* Consolidated Rail Corp. 1133
Cardenas *v.* Canale 1139
Carlson; John *v.* 1124
Carpenters; Swanson-Dean Corp. *v.* 1105
Carrier *v.* United States 1139
Cassel *v.* United States 1132
Castro *v.* Texas Dept. of Human Resources 1119
Caterpillar Tractor Co.; Chicago Bridge & Iron Co. *v.* 1103
CBS Inc. *v.* Columbia Pictures Industries, Inc. 1118
Certain Named & Unnamed Undocumented Alien Children; Texas *v.* 202
Chamberlain *v.* Arthur Phillips & Co. 1118
Chatlos Systems, Inc.; National Cash Register Corp. *v.* 1112
Cheetwood & Davies; Williams *v.* 1101
Chevron Chemical Co.; Voluntary Purchasing Groups, Inc. *v.* 1126
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 1103
Chino Valley *v.* Prescott 1101
Circuit Court for Washington County; Holsey *v.* 1137
Cities Service Gas Co. *v.* Mobil Oil Corp. 1126
C. Itoh & Co. (America); Spiess *v.* 1128
City. See name of city.
Civiletti; Campbell *v.* 1110
Clayton *v.* Douglas 1109
Cleary; United States *v.* 1113
Clements *v.* Fashing 957
Click *v.* Idaho *ex rel.* Evans 1116

BEST COPY AVAILABLE

Page
Cobb *v.* Wainwright 1107
Collins; Hunt *v.* 1127
Collins *v.* Zant 1126
Colorado *v.* New Mexico 1103,1115
Columbia Pictures Industries, Inc.; CBS Inc. *v.* 1118
Commissioner; Diedrich *v.* 191
Commissioner; Hillsboro National Bank *v.* 1103
Commissioner; Kalita *v.* 1121
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Revenue of Alaska; Zobel *v.* 55
Commonwealth. See name of Commonwealth.
Community Television of Southern California *v.* Gottfried 1115
Compagnie des Bauxites de Guinee *v.* Insurance Corp. of Ireland 1105
Comptroller of Public Accounts for Tex. *v.* Briggs 1135
Connecticut *v.* Teal 440
Consolidated Motor Inns *v.* BVA Credit Corp. 1140
Consolidated Rail Corp.; Cannon *v.* 1133
Consolidated Rail Corp.; Transportation Union *v.* 1133
Controller of Cal. *v.* White 85
Conway *v.* United States 1121
Cook County; Starview Drive In Theatre, Inc. *v.* 1113
Cory *v.* White 85
Council of Public Utility Mailers *v.* U. S. Postal Service 1133
Country-Wide Ins. Co. *v.* Rodriguez 1118
County. See name of county.
Crawford *v.* Little 1137
Cross *v.* Tulsa 1139
Crow Tribe of Indians; Montana *v.* 1116
Cummins; Heritage Publishing Co. *v.* 1106
Currie; United States *v.* 1128
Daggett; Karcher *v.* 1131
Daniels; Alabama *v.* 1114
Daniels *v.* United States 1110
Darks *v.* United States 1125
Darroch *v.* North Carolina 1138
Davis; Alabama *v.* 1114
Davis *v.* Mississippi 1113
DeLucia *v.* United States 1107
Department of Justice; Kondrat *v.* 1120
Department of State; Kondrat *v.* 1121
DeVincent *v.* Putnam 1125
Diedrich *v.* Commissioner 191
Dinnan *v.* Blaubergs 1106

BEST COPY AVAILABLE

Page

Director of penal or correctional institution. See name or title of director.
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
Dodson *v.* Arkansas 1136
Doe *v.* New Mexico 1136
Doe; Plyler *v.* 202
Donald Schriver, Inc. *v.* National Labor Relations Bd. 1111
Donovan *v.* San Antonio Metropolitan Transit Authority 1102
Douglas; Clayton *v.* 1109
Douglas *v.* United States 1108
Drake *v.* Georgia 1111
Early *v.* United States 1132
Eason *v.* Illinois 1137
East Ohio Gas Co.; Black *v.* 1109
Eatough *v.* Albano 1119
Eckerd Drugs, Inc. *v.* Brown 1128
Edgar *v.* MITE Corp. 624
Edmondson Oil Co.; Lugar *v.* 922
Ellis; Holsey *v.* 1123
Engle; Ball *v.* 1121
Engle *v.* Hughes 1141
Engle *v.* Isaac 1141
Escobar *v.* Bantim 1102
Estelle; Adams *v.* 1136
Estelle *v.* Bullard 1116
Estelle; Jorden *v.* 1137
Estelle; Pietrowski *v.* 1123
Estelle; Rodgers *v.* 1138
Evans; Click *v.* 1116
Evans *v.* United States 1119
Everett; Williams *v.* 1126
Exxon Corp.; Matthews *v.* 1124
Falcon; General Telephone Co. of Southwest *v.* 147
Fashing; Clements *v.* 957
Federal Communications Comm'n; Fidelity Television, Inc. *v.* 1119
Federal Communications Comm'n *v.* Gottfried 1115
Federal Communications Comm'n; Multi-State Communications *v.* 1119
Federal Election Comm'n; Brown *v.* 1111
Federal Energy Regulatory Comm'n; Harvey *v.* 1105
Federal Energy Regulatory Comm'n; New England Power Co. *v.* 1117
Federal Energy Regulatory Comm'n; Texas *v.* 1105
Feliciano, *In re* 1115

BEST COPY AVAILABLE

Page
Fernandez-Uriarte *v.* United States 1121
Fidelity Television, Inc. *v.* Federal Communications Comm'n 1119
Finlay; Washington *v.* 1120
First National Bank of South Central Michigan; Van Orman *v.* 1139
First National Corp.; Ma *v.* 1138
Fisher *v.* Washington 1137
Fitzgerald; Harlow *v.* 800
Fitzgerald; Nixon *v.* 731
Fletcher; Stallings *v.* 1134
Florida; Arango *v.* 1140
Florida; Bolyea *v.* 1118
Florida; Jent *v.* 1111
Florida; Moore *v.* 1138
Florida; Speed *v.* 1118
Florida; Tibbs *v.* 31
Florida Bar; Beach *v.* 1101
Florida Businessmen for Free Enterprise *v.* Hollywood 1128
Florida Public Employees Relations Comm'n; Paschal *v.* 1109
Fogg; Olivo *v.* 1122
Foremost Ins. Co. *v.* Richardson 668
Forrester *v.* California 1107
Fowler; Gorrell *v.* 1113
Gabbey; Raysor *v.* 1127
Garcia *v.* San Antonio Metropolitan Transit Authority 1102
Garden State Bar Assn.; Middlesex County Ethics Committee *v.* . 393
Garrison; Johnson *v.* 1137
General Telephone Co. of Southwest *v.* Falcon 147
Genson *v.* Ripley 1140
George *v.* United States 1110
Georgia; Drake *v.* 1111
Georgia; Krier *v.* 1140
Gerald *v.* United States 1107
Gill *v.* Oklahoma 1109
Gillette Co. *v.* Miner 1116
Globe Newspaper Co. *v.* Superior Court, Norfolk County 596
Goodwin *v.* United States 1125
Goodwin; United States *v.* 368
Gopman *v.* United States 1123
Gordonsville Industries, Inc. *v.* National Labor Relations Bd. 1117
Gorman; Army and Air Force Exchange Service *v.* 1102
Gorrell *v.* Fowler 1113
Gotkin, *In re* 1102
Gottfried; Community Television of Southern California *v.* 1115
Gottfried; Federal Communications Comm'n *v.* 1115

BEST COPY AVAILABLE

Page
Governor of Idaho; Click *v.* 1116
Governor of Miss.; Brooks *v.* 1129
Governor of Neb.; Pope *v.* 1140
Grace; United States *v.* 1131
Grace Brethren Church; California *v.* 393
Grace Brethren Church *v.* United States 393
Grace Brethren Church; United States *v.* 393
Granholm; Johnson *v.* 1120
Green *v.* United States 1135
Green *v.* U. S. Probation Office 1136
Greer; Atkins *v.* 1123
Griffith Co. *v.* National Labor Relations Bd. 1105
Grounds *v.* Mobil Oil Corp. 1126
Group Life & Health Ins. Co. *v.* United States 1132
Guide Publishing Co. *v.* Thomas 1140
Gulf Trading & Transportation Co.; Vessel Hoegh Shield *v.* 1119
Haig; Thomas *v.* 1110
Halderman; Pennhurst State School and Hospital *v.* 1131
Hale; Belknap, Inc. *v.* 1131
Haley *v.* United States 1117
Halikas *v.* River Region Mental Health-Mental Retardation Bd. 1106
Harlow *v.* Fitzgerald 800
Harrington *v.* Tennessee 1110
Harris *v.* California 1111
Harris; Hudgins *v.* 1122
Harris County; Xerox Corp. *v.* 1130
Harrison *v.* United States 1121
Harvey *v.* Federal Energy Regulatory Comm'n 1105
Hatch *v.* Madsen 1112
Hathorn *v.* Lovorn 255
Helms; Joseph *v.* 1117
Henry; Burlington Northern Inc. *v.* 1101
Henry; Wainwright *v.* 1114
Hensel *v.* United States 1107
Hensley; Washington Metropolitan Area Transit Authority *v.* 1130
Heritage Homes of Attleboro, Inc. *v.* Seekonk Water Dist. 1120
Heritage Publishing Co. *v.* Cummins 1106
Hernandez *v.* Attorney General 1110
Hernandez *v.* United States 1125
Hill; Alabama *v.* 1114
Hillis *v.* Stephen F. Austin Univ. 1106
Hillsboro National Bank *v.* Commissioner 1103
Hilton; United States *ex rel.* Simmons *v.* 1110
Hishaw *v.* Oklahoma 1137

BEST COPY AVAILABLE

Page
Hogan; Schweiker *v.* 569
Hollywood; Florida Businessmen for Free Enterprise *v.* 1128
Holsey *v.* Circuit Court for Washington County 1137
Holsey *v.* Ellis 1123
Hoover *v.* Mississippi 1137
Hopper *v.* California 1126
Horsley; Alabama *v.* 1114
Howell & Howell, Inc. *v.* Painters 1129
Hubbard, *In re* 1103
Hudgins *v.* Harris 1122
Hughes; Engle *v.* 1141
Hunt *v.* Collins 1127
Idaho *ex rel.* Evans; Click *v.* 1116
Illinois; Buckhana *v.* 1122
Illinois; Eason *v.* 1137
Illinois; Woods *v.* 1137
Illinois *ex rel.* Myers *v.* Mews 1117
Immigration and Naturalization Service; Binder *v.* 1132
Immigration and Naturalization Service; Quitiquit *v.* 1139
Indiana; Kentucky *v.* 1141
Indiana; Lewis *v.* 1118
Indiana; Seymour National Bank *v.* 1127
Industrial Comm'n of Ill.; Kozmel *v.* 1119
Ingram *v.* United States 1125
Inland Steel Co.; Smith *v.* 1138
In re. See name of party.
Insurance Corp. of Ireland; Compagnie des Bauxites de Guinee *v.* 1105
International Medication Systems, Ltd. *v.* NLRB 1118
Isaac; Engle *v.* 1141
Itoh & Co. (America); Spiess *v.* 1128
Jackson Transit Authority *v.* Transit Union 15
Jacksonville Bulk Terminals, Inc. *v.* Longshoremen 702
Jannotti *v.* United States 1106
Jeffers *v.* United States 1139
Jenkins *v.* Maggio 1136
Jennings *v.* United States 1135
Jent *v.* Florida 1111
John *v.* Carlson 1124
Johnson *v.* Board of Ed. of Chicago 52
Johnson *v.* California 1108
Johnson *v.* Garrison 1137
Johnson *v.* Granholm 1120
Johnson *v.* United States 1109
Johnson; United States *v.* 537

BEST COPY AVAILABLE

Page
Johnston *v.* United States 1139
Johnstone *v.* Wolff 1122
Joint Legis. Comm. for Performance Review of Miss. *v.* Phillips . 1140
Jones, *In re* 1130
Jones *v.* Barnes 1104
Jorden *v.* Estelle 1137
Joseph *v.* Bond 1102
Joseph *v.* Helms 1117
Journal and Guide *v.* Thomas 1140
Judge, Circuit Court of St. Louis City; Wilson *v.* 1136
Judge, Court of Common Pleas, Pike County, Ohio; Stacy *v.* 1107
Kalita *v.* Commissioner 1121
Kansas Supreme Court; Phelps *v.* 1112
Karcher *v.* Daggett 1131
Keating *v.* Keating 1119
Kelly *v.* United States 1138
Kentucky *v.* Indiana 1141
Kentucky; Ohio *v.* 1141
Kimberlin *v.* United States 1126
King *v.* United States 1124
Kirshenbaum *v.* Pennsylvania Bd. of Law Examiners 1105
Kite *v.* Marshall 1120
Klippel; Mid-Carolina Oil, Inc. *v.* 1107
Knotts; United States *v.* 1131
Kohn; Rendell-Baker *v.* 830
Kolender *v.* Lawson 1104
Kondrat *v.* Department of Justice 1120
Kondrat *v.* Department of State 1121
Kourkene *v.* State Bar of California 1110
Kozmel *v.* Industrial Comm'n of Ill. 1119
Krier *v.* Georgia 1140
Labor Union. See name of trade.
Lagasse *v.* Vestal 1122
Lam *v.* United States 1121
Lambert *v.* Wattigny 1132
Lane *v.* Smith 1102
Laney *v.* United States 1108
Larson *v.* Valente 1111
Lawson; Kolender *v.* 1104
Lebedun *v.* Young 1109
Lee *v.* United States 1122
Leverette; Bragg *v.* 1123
Lewis *v.* Indiana 1118
Lewis *v.* United States 1121,1133

BEST COPY AVAILABLE

Page
Liberatore *v.* United States 1134
Little; Crawford *v.* 1137
Little, Brown & Co.; Martin *v.* 1108
Local. For labor union, see name of trade.
Lockhart *v.* United States 1125
Loften *v.* United States 1120
Longshoremen; Jacksonville Bulk Terminals, Inc. *v.* 702
Los Angeles *v.* Lyons 1115
Louisiana; Naas *v.* 1119
Louisiana; United States *v.* 1115
Louisville & Jefferson County Transit Authority *v.* Transit Union 1113
Lovorn; Hathorn *v.* 255
Lozada *v.* United States 1125
Lucas, *In re* 1104
Lugar *v.* Edmondson Oil Co. 922
Lupo *v.* United States 1135
Lyons; Los Angeles *v.* 1115
Lyons *v.* United States 1136
Ma *v.* First National Corp. 1138
Madsen; Hatch *v.* 1112
Maggio; Jenkins *v.* 1136
Maine *v.* Patten 1114
Mallory *v.* United States 1125
Mandrachio *v.* New York 1122
Mansion House Center South Redevelopment Co. *v.* United States .. 1117
Maricopa County Medical Society; Arizona *v.* 332
Mark *v.* Seattle Times 1124
Marks *v.* Marks 1110
Marshall; Kite *v.* 1120
Martin *v.* Little, Brown & Co. 1108
Martinez *v.* Brockette 1131
Maryland; Wantland *v.* 1121
Maselli *v.* State Bd. of Equalization of Cal. 1108
Massachusetts; Tavares *v.* 1137
Massachusetts; Transit Union *v.* 1117
Massachusetts Bd. of Registration in Podiatry; Camoscio *v.* 1139
Mathis *v.* United States 1120
Matthews *v.* Exxon Corp. 1124
Mayor of Columbia, S. C.; Washington *v.* 1120
Mazzio *v.* United States 1134
McCarthy *v.* O'Connor 1109
McCrary *v.* Smith 1126
McCready; Blue Shield of Virginia *v.* 465
McDonald *v.* Thompson 1126

BEST COPY AVAILABLE

Page
McKinstry *v.* Ohio 1138
Medved *v.* United States 1126
Meinster *v.* United States 1136
Memorial Park Cemetery Assn. *v.* Rosebrough Monument Co. ... 1111
Mengarelli *v.* United States 1117
Metropolitan Edison Co. *v.* National Labor Relations Bd. 1116
Mews; Illinois *ex rel.* Myers *v.* 1117
Michigan; Yeo *v.* 1134
Mid-Carolina Oil, Inc. *v.* Klippel 1107
Middlesex County Ethics Committee *v.* Garden State Bar Assn. . 423
Mills *v.* Rogers 291
Miner; Gillette Co. *v.* 1116
Minneapolis Star & Tribune Co. *v.* Minnesota Comm'r of Revenue 1130
Minnesota Comm'r of Revenue; Minneapolis Star & Tribune Co. *v.* . 1130
Mississippi; Davis *v.* 1113
Mississippi; Hoover *v.* 1137
Mississippi *v.* Phillips 1140
Mitchell *v.* United States 1124
Mitchell; United States *v.* 1104
MITE Corp.; Edgar *v.* 624
Mobil Oil Corp.; Cities Service Gas Co. *v.* 1126
Mobil Oil Corp.; Grounds *v.* 1126
Mobil Oil Corp.; Northern Natural Gas Co. *v.* 1126
Mobil Oil Corp.; Panhandle Eastern Pipe Line Co. *v.* 1126
Mobley *v.* Tabor 1123
Monk *v.* Schweiker 1122
Montana *v.* Crow Tribe of Indians 1116
Moore *v.* Florida 1138
Moore *v.* United States 1106
Moran *v.* Schweiker 1125
Moritz, *In re* 1129
Multi-State Communications, Inc. *v.* FCC 1119
Murphy *v.* United States 1121
Murphy; Wright *v.* 1107
Murray *v.* Toyota Motor Distributors, Inc. 1106
Myers *v.* Mews 1117
Myers *v.* United States 1136
Naas *v.* Louisiana 1119
Najar *v.* Oman 1108
National Cash Register Corp. *v.* Chatlos Systems, Inc. 1112
National Labor Relations Bd.; Borg Warner Corp. *v.* 1105
National Labor Relations Bd.; Donald Schriver, Inc. *v.* 1111
National Labor Relations Bd.; Gordonsville Industries, Inc. *v.* ... 1117
National Labor Relations Bd.; Griffith Co. *v.* 1105

BEST COPY AVAILABLE

Page
National Labor Relations Bd.; International Medication Systems *v.* 1118
National Labor Relations Bd.; Metropolitan Edison Co. *v.* 1116
National Labor Relations Bd.; Rockingham Machine-Lunex Co. *v.* 1107
Neustein *v.* United States 1124
New England Power Co. *v.* Federal Energy Regulatory Comm'n 1117
New Mexico; Colorado *v.* 1103,1115
New Mexico; Doe *v.* 1136
New York; Birden *v.* 1123
New York; Mandrachio *v.* 1122
Nicoll *v.* United States 1118
Nieves *v.* United States 1117
Nixon *v.* Fitzgerald 731
North Carolina; Darroch *v.* 1138
Northern Natural Gas Co. *v.* Mobil Oil Corp. 1126
Northwestern Bell Telephone Co.; Occhino *v.* 1139
Northwest Sports Enterprises *v.* Seattle Totems Hockey Club 1105
Nzongola *v.* Nzongola 1112
Oakland Unified School Dist.; Schmidt *v.* 594
Oakland Unified School Dist.; Schmidt & Pollard *v.* 594
Occhino *v.* Northwestern Bell Telephone Co. 1139
Occupational Safety & Health Rev. Comm'n; Super Excavators *v.* 1133
O'Connor; McCarthy *v.* 1109
Odom *v.* United States 1125
Officers for Justice; Police Officers *v.* 1115
Ohio; Bezak *v.* 1122
Ohio *v.* Kentucky 1141
Ohio; McKinstry *v.* 1138
Ohio; Puente *v.* 1109
Ohio; Washington *v.* 1109
Oil Transport Co. *v.* Transportation Employees 1135
Oklahoma; Gill *v.* 1109
Oklahoma; Hishaw *v.* 1137
Oklahoma; Slayton *v.* 1124
Oklahoma; Texas *v.* 172
Olivo *v.* Fogg 1122
Oman; Najar *v.* 1108
Oregon *v.* Newman 1111
Pacific Gas & Elec. Co. *v.* State Energy Res. Cons. & Dev. Comm'n 1132
Pacific Legal Found. *v.* State Energy Res. Cons. & Dev. Comm'n 1133
Painters; Howell & Howell, Inc. *v.* 1129
Pak Shing Lam *v.* United States 1121
Panhandle Eastern Pipe Line Co. *v.* Mobil Oil Corp. 1126
Paschal *v.* Florida Public Employees Relations Comm'n 1109
Passaro *v.* United States 1121

BEST COPY AVAILABLE

Page
Patsy *v.* Board of Regents of Fla. 496
Patten; Maine *v.* 1114
Pennhurst State School and Hospital *v.* Halderman 1131
Pennsylvania; Robinson *v.* 1101
Pennsylvania; Sawyer *v.* 1136
Pennsylvania Bd. of Law Examiners; Kirshenbaum *v.* 1105
Pepsi-Cola Bottling Co. of St. Louis, Mo.; Williams *v.* 1139
Perini *v.* Bell 1141
Perkins *v.* United States 1125
Petschen *v.* United States 1135
Pettee *v.* United States 1124,1125
Phelps *v.* Kansas Supreme Court 1112
Philadelphia National Bank *v.* United States 1105
Phillips; Joint Legis. Comm. for Performance Review of Miss. *v.* .. 1140
Phillips; Mississippi *v.* 1140
Phillips & Co.; Chamberlain *v.* 1118
Pico; Board of Ed., Island Trees Union Free School Dist. No. 26 *v.* 853
Pietrowski *v.* Estelle 1123
Place *v.* United States 1106
Place; United States *v.* 1104
Plyler *v.* Doe 202
Police Officers *v.* U. S. District Court 1115
Ponte; Smallwood *v.* 1124
Pope *v.* Thone 1140
Popular Democratic Party; Rodriguez *v.* 1
Porcher *v.* Brown 1104
Prescott; Chino Valley *v.* 1101
President of United States; Romieh *v.* 1126
Puente *v.* Ohio 1109
Pullman-Standard *v.* Swint 1130
Putnam; DeVincent *v.* 1125
Quintana *v.* United States 1135
Quitiquit *v.* Immigration and Naturalization Service 1139
Ragusa *v.* United States 1133
Raines; Boag *v.* 1123
Rawls *v.* United States 1137
Raysor *v.* Gabbey 1127
Raysor *v.* Stern 1127
RCA Corp. *v.* United States 1133
Reagan; Romieh *v.* 1126
Reed *v.* United States 1125
Regan *v.* Taxation with Representation of Washington 1129
Regilio *v.* United States 1133
Reiter *v.* Thomas 1123

BEST COPY AVAILABLE

Page
Remsing *v.* United States 1121
Rendell-Baker *v.* Kohn 830
Rice, *In re* 1115
Richardson; Foremost Ins. Co. *v.* 668
Richenberger; Westover *v.* 1140
Ripley; Genson *v.* 1140
Ritter; Alabama *v.* 1114
Ritter *v.* Ritter 1138
Rivera *v.* California 1123
Rivera *v.* United States 1122
River Region Mental Health-Mental Retardation Bd.; Halikas *v.* . 1106
Robinson *v.* Pennsylvania 1101
Rockingham Machine-Lunex Co. *v.* National Labor Relations Bd. 1107
Rockwell International Corp.; Thomas Merton Center *v.* 1134
Rodgers *v.* Estelle 1138
Rodriguez; Country-Wide Ins. Co. *v.* 1118
Rodriguez *v.* Popular Democratic Party 1
Rogers; Mills *v.* 291
Rogers *v.* White 1126
Romeo; Youngberg *v.* 307
Romieh *v.* Reagan 1126
Rose; Butler *v.* 1107
Rose; Turner *v.* 1123
Rosebrough Monument Co.; Memorial Park Cemetery Assn. *v.* .. 1111
Rosofsky; Schweiker *v.* 1141
Ross; Becker *v.* 1108
Roy *v.* Watson 1108
Rudman *v.* California 1138
Rudolph *v.* Allen 1122
Rushen; Archer *v.* 1107
Rushen; Bentley *v.* 1138
Russell *v.* United States 1108
Sadlowski; Steelworkers *v.* 102
Salisbury *v.* United States 1107
San Antonio Metropolitan Transit Authority; Donovan *v.* 1102
San Antonio Metropolitan Transit Authority; Garcia *v.* 1102
Sandini *v.* United States 1118
Sawyer *v.* Pennsylvania 1136
Scacchetti *v.* United States 1132
Scherer *v.* United States 1120
Schmidt *v.* Oakland Unified School Dist. 594
Schmidt & Pollard *v.* Oakland Unified School Dist. 594
Schriver, Inc. *v.* National Labor Relations Bd. 1111
Schweiker *v.* Campbell 1131

BEST COPY AVAILABLE

Page
Schweiker *v.* Hogan 569
Schweiker; Monk *v.* 1122
Schweiker; Moran *v.* 1125
Schweiker *v.* Rosofsky 1141
Schweiker; Tucker *v.* 1124
Scott, *In re* 1130
Scott *v.* United States 1110
Scurr; Armento *v.* 1138
Seattle Times; Mark *v.* 1124
Seattle Totems Hockey Club; Northwest Sports Enterprises *v.* 1105
Secretary of Health and Human Services *v.* Campbell 1131
Secretary of Health and Human Services *v.* Hogan 569
Secretary of Health and Human Services; Monk *v.* 1122
Secretary of Health and Human Services; Moran *v.* 1125
Secretary of Health and Human Services *v.* Rosofsky 1141
Secretary of Health and Human Services; Tucker *v.* 1124
Secretary of Labor *v.* San Antonio Metropolitan Transit Authority 1102
Secretary of State; Thomas *v.* 1110
Secretary of Treasury *v.* Taxation with Representation of Wash. 1129
Seekonk Water Dist.; Heritage Homes of Attleboro, Inc. *v.* 1120
Semble *v.* United States 1120
Seymour National Bank *v.* Indiana 1127
Shanahan *v.* United States 1106
Sharpe; United States *v.* 1127
Shing Lam *v.* United States 1121
Short *v.* United States 1119
Simmons *v.* Hilton 1110
Skaines; Uniroyal, Inc. *v.* 1119
Slater *v.* United States 1133
Slayton *v.* Oklahoma 1124
Sliwoo *v.* United States 1134
Smallwood *v.* Ponte 1124
Smiley, *In re* 1130
Smith *v.* Inland Steel Co. 1138
Smith; Lane *v.* 1102
Smith; McCrary *v.* 1126
Smith *v.* United States 1110
Sony Corp. of America *v.* Universal City Studios, Inc. 1116
South Carolina; Thompson *v.* 1112
Speaker, N. J. Assembly *v.* Daggett 1131
Speed *v.* Florida 1118
Spieler; United States *v.* 1113
Spiess *v.* C. Itoh & Co. (America) 1128
Stacy *v.* Bevens 1107

BEST COPY AVAILABLE

Page
Stallings *v.* Fletcher 1134
Standard Drywall, Inc. *v.* United States 1112
Starview Drive In Theatre, Inc. *v.* Cook County 1113
State. See name of State.
State Bar of California; Kourkene *v.* 1110
State Bd. of Equalization of Cal.; Maselli *v.* 1108
State Energy Res. Cons. & Dev. Comm'n; Pacific Gas & Elec. Co. *v.* 1132
State Energy Res. Cons. & Dev. Comm'n; Pacific Legal Found. *v.* 133
State Lands Comm'n *v.* United States 273
Steedman *v.* United States 1136
Steelworkers *v.* Sadlowski 102
Steelworkers *v.* Swint 1130
Stephen F. Austin Univ.; Hillis *v.* 1106
Stern; Raysor *v.* 1127
Sumitomo Shoji America, Inc. *v.* Avagliano 176
Sumitomo Shoji America, Inc.; Avagliano *v.* 176
Super Excavators, Inc. *v.* Occupational Safety & Health Rev. Comm'n 1133
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Court, Norfolk County; Globe Newspaper Co. *v.* 596
Supervisor of Assessments; Trustees of First Baptist Church *v.* 1134
Swanson-Dean Corp. *v.* Carpenters 1105
Swint; Pullman-Standard *v.* 1130
Swint; Steelworkers *v.* 1130
Swoboda *v.* United States 1134
Tabor; Mobley *v.* 1123
Tavares *v.* Massachusetts 1137
Tavarez *v.* United States 1121
Taxation with Representation of Washington; Regan *v.* 1129
Taylor *v.* Alabama 687
Taylor *v.* Wyrick 1124
Teal; Connecticut *v.* 440
Tennessee; Harrington *v.* 1110
Texas *v.* Brown 1116
Texas; California *v.* 164
Texas *v.* Certain Named & Unnamed Undocumented Alien Children 202
Texas *v.* Federal Energy Regulatory Comm'n 1105
Texas *v.* Oklahoma 172
Texas; Wade *v.* 1112
Texas; Walker *v.* 1126
Texas Dept. of Human Resources; Castro *v.* 1119
Thomas; Guide Publishing Co. *v.* 1140
Thomas *v.* Haig 1110
Thomas; Journal and Guide *v.* 1140

BEST COPY AVAILABLE

Page
Thomas; Reiter *v.* 1123
Thomas Merton Center *v.* Rockwell International Corp. 1134
Thompson; McDonald *v.* 1126
Thompson *v.* South Carolina 1112
Thone; Pope *v.* 1140
Thornton *v.* Atlanta & West Point R. Co. 1118
Tibbs *v.* Florida 31
Tillman; Wilson *v.* 1136
Tobias *v.* United States 1108
Town. See name of town.
Toyota Motor Distributors, Inc.; Big Sky Toyota *v.* 1106
Toyota Motor Distributors, Inc.; Murray *v.* 1106
Transit Authority of River City *v.* Transit Union 1113
Transit Union; Jackson Transit Authority *v.* 15
Transit Union; Louisville & Jefferson County Transit Authority *v.* 1113
Transit Union *v.* Massachusetts 1117
Transit Union; Transit Authority of River City *v.* 1113
Transportation Employees; Oil Transport Co. *v.* 1135
Transportation Union *v.* Consolidated Rail Corp. 1133
Trustees of First Baptist Church *v.* Supervisor of Assessments 1134
Tucker *v.* Schweiker 1124
Tulsa; Cross *v.* 1139
Turner *v.* Rose 1123
Udziela *v.* United States 1135
Union. For labor union, see name of trade.
Uniroyal, Inc. *v.* Skaines 1119
Uniroyal, Inc. *v.* Wyatt Tire Distributors 1119
United. For labor union, see name of trade.
United States. See name of other party.
U. S. District Court; Police Officers *v.* 1115
U. S. District Judge; Anthony *v.* 1133
United States *ex rel.* Simmons *v.* Hilton 1110
U. S. Parole Comm'n; Caballery *v.* 1136
U. S. Postal Service; Calzarano *v.* 1124
U. S. Postal Service; Council of Public Utility Mailers *v.* 1133
U. S. Postal Service Bd. of Governors *v.* Aikens 1129
U. S. Probation Office; Green *v.* 1136
Universal City Studios, Inc.; Sony Corp. of America *v.* 1116
Valente; Larson *v.* 1111
Vann; Billingsley *v.* 1109
Van Orman *v.* First National Bank of South Central Michigan ... 1139
Van Sickle *v.* Van Sickle 1119
Vessel Hoegh Shield *v.* Gulf Trading & Transportation Co. 1119
Vestal; Lagasse *v.* 1122

BEST COPY AVAILABLE

Page
Villamonte-Marquez; United States *v.* 1104
Vlasic *v.* United States 1125
Voluntary Purchasing Groups, Inc. *v.* Chevron Chemical Co. 1126
Wade *v.* Texas 1112
Wainwright; Cobb *v.* 1107
Wainwright *v.* Henry 1114
Walker *v.* Texas 1126
Wantland, *In re* 1115
Wantland *v.* Maryland 1121
Ward *v.* United States 1110
Warden. See name of warden.
Washington; Baker *v.* 1108
Washington *v.* Finlay 1120
Washington; Fisher *v.* 1137
Washington *v.* Ohio 1109
Washington Metropolitan Area Transit Authority *v.* Hensley 1130
Watson; Roy *v.* 1108
Watson *v.* United States 1106
Wattigny; Lambert *v.* 1132
Weber *v.* United States 1105
Weil *v.* United States 1117
Weingartner *v.* United States 1135
Weser, *In re* 1116
West; Anthony *v.* 1133
Westover *v.* Richenberger 1140
White; Cory *v.* 85
White; Rogers *v.* 1126
Wilburn *v.* California 1138
Williams *v.* Arkansas Public Service Comm'n 1123
Williams *v.* Cheetwood & Davies 1101
Williams *v.* Everett 1126
Williams *v.* Pepsi-Cola Bottling Co. of St. Louis, Mo. 1139
Williams; Zobel *v.* 55
Wilshire Oil Co. of Texas *v.* Board of Governors, FRS 1132
Wilson; Burlington Northern Inc. *v.* 1120
Wilson *v.* Tillman 1136
Winter; Brooks *v.* 1129
Wolff; Johnstone *v.* 1122
Wooden *v.* United States 1137
Woods *v.* Illinois 1137
Wright; Alabama *v.* 1114
Wright *v.* Murphy 1107
WTIC–FM Radio Station; Appleby *v.* 1141
Wyatt Tire Distributors; Uniroyal, Inc. *v.* 1119

BEST COPY AVAILABLE

Page
Wyrick; Bainter *v.* 1122
Wyrick; Taylor *v.* 1124
Xerox Corp. *v.* Harris County 1130
Yaretsky; Blum *v.* 991
Yeo *v.* Michigan 1134
Young; Lebedun *v.* 1109
Youngberg *v.* Romeo 307
Zant; Collins *v.* 1126
Zisook *v.* Attorney Registration & Discip. Comm'n, Ill. Sup Ct. 1134
Zobel *v.* Williams 55

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

595

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GLOBE NEWSPAPER CO. *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81-611. Argued March 29, 1982—Decided June 23, 1982

Appellee Massachusetts trial court, relying on a Massachusetts statute providing for exclusion of the general public from trials of specified sexual offenses involving a victim under the age of 18, ordered the exclusion of the press and public from the courtroom during the trial of a defendant charged with rape of three minor girls. Appellant newspaper publisher challenged the exclusion order, and ultimately, after the trial had resulted in the defendant's acquittal, the Massachusetts Supreme Judicial Court construed the Massachusetts statute as requiring, under all circumstances, the exclusion of the press and public during the testimony of a minor victim in a sex-offense trial.

Held:

1. The fact that the exclusion order expired with completion of the trial at which the defendant was acquitted does not render the controversy moot within the meaning of Art. III. The controversy is "capable of repetition, yet evading review," since it can reasonably be assumed that appellant will someday be subjected to another order relying on the Massachusetts statute and since criminal trials are typically of short duration. Pp. 602-603.

2. The Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment as applied to the States through the Fourteenth Amendment. Pp. 603-607.

(a) To the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that the constitutionally protected "discussion of governmental affairs" is an informed one. The right of access to *criminal trials* in particular is properly afforded protection by the First Amendment both because such trials have historically been open to the press and public and because such right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole. Pp. 603-606.

(b) The right of access to criminal trials is not absolute, but the circumstances under which the press and public can be barred are limited. The State must show that denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. Pp. 606-607.

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3. The Massachusetts statute cannot be justified on the basis of either the State's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner. Pp. 607–610.

(a) Compelling as the first interest is, it does not justify a *mandatory* closure rule. Such interest could be just as well served by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the minor victim's well-being necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest. Pp. 607–609.

(b) The second asserted interest is not only speculative in empirical terms but is also open to serious question as a matter of logic and common sense. Although the statute was construed to bar the press and public from the courtroom during a minor sex victim's testimony, the press is not denied access to the transcript, court personnel, or any other source that could provide an account of such testimony, and thus the statute cannot prevent the press from publicizing the substance of that testimony, as well as the victim's identity. Pp. 609–610.

383 Mass. 838, 423 N. E. 2d 773, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 611. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 612. STEVENS, J., filed a dissenting opinion, *post*, p. 620.

James F. McHugh argued the cause and filed briefs for appellant.

Mitchell J. Sikora, Jr., Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Francis X. Bellotti*, Attorney General, and *Gerald J. Caruso* and *Alan B. Sherr*, Assistant Attorneys General.*

---

*Briefs of *amici curiae* urging reversal were filed by *Carl R. Ramey, J. Roger Wollenberg, Timothy B. Dyk, Ralph E. Goldberg, Erwin G. Krasnow, J. Laurent Scharff*, and *Carol D. Weisman* for American Broadcasting Cos., Inc., et al.; by *James D. Spaniolo, Gary G. Gerlach, Robert C. Lobdell, A. Daniel Feldman, Robert Sack, P. Cameron Devore, Andrew L. Hughes, Samuel E. Klein, Alan E. Peterson, Bruce W. Sanford,*

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379-675 O - 83 - 3

JUSTICE BRENNAN delivered the opinion of the Court.

Section 16A of Chapter 278 of the Massachusetts General Laws,[1] as construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

I

The case began when appellant, Globe Newspaper Co. (Globe), unsuccessfully attempted to gain access to a rape trial conducted in the Superior Court for the County of Norfolk, Commonwealth of Massachusetts. The criminal defendant in that trial had been charged with the forcible rape and forced unnatural rape of three girls who were minors at the time of trial—two 16 years of age and one 17. In April 1979, during hearings on several preliminary motions, the trial judge ordered the courtroom closed.[2] Before the trial

---

J. Laurent Scharff, W. Terry Maguire, Richard M. Schmidt, Jr., Arthur Sackler, Peter C. Gould, Theodore Sherbow, Alexander Wellford, James F. Henderson, David M. Olive, Conrad M. Shumadine, and *Lawrence Gunnels* for the Miami Herald Publishing Co. et al.; by *Howard Monderer* for the National Broadcasting Co., Inc.; and by *E. Barrett Prettyman, Jr.,* for the Reporters Committee for Freedom of the Press.

[1] Massachusetts Gen. Laws Ann., ch. 278, § 16A (West 1981), provides in pertinent part:

"At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

[2] "The court caused a sign marked 'closed' to be placed on the courtroom door, and court personnel turned away people seeking entry." *Globe Newspaper Co.* v. *Superior Court*, 379 Mass. 846, 848, 401 N. E. 2d 360, 362–363 (1980) (footnote omitted).

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began, Globe moved that the court revoke this closure order, hold hearings on any future such orders, and permit appellant to intervene "for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions." App. 12a–14a. The trial court denied Globe's motions,[3] relying on Mass. Gen. Laws Ann., ch. 278, § 16A (West 1981), and ordered the exclusion of the press and general public from the courtroom during the trial. The defendant immediately objected to that exclusion order, and the prosecution stated for purposes of the record that the order was issued on the court's "own motion and not at the request of the Commonwealth." App. 18a.

Within hours after the court had issued its exclusion order, Globe sought injunctive relief from a justice of the Supreme Judicial Court of Massachusetts.[4] The next day the justice conducted a hearing, at which the Commonwealth, "on behalf of the victims," waived "whatever rights it [might] have [had] to exclude the press." *Id.*, at 28a.[5] Nevertheless,

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[3] The court refused to permit Globe to file its motion to intervene and explicitly stated that it would not act on Globe's other motions. App. 17a–18a.

[4] Globe's request was contained in a petition for extraordinary relief filed pursuant to Mass. Gen. Laws Ann., ch. 211, § 3 (West 1958 and Supp. 1982–1983).

[5] The Commonwealth's representative stated:

"[O]ur position before the trial judge [was], and it is before this Court, that in some circumstances a trial judge, where the defendant is asserting his right to a constitutional, public trial, . . . may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth [acts] on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press." App. 28a.

Some time after the trial began, the prosecuting attorney informed the judge at a lobby conference that she had "spoke[n] with each of the victims regarding . . . excluding the press." *Id.*, at 48a. The prosecuting attorney indicated that the victims had expressed some "privacy concerns" that were based on "their own privacy interests, as well as the fact that there

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Globe's request for relief was denied. Before Globe appealed to the full court, the rape trial proceeded and the defendant was acquitted.

Nine months after the conclusion of the criminal trial, the Supreme Judicial Court issued its judgment, dismissing Globe's appeal. Although the court held that the case was rendered moot by completion of the trial, it nevertheless stated that it would proceed to the merits, because the issues raised by Globe were "significant and troublesome, and . . . 'capable of repetition yet evading review.'" *Globe Newspaper Co.* v. *Superior Court*, 379 Mass. 846, 848, 401 N. E. 2d 360, 362 (1980), quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). As a statutory matter, the court agreed with Globe that § 16A did not require the exclusion of the press from the entire criminal trial. The provision was designed, the court determined, "to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial." 379 Mass., at 860, 401 N. E. 2d, at 369. Relying on these twin purposes, the court concluded that § 16A *required* the closure of sex-offense trials only during the testimony of minor victims; during other portions of such trials, closure was "a matter within the judge's sound discretion." *Id.*, at 864, 401 N. E. 2d, at 371. The court did not pass on Globe's contentions that it had a right to attend the entire

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are grandparents involved with a couple of these victims." *Ibid.* But according to the prosecuting attorney, the victims "wouldn't object to the press being included" if "it were at all possible to obtain a guarantee" that the press would not attempt to interview them or publish their names, photographs, or any personal information. *Ibid.* In fact, their names were already part of the public record. See 383 Mass. 838, 849, 423 N. E. 2d 773, 780 (1981). It is not clear from the record, however, whether or not the victims were aware of this fact at the time of their discussions with the prosecuting attorney.

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criminal trial under the First and Sixth Amendments, noting that it would await this Court's decision—then pending—in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980).[6]

Globe then appealed to this Court. Following our decision in *Richmond Newspapers*, we vacated the judgment of the Supreme Judicial Court, and remanded the case for further consideration in light of that decision. *Globe Newspaper Co.* v. *Superior Court*, 449 U. S. 894 (1980).

On remand, the Supreme Judicial Court, adhering to its earlier construction of § 16A, considered whether our decision in *Richmond Newspapers* required the invalidation of the mandatory closure rule of § 16A. 383 Mass. 838, 423 N. E. 2d 773 (1981).[7] In analyzing the First Amendment issue,[8] the court recognized that there is "an unbroken tradition of openness" in criminal trials. *Id.*, at 845, 423 N. E. 2d, at 778. But the court discerned "at least one notable exception" to this tradition: "In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult." *Id.*, at 846, 423

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[6] Justice Quirico dissented, being of the view that the mandatory closure rule of § 16A was not limited to the testimony of minor victims, but was applicable to the entire trial.

[7] The court again noted that the First Amendment issue arising from the closure of the then-completed trial was "'capable of repetition yet evading review.'" *Id.*, at 841, n. 4, 423 N. E. 2d, at 775, n. 4, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). But in contrast to the view it had taken in its prior opinion, *supra*, at 600, the court held that the case was *not moot* because of this possibility of repetition without opportunity for review.

[8] The court found it unnecessary to consider Globe's argument that the mandatory closure rule violated the Sixth Amendment rights of the criminal defendant who had been acquitted in the rape trial. Those Sixth Amendment rights, the court stated, were "personal rights" that, "at least in the context of this case, [could] only be asserted by the original criminal defendant." 383 Mass., at 842, 423 N. E. 2d, at 776 (footnote omitted).

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N. E. 2d, at 778. The court also emphasized that § 16A's mandatory closure rule furthered "genuine State interests," which the court had identified in its earlier decision as underlying the statutory provision. These interests, the court stated, "would be defeated if a case-by-case determination were used." *Id.*, at 848, 423 N. E. 2d, at 779. While acknowledging that the mandatory closure requirement results in a "temporary diminution" of "the public's knowledge about these trials," the court did not think "that *Richmond Newspapers* require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." *Id.*, at 851, 423 N. E. 2d, at 781. The court accordingly dismissed Globe's appeal.[9]

Globe again sought review in this Court. We noted probable jurisdiction. 454 U. S. 1051 (1981). For the reasons that follow, we reverse, and hold that the mandatory closure rule contained in § 16A violates the First Amendment.[10]

II

In this Court, Globe challenges that portion of the trial court's order, approved by the Supreme Judicial Court of Massachusetts, that holds that § 16A requires, under all circumstances, the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial. Because the entire order expired with the completion of the rape trial at which the defendant was acquitted, we must consider at the outset whether a live controversy remains. Under Art. III, § 2, of the Constitution, our jurisdiction extends only to actual cases or controversies. *Nebraska Press*

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[9] Justice Wilkins filed a concurring opinion in which he expressed concern whether a statute constitutionally could require closure "without specific findings by the judge that the closing is justified by overriding or countervailing interests of the Commonwealth." *Id.*, at 852, 423 N. E. 2d, at 782.

[10] We therefore have no occasion to consider Globe's additional argument that the provision violates the Sixth Amendment.

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Assn. v. *Stuart*, 427 U. S. 539, 546 (1976). "The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Ibid.*, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S., at 515.

The controversy between the parties in this case is indeed "capable of repetition, yet evading review." It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to another order relying on § 16A's mandatory closure rule. See *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378 (1979); *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 563 (plurality opinion). And because criminal trials are typically of "short duration," *ibid.*, such an order will likely "evade review, or at least considered plenary review in this Court." *Nebraska Press Assn.* v. *Stuart*, *supra*, at 547. We therefore conclude that the controversy before us is not moot within the meaning of Art. III, and turn to the merits.

III

A

The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. 448 U. S., at 558–581 (plurality opinion); *id.*, at 584–598 (BRENNAN, J., concurring in judgment); *id.*, at 598–601 (Stewart, J., concurring in judgment); *id.*, at 601–604 (BLACKMUN, J., concurring in judgment).[11]

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[11] JUSTICE POWELL took no part in the consideration or decision of *Richmond Newspapers*. But he had indicated previously in a concurring opin-

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Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment.[12] But we have long eschewed any "narrow, literal conception" of the Amendment's terms, *NAACP* v. *Button*, 371 U. S. 415, 430 (1963), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 579–580, and n. 16 (plurality opinion) (citing cases); *id.*, at 587–588, and n. 4 (BRENNAN, J., concurring in judgment). Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. See *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 587–588 (BRENNAN, J., concurring in judgment). See also *id.*, at 575 (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus to the extent that the First Amendment embraces a right of access to crim-

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ion in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), that he viewed the First Amendment as conferring on the press a right of access to criminal trials. *Id.*, at 397–398.

[12] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1.

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inal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, Inc.* v. *Virginia, supra*, at 569 (plurality opinion). And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in *In re Oliver*, 333 U. S. 257 (1948), the presumption was so solidly grounded that the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.*, at 266 (footnote omitted). This uniform rule of openness has been viewed as significant in constitutional terms not only "because the Constitution carries the gloss of history," but also because "a tradition of accessibility implies the favorable judgment of experience." *Richmond Newspapers, Inc.* v. *Virginia, supra*, at 589 (BRENNAN, J., concurring in judgment).[13]

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[13] Appellee argues that criminal trials have not always been open to the press and general public during the testimony of minor sex victims. Brief for Appellee 13–22. Even if appellee is correct in this regard, but see *Gannett Co.* v. *DePasquale, supra*, at 423 (BLACKMUN, J., concurring in part and dissenting in part), the argument is unavailing. In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction. See Part III–B, *infra*.

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Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.[14] Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.[15] And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.[16] In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

B

Although the right of access to criminal trials is of constitutional stature, it is not absolute. See *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 581, n. 18 (plurality opinion); *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 570. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information,

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[14] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 569 (plurality opinion); *id.*, at 596–597 (BRENNAN, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, 443 U. S., at 383; *id.*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[15] See *Levine* v. *United States*, 362 U. S. 610, 616 (1960); *In re Oliver*, 333 U. S. 257, 268–271 (1948); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 595 (BRENNAN, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, *supra*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[16] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 596 (BRENNAN, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, 443 U. S., at 394 (BURGER, C. J., concurring); *id.*, at 428 (BLACKMUN, J., concurring in part and dissenting in part).

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it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. See, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45, 53–54 (1982); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101–103 (1979); *NAACP* v. *Button*, 371 U. S., at 438.[17] We now consider the state interests advanced to support Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims.

IV

The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner.[18] We consider these interests in turn.

We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor[19]—is a compelling one. But as compelling as that interest is, it

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[17] Of course, limitations on the right of access that resemble "time, place, and manner" restrictions on protected speech, see *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63, n. 18 (1976), would not be subjected to such strict scrutiny. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 581–582, n. 18 (plurality opinion); *id.*, at 598, n. 23 (BRENNAN, J., concurring in judgment); *id.*, at 600 (Stewart, J., concurring in judgment).

[18] In its opinion following our remand, the Supreme Judicial Court of Massachusetts described the interests in the following terms:

"(a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . ; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice . . . ; (e) to preserve evidence and obtain just convictions." 383 Mass., at 848, 423 N. E. 2d, at 779.

[19] It is important to note that in the context of § 16A, the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*

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does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.[20] Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim,[21] and the interests of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.[22] In the case before us, for example, the names of the minor victims were already in the public record,[23] and the record indicates that the victims

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[20] Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." 448 U. S., at 581 (footnote omitted) (emphasis added).

[21] "[I]f the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable." 383 Mass., at 853, 423 N. E. 2d, at 782 (Wilkins, J., concurring).

[22] It appears that while other States have statutory or constitutional provisions that would *allow* a trial judge to close a criminal sex-offense trial during the testimony of a minor victim, no other State has a *mandatory* provision excluding both the press and general public during such testimony. See, *e. g.*, Ala. Code § 12-21-202 (1975); Ariz. Rule Crim. Proc. 9.3; Ga. Code § 81-1006 (1978); La. Rev. Stat. Ann. § 15:469.1 (West 1981); Miss. Const., Art. 3, § 26; N. H. Rev. Stat. Ann. § 632-A:8 (Supp. 1981); N. Y. Jud. Law § 4 (McKinney 1968); N. C. Gen. Stat. § 15-166 (Supp. 1981); N. D. Cent. Code § 27-01-02 (1974); Utah Code Ann. § 78-7-4 (1953); Vt. Stat. Ann., Tit. 12, § 1901 (1973); Wis. Stat. § 970.03(4) (1979-1980). See also Fla. Stat. § 918.16 (1979) (providing for mandatory exclusion of *general public* but not *press* during testimony of minor victims). Of course, we intimate no view regarding the constitutionality of these state statutes.

[23] The Court has held that the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the pub-

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may have been willing to testify despite the presence of the press.[24] If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.[25]

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities.[26] Not only is the claim speculative in empirical

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lic record. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). See also *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

[24] See n. 5, *supra*.

[25] Of course, for a case-by-case approach to be meaningful, representatives of the press and general public "must be given an opportunity to be heard on the question of their exclusion." *Gannett Co.* v. *DePasquale*, 443 U. S., at 401 (POWELL, J., concurring). This does not mean, however, that for purposes of this inquiry the court cannot protect the minor victim by denying these representatives the opportunity to confront or cross-examine the victim, or by denying them access to sensitive details concerning the victim and the victim's future testimony. Such discretion is consistent with the traditional authority of trial judges to conduct *in camera* conferences. See *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 598, n. 23 (BRENNAN, J., concurring in judgment). Without such trial court discretion, a State's interest in safeguarding the welfare of the minor victim, determined in an individual case to merit some form of closure, would be defeated before it could ever be brought to bear.

[26] To the extent that it is suggested that, quite apart from encouraging minor victims to testify, § 16A improves the quality and credibility of testi-

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terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. And even if § 16A effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers:* namely, "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." 448 U. S., at 573 (plurality opinion).

V

For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, vio-

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mony, the suggestion also is speculative. And while closure may have such an effect in particular cases, the Court has recognized that, *as a general matter*, "*[o]penness* in court proceedings may *improve* the quality of testimony." *Gannett Co.* v. *DePasquale*, *supra*, at 383 (emphasis added). In the absence of any showing that closure would improve the quality of testimony of *all* minor sex victims, the State's interest certainly cannot justify a *mandatory* closure rule.

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lates the First Amendment to the Constitution.[27] Accordingly, the judgment of the Massachusetts Supreme Judicial Court is

Reversed.

JUSTICE O'CONNOR, concurring in the judgment.

In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is "necessary to the enjoyment of other First Amendment rights." *Ante*, at 604. Instead, *Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in *Richmond Newspapers* stresses, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 448 U. S., at 575. Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials.

This case, however, does involve a criminal trial. Moreover, it involves a statute mandating automatic exclusion of the public from certain testimony. As the Court explains, Massachusetts has demonstrated no interest weighty enough to justify application of its automatic bar to all cases, even those in which the victim, defendant, and prosecutor have no objection to an open trial. Accordingly, I concur in the judgment.

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[27] We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

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CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

Historically our society has gone to great lengths to protect minors *charged* with crime, particularly by prohibiting the release of the names of offenders, barring the press and public from juvenile proceedings, and sealing the records of those proceedings. Yet today the Court holds unconstitutional a state statute designed to protect not the *accused*, but the minor *victims* of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused.

The Court has tried to make its holding a narrow one by not disturbing the authority of state legislatures to enact more narrowly drawn statutes giving trial judges the discretion to exclude the public and the press from the courtroom during the minor victim's testimony. *Ante*, at 611, n. 27. I also do not read the Court's opinion as foreclosing a state statute which mandates closure except in cases where the victim agrees to testify in open court.[1] But the Court's deci-

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[1] It certainly cannot be said that the victims in this case consented to testifying in open court. During a lobby conference prior to trial, the prosecutor informed the trial judge that she had interviewed the victims, that they were concerned about publicity, and would agree to press attendance only if certain guarantees could be given:

"Each of [the three victims] indicated that they had the same concerns and basically they are privacy concerns.

"The difficulty of obtaining any kind of guarantee that the press would not print their names or where they go to school or any personal data or take pictures of them or attempt to interview them, those concerns come from their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims who do not know what hap-

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sion is nevertheless a gross invasion of state authority and a state's duty to protect its citizens—in this case minor victims of crime. I cannot agree with the Court's expansive interpretation of our decision in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), or its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule. Accordingly, I dissent.

I

The Court seems to read our decision in *Richmond Newspapers, supra*, as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances. *Ante*, at 605, n. 13. That is plainly incorrect. In *Richmond Newspapers*, we examined "the right of access to places traditionally open to the public" and concluded that criminal trials were generally open to the public throughout this country's history and even before that in England. The opinions of a majority of the Justices emphasized the historical tradition of open criminal trials. 448 U. S., at 564–573; *id.*, at 589–591 (BRENNAN, J., concurring in judgment); *id.*, at 599 (Stewart, J., concurring in judgment); *id.*, at 601 (BLACKMUN, J., concurring in judgment). The proper mode of analysis to be followed in determining whether there is a right of access was emphasized by JUSTICE BRENNAN:

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pened and if they were to find out by reading the paper, everyone was concerned about what would happen then. And they stated that if it were at all possible to obtain a guarantee that this information would not be used, then they wouldn't object to the press being included. I explained that that is [a] very difficult guarantee to obtain because the Court cannot issue a conditional order, or anything like that, but I just wanted to put on the record what their concerns were and what they are afraid of." App. 48a.

It is clear that the victims would "waive" the exclusion of the press only if the trial court gave them guarantees of strict privacy, guarantees that were probably beyond the authority of the court and which themselves would raise grave constitutional problems. See *Oklahoma Publishing Co.* v. *District Court of Oklahoma County*, 430 U. S. 308 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975).

379-675 O—82——4 : QL 3

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> "As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." *Id.*, at 597–598.

Today JUSTICE BRENNAN ignores the weight of historical practice. There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors. See, *e. g.*, *Harris* v. *Stephens*, 361 F. 2d 888 (CA8 1966), cert. denied, 386 U. S. 964 (1967); *Reagan* v. *United States*, 202 F. 488 (CA9 1913); *United States* v. *Geise*, 158 F. Supp. 821 (Alaska), aff'd, 262 F. 2d 151 (CA9 1958), cert. denied, 361 U. S. 842 (1959); *Hogan* v. *State*, 191 Ark. 437, 86 S. W. 2d 931 (1935); *State* v. *Purvis*, 157 Conn. 198, 251 A. 2d 178 (1968), cert. denied, 395 U. S. 928 (1969); *Moore* v. *State*, 151 Ga. 648, 108 S. E. 47 (1921), appeal dism'd, 260 U. S. 702 (1922).[2] Several States have longstanding provisions allowing closure of cases involving sexual assaults against minors.[3]

It would misrepresent the historical record to state that there is an "unbroken, uncontradicted history" of open proceedings in cases involving the sexual abuse of minors. *Richmond Newspapers*, *supra*, at 573. Absent such a history of openness, the positions of the Justices joining reversal in *Richmond Newspapers* give no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment.[4]

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[2] Cf. *Stamicarbon, N.V.* v. *American Cyanamid Co.*, 506 F. 2d 532, 539–540 (CA2 1974), and cases cited therein.

[3] See, *e. g.*, Ala. Const., Art. VI, § 169 (1901) (repealed 1973); Fla. Stat. § 918.16 (1979); Ga. Code § 81–1006 (1978); Miss. Const., Art. 3, § 26; N. H. Rev. Stat. Ann. § 632–A:8 (Supp. 1981); N. Y. Jud. Law § 4 (McKinney 1968); N. C. Gen. Stat. § 15–166 (Supp. 1981); Utah Code Ann. § 78–7–4 (1953).

[4] It is hard to find a limiting principle in the Court's analysis. The same reasoning might require a hearing before a trial judge could hold a bench conference or any *in camera* proceedings.

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II

The Court does not assert that the First Amendment right it discerns from *Richmond Newspapers* is absolute; instead, it holds that when a "State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Ante*, at 606–607. The Court's wooden application of the rigid standard it asserts for this case is inappropriate. The Commonwealth has not denied the public or the media access to information as to what takes place at trial. As the Court acknowledges, Massachusetts does not deny the press and the public access to the trial transcript or to other sources of information about the victim's testimony. Even the victim's identity is part of the public record, although the name of a 16-year-old accused rapist generally would not be a matter of public record. Mass. Gen. Laws Ann., ch. 119, § 60A (West Supp. 1982–1983). The Commonwealth does not deny access to information, and does nothing whatever to inhibit its disclosure. This case is quite unlike others in which we have held unconstitutional state laws which prevent the dissemination of information or the public discussion of ideas. See, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45 (1982); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohen*, 420 U. S. 469 (1975); *NAACP* v. *Button*, 371 U. S. 415 (1963).

The purpose of the Commonwealth in enacting § 16A was to give assurance to parents and minors that they would have this moderate and limited protection from the trauma, embarrassment, and humiliation of having to reveal the intimate details of a sexual assault in front of a large group of unfamiliar spectators—and perhaps a television audience—and to lower the barriers to the reporting of such crimes which might come from the victim's dread of public testimony. *Globe Newspaper Co.* v. *Superior Court*, 379 Mass.

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846, 865, 401 N. E. 2d 360, 372 (1980); 383 Mass. 838, 847–848, 423 N. E. 2d 773, 779 (1981).

Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the interests of the Commonwealth override the very limited incidental effects of the law on First Amendment rights. See *Richmond Newspapers*, 448 U. S., at 580–581 (plurality opinion); *id.*, at 600 (Stewart, J., concurring in judgment); *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). Our obligation in this case is to balance the competing interests: the interests of the media for instant access, against the interest of the State in protecting child rape victims from the trauma of public testimony. In more than half the states, public testimony will include television coverage.

III

For me, it seems beyond doubt, considering the minimal impact of the law on First Amendment rights and the overriding weight of the Commonwealth's interest in protecting child rape victims, that the Massachusetts law is not unconstitutional. The Court acknowledges that the press and the public have prompt and full access to all of the victim's testimony. Their additional interest in actually being present during the testimony is minimal. While denying it the power to protect children, the Court admits that the Commonwealth's interest in protecting the victimized child is a compelling interest. *Ante*, at 607. This meets the test of *Richmond Newspapers*, *supra*.

The law need not be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest. Certainly this law, which excludes the press and public only

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during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from the severe—possibly permanent—psychological damage. It is not disputed that such injury is a reality.[5]

The law also seems a rational response to the undisputed problem of the underreporting of rapes and other sexual offenses. The Court rejects the Commonwealth's argument that § 16A is justified by its interest in encouraging minors to report sex crimes, finding the claim "speculative in empirical terms [and] open to serious question as a matter of logic and common sense." *Ante*, at 609–610. There is no basis whatever for this cavalier disregard of the reality of human experience. It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Chandler* v. *Florida*, 449 U. S. 560, 579–580 (1981); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 441 (1980); *Whalen* v. *Roe*, 429 U. S. 589, 597, and n. 20 (1977).

The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails "as a matter of logic and common sense." This conclusion is based on a misperception of the Commonwealth's argument and an overly narrow view of the protection the statute seeks to afford young victims. The Court apparently believes that the statute does not prevent any sig-

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[5] For a discussion of the traumatic effect of court proceedings on minor rape victims, see E. Hilberman, The Rape Victim 53–54 (1976); S. Katz & M. Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 198–200 (1979), and studies cited therein.

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nificant trauma, embarrassment, or humiliation on the part of the victim simply because the press is not prevented from discovering and publicizing both the identity of the victim and the substance of the victim's testimony. *Ante*, at 609–610. Section 16A is intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers.[6] In most states, that crowd may be expanded to include a live television audience, with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars.[7]

The Commonwealth's interests are clearly furthered by the mandatory nature of the closure statute. Certainly if the law were discretionary, most judges would exercise that discretion soundly and would avoid unnecessary harm to the child, but victims and their families are entitled to assurance of such protection. The legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncracies of individual judges subject to the pressures avail-

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[6] As one commentator put it: "Especially in cases involving minors, the courts stress the serious embarrassment and shame of the victim who is forced to testify to sexual acts or whose intimate life is revealed in detail before a crowd of the idly curious." Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 88 (1977). The victim's interest in avoiding the humiliation of testifying in open court is thus quite separate from any interest in preventing the public from learning of the crime. It is ironic that the Court emphasizes the failure of the Commonwealth to seal the trial transcript and bar disclosure of the victim's identity. The Court implies that a state law more severely encroaching upon the interests of the press and public would be upheld.

[7] See Hilberman, *supra;* L. Holmstrom & A. Burgess, The Victim of Rape: Institutional Reactions 222, 227 (1978); Berger, *supra*, at 88, 92–93; Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1021 (1969). Holmstrom and Burgess report that nearly half of all *adult* rape victims were disturbed by the public setting of their trials. Certainly the impact on children must be greater.

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able to the media. The victim might very well experience considerable distress prior to the court appearance, wondering, in the absence of such statutory protection, whether public testimony will be required. The mere possibility of public testimony may cause parents and children to decide not to report these heinous crimes. If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself,[8] a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce that trauma. Furthermore, we cannot expect victims and their parents to be aware of all of the nuances of state law; a person who sees newspaper, or perhaps even television, reports of a minor victim's testimony may very well be deterred from reporting a crime on the belief that public testimony will be required. It is within the power of the state to provide for mandatory closure to alleviate such understandable fears and encourage the reporting of such crimes.

IV

There is, of course, "a presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." But we have consistently emphasized that this presumption is not absolute or irrebutable. A majority of the Justices in *Richmond Newspapers* acknowledged that closure might be permitted under certain circumstances. Justice Stewart's separate opinion pointedly recognized that exclusion of the public might be justified to protect "the sensibilities of a youthful prosecution witness . . . in a criminal trial for rape." 448 U. S., at 600, n. 5.[9] The Massachusetts statute has a relatively minor incidental impact on First

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[8] See Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 390 (1975); Katz & Mazur, *supra;* Holmstrom & Burgess, *supra;* Hilberman, *supra;* Berger, *supra.*

[9] See also 448 U. S., at 580–581; *id.*, at 582 (WHITE, J., concurring); *id.*, at 584 (STEVENS, J., concurring); *id.*, at 598 (BRENNAN, J., concurring in judgment).

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Amendment rights and gives effect to the overriding state interest in protecting child rape victims. Paradoxically, the Court today denies the victims the kind of protection routinely given to juveniles who commit crimes. Many will find it difficult to reconcile the concern so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape or other sexual abuse, are denied the modest protection the Massachusetts Legislature provided.

JUSTICE STEVENS, dissenting.

The duration of a criminal trial generally is shorter than the time it takes for this Court's jurisdiction to be invoked and our judgment on the merits to be announced. As a result, our power to review pretrial or midtrial orders implicating the freedom of the press has rested on the exception to the mootness doctrine for orders "capable of repetition, yet evading review." See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 563; *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547.

Today the Court expands that exception in order to pass on the constitutionality of a statute that, as presently construed, has never been applied in a live controversy. In this case, unlike the three cases cited above, the governing state law was materially changed after the trial court's order had expired by its own terms. There consequently is no possibility "'that the same complaining party will be subject to the same action again.'" *Gannett Co.* v. *DePasquale*, *supra*, at 377 (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149).

The fact that the Massachusetts Supreme Judicial Court narrowly construed—and then upheld in the abstract—the state statute that the trial court had read to mandate the closure of the entire trial bears on our review function in other respects. We have only recently recognized the First

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Amendment right of access to newsworthy matter. See *ante*, at 603; *Richmond Newspapers, Inc.* v. *Virginia, supra*, at 582 (STEVENS, J., concurring). In developing constitutional jurisprudence, there is a special importance in deciding cases on concrete facts. Cf. *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–127; *United States* v. *Raines*, 362 U. S. 17, 21. Only in specific controversies can the Court decide how this right of access to criminal trials can be accommodated with other societal interests, such as the protection of victims or defendants. The advisory opinion the Court announces today sheds virtually no light on how such rights should be accommodated.

The question whether the Court should entertain a facial attack on a statute that bears on the right of access cannot be answered simply by noting that the right has its source in the First Amendment. See, *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381; *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 61. For the right of access is plainly not coextensive with the right of expression that was vindicated in *Nebraska Press Assn., supra.*[1] Because statutes that bear on this right of access do not deter protected activity in the way that other laws sometimes interfere with the right of expression, we should follow the norm of reviewing these statutes as applied rather than on their face.

It is not clear when, if ever, the Court will need to confront the question whether a mandatory partial-closure statute is unconstitutional. If the order hypothesized by the Supreme Judicial Court, instead of the trial court's order, had actually been entered in this case, and if the press had been given prompt access to a transcript of the testimony of the minor victims, appellant might not even have appealed. At the

[1] For example, even though a reporter may have no right of access to a judge's side-bar conference, it surely does not follow that the judge could enjoin publication of what a reporter might have learned about such a conference.

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very least the press, the prosecutor, and defense counsel would have argued the constitutionality of the partial-closure order in the context of the facts relevant to such an order, and a different controversy would have been framed for appellate review. In future cases the trial courts may voluntarily follow the direction of Justice Wilkins and make specific findings demonstrating a compelling state interest supporting the mandated partial-closure order. See 383 Mass. 838, 852–853, 423 N. E. 2d 773, 782 (concurring opinion). Or the record in future cases may plainly disclose a justification for a partial closure that the Court would consider acceptable. Thus, aside from the illumination provided by live controversies, a decision to review only orders actually entered pursuant to the Massachusetts statute would advance the policy of avoiding the premature and unnecessary adjudication of constitutional questions;[2] it is at least conceivable that no such order may ever have to be justified by the conclusion of the legislature that the mandatory closure of the trial during the testimony of a minor victim of a sex crime is necessary to serve important state interests.

The Court does not hold that on this record a closure order limited to the testimony of the minor victims would have been unconstitutional. Rather, the Court holds only that if ever such an order is entered, it must be supported by adequate findings. Normally, if the constitutional deficiency is the absence of findings to support a trial order, the Court would either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards. The infeasibility of this course of action—since no such order was entered in this case and since the order that was entered has expired—further demon-

[2] "But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett*, 328 U. S. 303, 320 (Frankfurter, J., concurring).

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strates that the Court's comment on the First Amendment issues implicated by the Massachusetts statute is advisory, hypothetical, and, at best, premature.[3]

I would dismiss the appeal.

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[3] The "capable of repetition, yet evading review" exception to the mootness doctrine generally is compatible with our settled policy of avoiding the premature adjudication of constitutional questions, see *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 756, n. 8, for an order that is capable of repetition yet evading review generally is no less ripe for review the first time it is presented than it would be on subsequent occasions. But when the "order" that is presented for review the first time is formulated in the abstract, as was the ruling of the Supreme Judicial Court in this case, the policy requires the Court to defer review of such an order until it is entered in a live controversy.

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EDGAR *v.* MITE CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1188. Argued November 30, 1981—Decided June 23, 1982

The Illinois Business Take-Over Act requires a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the terms of the offer 20 days before the offer becomes effective. During that time the offeror may not communicate its offer to the shareholders, but the target company is free to disseminate information to its shareholders concerning the impending offer. The Act also requires any takeover offer to be registered with the Secretary of State. A target company is defined as a corporation of which Illinois shareholders own 10% of the class of securities subject to the takeover offer or for which any two of the following conditions are met: the corporation has its principal office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented within the State. An offer becomes registered 20 days after a registration statement is filed with the Secretary of State unless he calls a hearing to adjudicate the fairness of the offer. Appellee MITE Corp., a corporation organized under Delaware laws with its principal office in Connecticut, initiated a tender offer for all outstanding shares of Chicago Rivet & Machine Co., an Illinois corporation, by filing with the Securities and Exchange Commission the schedule required by the Williams Act. MITE, however, did not comply with the Illinois Act, and brought an action in Federal District Court seeking a declaratory judgment that the Illinois Act was pre-empted by the Williams Act and violated the Commerce Clause, and also seeking injunctive relief. The District Court issued a preliminary injunction prohibiting enforcement of the Illinois Act against MITE's tender offer. MITE then published its offer. Subsequently, the District Court issued the requested declaratory judgment and a permanent injunction. Shortly thereafter, MITE and Chicago Rivet entered into an agreement whereby both MITE's tender offer and an offer made by Chicago Rivet before the District Court entered its judgment were withdrawn and MITE was given a specified time to make another offer. Ultimately, MITE decided not to make another offer. The Court of Appeals affirmed the District Court.

Held: The judgment is affirmed.

633 F. 2d 486, affirmed.

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JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, and V–B, concluding that:

1. The case is not moot. Because the Secretary of State has indicated his intention to enforce the Illinois Act against MITE, a reversal of the District Court's judgment would expose MITE to civil and criminal liability for making an offer in violation of the Act. P. 630.

2. The Illinois Act is unconstitutional under the Commerce Clause, because it imposes burdens on interstate commerce that are excessive in light of the local interests the Act purports to further. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137. Illinois' asserted interests in protecting resident security holders and regulating the internal affairs of companies incorporated under Illinois law are insufficient to outweigh such burdens. Pp. 643–646.

WHITE, J., delivered an opinion, joined in its entirety by BURGER, C. J., Parts I, II, and V–B of which are the opinion of the Court. BLACKMUN, J., joined Parts I, II, III, and IV. POWELL, J., joined Parts I and V–B. STEVENS and O'CONNOR, JJ., joined Parts I, II, and V. POWELL, J., filed an opinion concurring in part, *post*, p. 646. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 647. O'CONNOR, J., filed an opinion concurring in part, *post*, p. 655. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 655. REHNQUIST, J., filed a dissenting opinion, *post*, p. 664.

Russell C. Grimes, Jr., Assistant Attorney General of Illinois, argued the cause for appellant. With him on the briefs were *Tyrone C. Fahner*, Attorney General, and *Paul J. Bargiel*, Assistant Attorney General.

Richard W. Hulbert argued the cause for appellees. With him on the brief was *Christopher H. Lunding*.

Eugene D. Berman, Assistant Attorney General, argued the cause for the State of New York as *amicus curiae* urging reversal. With him on the brief were *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, *Linda S. Martinson*, Deputy Assistant Attorney General, and *Elizabeth Block*, Assistant Attorney General.

Stephen M. Shapiro argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General*

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Wallace, Assistant Attorney General Baxter, Deputy Solicitor General Geller, Ralph C. Ferrara, Paul Gonson, Daniel L. Goelzer, and *James R. Farrand.**

JUSTICE WHITE delivered an opinion, Parts I, II, and V-B of which are the opinion of the Court.†

The issue in this case is whether the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121½, ¶ 137.51 *et seq.* (1979), is unconstitutional under the Supremacy and Commerce Clauses of the Federal Constitution.

I

Appellee MITE Corp. and its wholly owned subsidiary, MITE Holdings, Inc., are corporations organized under the laws of Delaware with their principal executive offices in Connecticut. Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Under the Illinois Act any takeover offer[1] for the shares of a target company must be

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*Briefs of *amici curiae* urging reversal were filed by *William J. Brown*, Attorney General, and *Roger P. Sugarman*, Assistant Attorney General, for the State of Ohio; by *Marshall Coleman*, Attorney General, *Walter H. Ryland*, Chief Deputy Attorney General, and *Karen A. Gould*, Assistant Attorney General, for the Commonwealth of Virginia; and by *Orestes J. Mihaly*, *Stephen M. Coons*, and *K. Houston Matney*, for the North American Securities Administrators Association, Inc.

†THE CHIEF JUSTICE joins the opinion in its entirety; JUSTICE BLACKMUN joins Parts I, II, III, and IV; JUSTICE POWELL joins Parts I and V-B; and JUSTICE STEVENS and JUSTICE O'CONNOR join Parts I, II, and V.

[1] The Illinois Act defines "take-over offer" as "the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer . . . ." Ill. Rev. Stat., ch. 121½, ¶ 137.52-9 (1979). "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251 (1973) (footnotes omitted). The terms "tender offer" and "takeover offer" are often used interchangeably.

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registered with the Secretary of State. Ill. Rev. Stat., ch. 121½, ¶ 137.54.A (1979). A target company is defined as a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State. ¶ 137.52–10. An offer becomes registered 20 days after a registration statement is filed with the Secretary unless the Secretary calls a hearing. ¶ 137.54.E. The Secretary may call a hearing at any time during the 20-day waiting period to adjudicate the substantive fairness of the offer if he believes it is necessary to protect the shareholders of the target company, and a hearing must be held if requested by a majority of a target company's outside directors or by Illinois shareholders who own 10% of the class of securities subject to the offer. ¶ 137.57.A. If the Secretary does hold a hearing, he is directed by the statute to deny registration to a tender offer if he finds that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees . . . ." ¶ 137.57.E.

On January 19, 1979, MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet & Machine Co., a publicly held Illinois corporation, by filing a Schedule 14D–1 with the Securities and Exchange Commission in order to comply with the Williams Act.[2] The Schedule 14D–1 indi-

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[2] The Williams Act, 82 Stat. 454, codified at 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f), added new §§ 13(d), 13(e), and 14(d)–(f) to the Securities Exchange Act of 1934. Section 14(d)(1) of the Securities Exchange Act requires an offeror seeking to acquire more than 5% of any class of equity security by means of a tender offer to first file a Schedule 14D–1 with the Securities and Exchange Commission. The Schedule requires disclosure

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cated that MITE was willing to pay $28 per share for any and all outstanding shares of Chicago Rivet, a premium of approximately $4 over the then-prevailing market price. MITE did not comply with the Illinois Act, however, and commenced this litigation on the same day by filing an action in the United States District Court for the Northern District of Illinois. The complaint asked for a declaratory judgment that the Illinois Act was pre-empted by the Williams Act and violated the Commerce Clause. In addition, MITE sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

Chicago Rivet responded three days later by bringing suit in Pennsylvania, where it conducted most of its business, seeking to enjoin MITE from proceeding with its proposed tender offer on the ground that the offer violated the Pennsylvania Takeover Disclosure Law, Pa. Stat. Ann., Tit. 70, § 71 *et seq.* (Purdon Supp. 1982–1983). After Chicago Rivet's efforts to obtain relief in Pennsylvania proved unsuccessful,[3] both Chicago Rivet and the Illinois Secretary of State

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of the source of funds used to purchase the target shares, past transactions with the target company, and other material financial information about the offeror. In addition, the offeror must disclose any antitrust or other legal problems which might result from the success of the offer. 17 CFR § 240.14d–100 (1981). Section 14(d)(1) requires the offeror to publish or send a statement of the relevant facts contained in the Schedule 14D–1 to the shareholders of the target company.

In addition, § 13(d), added by the Williams Act, requires a purchaser of any equity security registered pursuant to § 12 of the Securities Exchange Act, 15 U. S. C. § 78*l*, to file a Schedule 13D with the Commission within 10 days after its purchases have exceeded 5% of the outstanding shares of the security. Schedule 13D requires essentially the same disclosures as required by Schedule 14D–1. Compare 17 CFR § 240.13d–101 (1981) with 17 CFR § 240.14d–100 (1981).

[3] In addition to filing suit in state court, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission requesting the Commission to enforce the Pennsylvania Act against MITE. On January 31, 1979, the

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took steps to invoke the Illinois Act. On February 1, 1979, the Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist further efforts to make a tender offer for Chicago Rivet. On February 2, 1979, Chicago Rivet notified MITE by letter that it would file suit in Illinois state court to enjoin the proposed tender offer. MITE renewed its request for injunctive relief in the District Court and on February 2 the District Court issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet.

MITE then published its tender offer in the February 5 edition of the Wall Street Journal. The offer was made to all shareholders of Chicago Rivet residing throughout the United States. The outstanding stock was worth over $23 million at the offering price. On the same day Chicago Rivet made an offer for approximately 40% of its own shares at $30 per share.[4] The District Court entered final judgment on February 9, declaring that the Illinois Act was pre-empted by the Williams Act and that it violated the Commerce Clause. Accordingly, the District Court permanently enjoined enforcement of the Illinois statute against MITE. Shortly after final judgment was entered, MITE and Chicago Rivet entered into an agreement whereby both tender offers were withdrawn and MITE was given 30 days to examine the books and records of Chicago Rivet. Under the agreement MITE was either to make a tender offer of $31 per share be-

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Pennsylvania Securities Commission decided that it would not invoke the Pennsylvania Takeover Disclosure Law. The next day, the United States District Court for the Western District of Pennsylvania, to which MITE had removed the state-court action, denied Chicago Rivet's motion for a temporary restraining order.

[4] Chicago Rivet's offer for its own shares was exempt from the requirements of the Illinois Act pursuant to Ill. Rev. Stat., ch. 121½, ¶ 137.52-9(4) (1979).

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fore March 12, 1979, which Chicago Rivet agreed not to oppose, or decide not to acquire Chicago Rivet's shares or assets. App. to Brief for Appellees 1a–4a. On March 2, 1979, MITE announced its decision not to make a tender offer.

The United States Court of Appeals for the Seventh Circuit affirmed *sub nom. MITE Corp.* v. *Dixon*, 633 F. 2d 486 (1980). It agreed with the District Court that several provisions of the Illinois Act are pre-empted by the Williams Act and that the Illinois Act unduly burdens interstate commerce in violation of the Commerce Clause. We noted probable jurisdiction, 451 U. S. 968 (1981), and now affirm.

II

The Court of Appeals specifically found that this case was not moot, 633 F. 2d, at 490, reasoning that because the Secretary has indicated he intends to enforce the Act against MITE, a reversal of the judgment of the District Court would expose MITE to civil and criminal liability[5] for making the February 5, 1979, offer in violation of the Illinois Act. We agree. It is urged that the preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties. While, as JUSTICE STEVENS' concurrence indicates, that is not a frivolous question by any means, it is an issue to be decided when and if the Secretary of State initiates an action. That action would be foreclosed if we agree with the Court of Appeals that the Illinois Act is unconstitutional. Accordingly, the case is not moot.

III

We first address the holding that the Illinois Take-Over Act is unconstitutional under the Supremacy Clause. We note at the outset that in passing the Williams Act, which is

[5] The Secretary of State may bring an action for civil penalties for violations of the Illinois Act., Ill. Rev. Stat., ch. 121½, ¶ 137.65 (1979), and a person who willfully violates the Act is subject to criminal prosecution. ¶ 137.63.

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an amendment to the Securities Exchange Act of 1934, Congress did not also amend § 28(a) of the 1934 Act, 15 U. S. C. § 78bb(a).[6] In pertinent part, § 28(a) provides as follows:

> "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder." 48 Stat. 903.

Thus Congress did not explicitly prohibit States from regulating takeovers; it left the determination whether the Illinois statute conflicts with the Williams Act to the courts. Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and

> "[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . .' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, [430 U. S. 519,] 526, 540–541 [(1977)]. Accord, *De Canas* v. *Bica*, 424 U. S. 351, 363 (1976)." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Our inquiry is further narrowed in this case since there is no contention that it would be impossible to comply with both

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[6] There is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act. When the Williams Act was enacted in 1968, only Virginia had a takeover statute. The Virginia statute, Va. Code § 13.1–528 (1978), became effective March 5, 1968; the Williams Act was enacted several months later on July 19, 1968. Takeover statutes are now in effect in 37 States. Sargent, On the Validity of State Takeover Regulation: State Responses to *MITE* and *Kidwell*, 42 Ohio St. L. J. 689, 690, n. 7 (1981).

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the provisions of the Williams Act and the more burdensome requirements of the Illinois law. The issue thus is, as it was in the Court of Appeals, whether the Illinois Act frustrates the objectives of the Williams Act in some substantial way.

The Williams Act, passed in 1968, was the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act filled this regulatory gap. The Act imposes several requirements. First, it requires that upon the commencement of the tender offer, the offeror file with the SEC, publish or send to the shareholders of the target company, and furnish to the target company detailed information about the offer. 15 U. S. C. § 78n(d)(1); 17 CFR § 240.24d–3 (1981). The offeror must disclose information about its background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. 15 U. S. C. § 78m(d)(1) (1976 ed., Supp. IV); 17 CFR § 240.13d–1 (1981). See also n. 2, *supra*. Second, stockholders who tender their shares may withdraw them during the first 7 days of a tender offer and if the offeror has not yet purchased their shares, at any time after 60 days from the commencement of the offer. 15 U. S. C. § 78n(d)(5).[7] Third, all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U. S. C. § 78n(d)(7).[8]

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[7] The 7-day withdrawal period contained in the Williams Act has been extended to 15 business days by the Commission. 17 CFR § 240.14d–7(a)(1) (1981).

[8] The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata

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There is no question that in imposing these requirements, Congress intended to protect investors. *Piper* v. *Chris-Craft Industries, Inc., supra*, at 35; *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess., 3–4 (1967) (Senate Report). But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder. As we noted in *Piper*, the disclosure provisions originally embodied in S. 2731 "were avowedly pro-management in the target company's efforts to defeat takeover bids." 430 U. S., at 30. But Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." Senate Report, at 3.[9] It also became apparent that entrenched management was often successful in defeating takeover attempts. As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids," *Rondeau* v. *Mosinee Paper Corp., supra*, at 58, and expressly embraced a policy of neutrality. As Senator Williams explained: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." 113 Cong. Rec. 24664 (1967). This policy of "evenhandedness," *Piper* v. *Chris-Craft Industries, Inc., supra*, at 31, represented a conviction that neither side in the contest should be extended additional advantages vis-à-vis the investor, who if furnished with adequate information would be in a position to make his

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basis. 15 U. S. C. § 78n(d)(6). The Act also contains a general antifraud provision, 15 U. S. C. § 78n(e), which has been interpreted to require disclosure of material information known to the offeror even if disclosure were not otherwise required. See, *e. g.*, *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F. 2d 247, 250 (CA2 1973).

[9] Congress also did not want to deny shareholders "the opportunities which result from the competitive bidding for a block of stock of a given company," namely, the opportunity to sell shares for a premium over their market price. 113 Cong. Rec. 24666 (1967) (remarks of Sen. Javits).

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own informed choice. We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice. 633 F. 2d, at 496.

To implement this policy of investor protection while maintaining the balance between management and the bidder, Congress required the latter to file with the Commission and furnish the company and the investor with all information adequate to the occasion. With that filing, the offer could go forward, stock could be tendered and purchased, but a stockholder was free within a specified time to withdraw his tendered shares. He was also protected if the offer was increased. Looking at this history as a whole, it appears to us, as it did to the Court of Appeals, that Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "inten[tion] to do . . . more than give incumbent management an opportunity to express and explain its position." *Rondeau* v. *Mosinee Paper Corp.*, *supra*, at 58. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

IV

The Court of Appeals identified three provisions of the Illinois Act that upset the careful balance struck by Congress and which therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress. We agree with the Court of Appeals in all essential respects.

A

The Illinois Act requires a tender offeror to notify the Secretary of State and the target company of its intent to make a

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tender offer and the material terms of the offer 20 business days before the offer becomes effective. Ill. Rev. Stat., ch. 121½, ¶¶ 137.54.E, 137.54.B (1979). During that time, the offeror may not communicate its offer to the shareholders. ¶ 137.54.A. Meanwhile, the target company is free to disseminate information to its shareholders concerning the impending offer. The contrast with the Williams Act is apparent. Under that Act, there is no precommencement notification requirement; the critical date is the date a tender offer is "first published or sent or given to security holders." 15 U. S. C. § 78n(d)(1). See also 17 CFR § 240.14d-2 (1981).

We agree with the Court of Appeals that by providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.[10] These consequences are precisely what Congress determined should be avoided, and for this reason, the precommencement notification provision frustrates the objectives of the Williams Act.

It is important to note in this respect that in the course of events leading to the adoption of the Williams Act, Congress several times refused to impose a precommencement disclosure requirement. In October 1965, Senator Williams introduced S. 2731, a bill which would have required a bidder to notify the target company and file a public statement with the Securities and Exchange Commission at least 20 days before commencement of a cash tender offer for more than 5% of a class of the target company's securities. 111 Cong. Rec. 28259 (1965). The Commission commented on the bill and stated that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders . . . ." 112 Cong. Rec. 19005 (1966).

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[10] See n. 11 and accompanying text, *infra*.

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Senator Williams introduced a new bill in 1967, S. 510, which provided for a confidential filing by the tender offeror with the Commission five days prior to the commencement of the offer. S. 510 was enacted as the Williams Act after elimination of the advance disclosure requirement. As the Senate Report explained:

> "At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public." Senate Report, at 4.

Congress rejected another precommencement notification proposal during deliberations on the 1970 amendments to the Williams Act.[11]

B

For similar reasons, we agree with the Court of Appeals

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[11] H. R. 4285, 91st Cong., 2d Sess. (1970). The bill was not reported out of the Subcommittee. Instead, the Senate amendments to the Williams Act, which did not contain precommencement notification provisions, were adopted. Pub. L. 91-567, 84 Stat. 1497.

The Securities and Exchange Commission has promulgated detailed rules governing the conduct of tender offers. Rule 14d-2(b), 17 CFR § 240.14d-2(b) (1981), requires that a tender offeror make its offer effective within five days of publicly announcing the material terms of the offer by disseminating specified information to shareholders and filing the requisite documents with the Commission. Otherwise the offeror must announce that it is withdrawing its offer. The events in this litigation took place prior to the effective date of Rule 14d-2(b), and because Rule 14d-2(b) operates prospectively only, see 44 Fed. Reg. 70326 (1979), it is not at issue in this case.

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that the hearing provisions of the Illinois Act frustrate the congressional purpose by introducing extended delay into the tender offer process. The Illinois Act allows the Secretary of State to call a hearing with respect to any tender offer subject to the Act, and the offer may not proceed until the hearing is completed. Ill. Rev. Stat., ch. 121½, ¶¶ 137.57.A and B (1979). The Secretary may call a hearing at any time prior to the commencement of the offer, and there is no deadline for the completion of the hearing. ¶¶ 137.57.C and D. Although the Secretary is to render a decision within 15 days after the conclusion of the hearing, that period may be extended without limitation. Not only does the Secretary of State have the power to delay a tender offer indefinitely, but incumbent management may also use the hearing provisions of the Illinois Act to delay a tender offer. The Secretary is required to call a hearing if requested to do so by, among other persons, those who are located in Illinois "as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the take-over offer." ¶ 137.57.A. Since incumbent management in many cases will control, either directly or indirectly, 10% of the target company's shares, this provision allows management to delay the commencement of an offer by insisting on a hearing. As the Court of Appeals observed, these provisions potentially afford management a "powerful weapon to stymie indefinitely a takeover." 633 F. 2d, at 494.[12] In enacting the Williams Act, Congress itself "recognized that delay can seriously impede a tender offer" and sought to avoid it. *Great*

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[12] Delay has been characterized as "the most potent weapon in a tender-offer fight." Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Rev. 213, 238 (1977). See also Wachtell, Special Tender Offer Litigation Tactics, 32 Bus. Law. 1433, 1437–1442 (1977); Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 Ford. L. Rev. 1, 9–10 (1976).

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Western United Corp. v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978); Senate Report, at 4.[13]

Congress reemphasized the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1397, 15 U. S. C. § 12 *et seq.*

> "[I]t is clear that this short waiting period [the 10-day period for proration provided for by § 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." H. R. Rep. No. 94–1373, p. 12 (1976).[14]

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[13] According to the Securities and Exchange Commission, delay enables a target company to:

"(1) repurchase its own securities;

"(2) announce dividend increases or stock splits;

"(3) issue additional shares of stock;

"(4) acquire other companies to produce an antitrust violation should the tender offer succeed;

"(5) arrange a defensive merger;

"(6) enter into restrictive loan agreements; and

"(7) institute litigation challenging the tender offer." Brief for Securities and Exchange Commission as *Amicus Curiae* 10, n. 8.

[14] Representative Rodino set out the consequences of delay in greater detail when he described the relationship between the Hart-Scott-Rodino Act and the Williams Act:

"In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime

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As we have said, Congress anticipated investors and the takeover offeror be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders. We therefore agree with the Court of Appeals that these hearing provisions conflict with the Williams Act.

C

The Court of Appeals also concluded that the Illinois Act is pre-empted by the Williams Act insofar as it allows the Secretary of State of Illinois to pass on the substantive fairness of a tender offer. Under ¶ 137.57.E of the Illinois law, the Secretary is required to deny registration of a takeover offer if he finds that the offer "fails to provide full and fair disclosure to the offerees . . . *or that the take-over offer is inequitable* . . ." (emphasis added).[15] The Court of Appeals understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to make their own decisions. We agree. Both the House and Senate Reports observed that the Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." H. R. Rep. No. 1711, 90th Cong.,

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employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so." 122 Cong. Rec. 30877 (1976).

[15] Appellant argues that the Illinois Act does not permit him to adjudicate the substantive fairness of a tender offer. Brief for Appellant 21–22. On this state-law issue, however, we follow the view of the Court of Appeals that ¶ 137.57.E allows the Secretary of State "to pass upon the substantive fairness of a tender offer . . . ." 633 F. 2d 486, 493 (1980).

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2d Sess., 4 (1968); Senate Report, at 3. Thus, as the Court of Appeals said, "[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." 633 F. 2d, at 494.

V

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." U. S. Const., Art. I, §8, cl. 3. "[A]t least since *Cooley* v. *Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause. . . . even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 370–371 (1976), quoting *Freeman* v. *Hewitt*, 329 U. S. 249, 252 (1946). See also *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), citing *Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443 (1960). The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited. *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 199 (1925). See also *Pike* v. *Bruce Church, Inc.*, *supra*, at 142. The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, unless its terms are satisfied, interstate tender offers which in turn would generate interstate transactions. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further.

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A

States have traditionally regulated intrastate securities transactions,[16] and this Court has upheld the authority of States to enact "blue-sky" laws against Commerce Clause challenges on several occasions. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Merrick* v. *N. W. Halsey & Co.*, 242 U. S. 568 (1917). The Court's rationale for upholding blue-sky laws was that they only regulated transactions occurring within the regulating States. "The provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . , they are only affected by the requirement of a license of one who deals with them *within* the State. . . . Such regulations affect interstate commerce in [securities] only incidentally." *Hall* v. *Geiger-Jones Co.*, *supra*, at 557–558 (citations omitted). Congress has also recognized the validity of such laws governing intrastate securities transactions in § 28(a) of the Securities Exchange Act, 15 U. S. C. § 78bb(a), a provision "designed to save state blue-sky laws from pre-emption." *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 182, n. 13 (1979).

The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. A tender offer for securities of a publicly held corporation is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across the country and abroad. Securities are tendered and transactions closed by similar means. Thus, in this case, MITE

[16] For example, the Illinois blue-sky law, Ill. Rev. Stat., ch. 121½, ¶ 137.1 *et seq.* (1979 and Supp. 1980), provides that securities subject to the law must be registered "prior to sale in this State . . . ." ¶ 137.5.

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Corp., the tender offeror, is a Delaware corporation with principal offices in Connecticut. Chicago Rivet is a publicly held Illinois corporation with shareholders scattered around the country, 27% of whom live in Illinois. MITE's offer to Chicago Rivet's shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines. These transactions would themselves be interstate commerce. Yet the Illinois law, unless complied with, sought to prevent MITE from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also with those living in other States and having no connection with Illinois. Indeed, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Rev. Stat., ch. 121½, ¶ 137.52–10(2) (1979). Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. In *Shafer* v. *Farmers Grain Co.*, *supra*, at 199, the Court held that "a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." See also *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 806 (1976). The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has ef-

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fects within the State. In *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state . . . ." The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U. S. 186, 197 (1977).

Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the State, it must be held invalid as were the laws at issue in *Shafer* v. *Farmers Grain Co.* and *Southern Pacific*.

B

The Illinois Act is also unconstitutional under the test of *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142, for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute. The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.

The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced. See Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev.

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1161, 1173–1174 (1981); Fischel, Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 Texas L. Rev. 1, 5, 27–28, 45 (1978); H. R. Rep. No. 94–1373, p. 12 (1976).

Appellant claims the Illinois Act furthers two legitimate local interests. He argues that Illinois seeks to protect resident security holders and that the Act merely regulates the internal affairs of companies incorporated under Illinois law. We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.

While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. We note, furthermore, that the Act completely exempts from coverage a corporation's acquisition of its own shares. Ill. Rev. Stat., ch. 121½, ¶ 137.52–9(4) (1979). Thus Chicago Rivet was able to make a competing tender offer for its own stock without complying with the Illinois Act, leaving Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts. This distinction is at variance with Illinois' asserted legislative purpose, and tends to undermine appellant's justification for the burdens the statute imposes on interstate commerce.

We are also unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration, and equal consideration rights. However, the Williams Act provides these same substantive protections, compare Ill. Rev. Stat., ch. 121½, ¶¶ 137.59.C, D, and E (1979) (with-

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drawal, proration, and equal consideration rights), with 15 U. S. C. §§ 78n(d)(5), (6), and (7) and 17 CFR § 240.14d–7 (1981) (same). As the Court of Appeals noted, the disclosures required by the Illinois Act which go beyond those mandated by the Williams Act and the regulations pursuant to it may not substantially enhance the shareholders' ability to make informed decisions. 633 F. 2d, at 500. It also was of the view that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management. We are unprepared to disagree with the Court of Appeals in these respects, and conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.

Appellant also contends that Illinois has an interest in regulating the internal affairs of a corporation incorporated under its laws. The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. See Restatement (Second) of Conflict of Laws § 302, Comment *b*, pp. 307–308 (1971). That doctrine is of little use to the State in this context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. *Great Western United Corp.* v. *Kidwell*, 577 F. 2d, at 1280, n. 53; Restatement, *supra*, § 302, Comment *e*, p. 310. Furthermore, the proposed justification is somewhat incredible since the Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents, Ill. Rev. Stat., ch. 121½, ¶ 137.52–10 (1979). The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other States. Illinois has no inter-

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est in regulating the internal affairs of foreign corporations.

We conclude with the Court of Appeals that the Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, concurring in part.

I agree with JUSTICE MARSHALL that this case is moot. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I and V-B of the Court's opinion.

I join Part V-B because its Commerce Clause reasoning leaves some room for state regulation of tender offers. This period in our history is marked by conglomerate corporate formations essentially unrestricted by the antitrust laws. Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as of capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State.*

The Williams Act provisions, implementing a policy of neutrality, seem to assume corporate entities of substantially equal resources. I agree with JUSTICE STEVENS that the

*The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.

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Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The question whether this case is moot depends on the effect of the preliminary injunction entered on February 2, 1979, restraining the Illinois Secretary of State from enforcing the Illinois Business Take-Over Act while the injunction remained in effect. If, as JUSTICE MARSHALL contends in his dissenting opinion, the injunction granted the MITE Corp. a complete immunity from state sanctions for any acts performed while the injunction was outstanding, I would agree that the case is moot. On the other hand, if the injunction did no more than it purported to do, setting aside the injunction would remove its protection and MITE would be subject to sanctions in the state courts. Those courts might regard the fact that an injunction was outstanding at the time MITE violated the Illinois statute as a defense to any enforcement proceeding, but unless the federal injunction was tantamount to a grant of immunity, there is no federal rule of law that would require the state courts to absolve MITE from liability. I believe, therefore, that to resolve the mootness issue—which, of course, is jurisdictional—we must answer the question that JUSTICE MARSHALL's dissent raises.

JUSTICE MARSHALL advances various reasons for adopting a rule that will give federal judges the power to grant complete immunity to persons who desire to test the constitutionality of a state statute. His proposed rule would treat any federal judge's preliminary injunction restraining enforcement of a state statute on federal grounds as a grant of immunity with respect to any conduct undertaken while the injunc-

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tion was outstanding. Under the rule he proposes, "if the statute is later determined to be valid, the State will never be able to prosecute the individual that obtained the preliminary injunction for action taken while the injunction was in effect." *Post*, at 657, n. 1. For me, the question is not whether such a rule would be wise; the question is whether federal judges possess the power to grant such immunity. In my opinion they do not.

I

The essential facts of this case are few and bear repeating. On February 2, 1979, MITE Corp. and MITE Holdings, Inc., obtained a preliminary injunction restraining the Illinois Secretary of State from invoking the provisions of the Illinois Business Take-Over Act to block MITE's intended takeover of Chicago Rivet & Machine Co. Three days later, without complying with the provisions of the Illinois statute, MITE published its offer in the Wall Street Journal. On February 9, 1979, the District Court entered a judgment declaring the Illinois statute unconstitutional; the court permanently enjoined the Secretary from enforcing the Illinois statute against MITE.

The State contends that the attempted takeover was subject to the provisions of the Illinois statute and that MITE violated the Act by failing to register with the Illinois Secretary of State. The State further argues that the Take-Over Act is consistent with federal law. For purposes of deciding the mootness issue, we must assume that these contentions are correct; a holding that this case is moot would mean that MITE is completely protected from any adverse action whether or not the statute is unconstitutional. Such a conclusion would be possible only if the District Court's preliminary injunction granted MITE absolute and permanent immunity from any prosecution—civil or criminal—brought to enforce the Illinois statute.

Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of

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the District Court's order as a grant of total immunity from future prosecution. More fundamentally, federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments.

A

An injunction restrains conduct. Its effect is normally limited to the parties named in the instrument. Since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully.[1] The bond, in effect, is the moving party's warranty that the law will uphold the issuance of the injunction.

These features of injunctive relief are inconsistent with a blanket grant of immunity, as this case demonstrates. The preliminary injunction did not purport to provide permanent immunity for violations of the statute that occurred during its effective period. It merely provided that the Secretary of State was enjoined from "issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act" against MITE. Record 16. It did not enjoin other parties who are authorized by the Act to enforce its provisions. Ill. Rev.

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[1] As provided by Federal Rule of Civil Procedure 65(c):

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

In Illinois damages apparently may be recovered for injuries caused by a preliminary injunction issued wrongfully by a state court even in the absence of an indemnity bond or abuse of process. See Ill. Rev. Stat., ch. 69, ¶ 12 (1979); Note, 73 Harv. L. Rev. 333, 347 (1959).

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Stat., ch. 121½, ¶¶ 137.62, 137.64 (1979). Moreover, the preliminary injunction was entered without any declaration that the Illinois statute was unconstitutional. There simply is no basis on which to conclude that the preliminary injunction issued by the District Court should be construed as having granted MITE permanent immunity from future proceedings brought under the Illinois statute.

In *Steffel* v. *Thompson*, 415 U. S. 452, the Court unanimously held that an individual who wished to engage in "constitutionally protected activity" but was threatened with prosecution under a state criminal statute could obtain a declaratory judgment in federal court declaring the statute invalid. The Court did not suggest that, armed with such a judgment from a federal district court, the individual could violate the statute with impunity; indeed, it stated just the opposite:

> "'[A] federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute.'" *Id.*, at 469–470 (quoting *Perez* v. *Ledesma*, 401 U. S. 82, 124 (separate opinion of BRENNAN, J.)).[2]

JUSTICE WHITE attached possibly the greatest significance to a federal declaratory judgment, writing separately in *Steffel* that "I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded res judicata effect in any later prosecution of that very conduct."

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[2] See also 415 U. S., at 480, (REHNQUIST, J., concurring) ("There is nothing in the [Declaratory Judgment] Act's history to suggest that Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct"); *id.*, at 482 ("A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions").

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415 U. S., at 477 (concurring opinion). A declaratory judgment reversed on appeal, however, certainly would not have such res judicata effect.

An individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril. One purpose of the federal declaratory judgment statute is to permit such an individual to test the legality of a state statute before engaging in conduct that is prohibited by its terms. See S. Rep. No. 1005, 73d Cong., 2d Sess., 2–3 (1934). Recognition of this fact, however, does not determine the point at which an individual may act with absolute assurance that he may not be punished for his contemplated activity. The fact that a federal judge has entered a declaration that the law is invalid does not provide that assurance; every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal. To repeat the words of this Court in *Steffel*, the most that can be said is: "'If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute.'" 415 U. S., at 470 (quoting *Perez* v. *Ledesma*, *supra*, at 124 (separate opinion of BRENNAN, J.)).[3]

Since a final judgment declaring a state statute unconstitutional would not grant immunity for actions taken in reliance on the court's decision, certainly a preliminary injunction—which on its face does nothing more than temporarily restrain conduct—should not accomplish that result. Neither the

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[3] The fact that an unreviewed judgment does not provide absolute protection does not render the declaratory judgment of a district court or a court of appeals meaningless. As stated in *Steffel:*

"'Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew.'" 415 U. S., at 470 (quoting *Perez* v. *Ledesma*, 401 U. S., at 125 (separate opinion of BRENNAN, J.)).

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preliminary injunction nor the subsequent judgment declaring the statute unconstitutional can fairly be construed as a grant of absolute immunity from enforcement of the Illinois statute.[4]

B

My conclusions concerning the proper nature of injunctive and declaratory relief are not based upon arcane interpreta-

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[4] In *Liner* v. *Jafco, Inc.*, 375 U. S. 301, the respondent obtained an injunction from a state court that restrained picketing at a construction site. Petitioners moved to dissolve the injunction on the ground that the state court was without jurisdiction to adjudicate the controversy because the subject matter of the picketing was exclusively within the cognizance of the National Labor Relations Board. Petitioners' motion was denied by the state court and that decision was affirmed on appeal. This Court granted a petition for certiorari.

While the case was pending in the state appellate court, construction at the site was completed. This Court nevertheless held that the issue of whether the injunction had issued properly was not moot because the respondent remained liable on an indemnity bond if the injunction had issued wrongfully. The Court stated:

"The petitioners plainly have 'a substantial stake in the judgment . . . ,' *Fiswick* v. *United States*, 329 U. S. 211, 222, which exists apart from and is unaffected by the completion of construction. Their interest derives from the undertaking of respondent Jafco, Inc., in the injunction bond to indemnify them in damages if the injunction was 'wrongfully' sued out. Whether the injunction was wrongfully sued out turns solely upon the answer to the federal question which the petitioners have pressed from the beginning. If the answer of the Tennessee Court of Appeals to that question may not be challenged here, the petitioners have no recourse against Jafco on the bond." *Id.*, at 305–306.

In this case it does not appear that MITE is liable on an injunction bond. The posting of an indemnity bond, however, merely creates a right of action—that may or may not otherwise exist—for damages caused during the period that a wrongfully issued injunction was in effect. In this case, such rights of action exist under an independent state law that we must presume to be valid. As in *Liner*, these rights of action may be pursued "if the injunction was 'wrongfully' sued out"; and "[w]hether the injunction was wrongfully sued out turns solely upon the answer to the federal question which the petitioners have pressed from the beginning."

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tions of common law. Federal courts are courts of limited jurisdiction.[5] Before a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act. There simply is no constitutional or statutory authority that permits a federal judge to grant dispensation from a valid state law.[6]

As I have written before, the federal judiciary can continue to perform its vital function in our governmental structure only if it recognizes the limitations on its own legitimate authority. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 178 (STEVENS, J., dissenting in part). A belief that a particular result appears reasonable or wise is an insufficient predicate for the exercise of federal judicial power.

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[5] As stated by Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch 75, 93:

"As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disdains all jurisdiction not given by the constitution, or by the laws of the United States.

"Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied."

[6] I do not suggest that, if the state law is valid, a federal court lacks jurisdiction to enter an injunction restraining state officials from enforcing the statute. Such an injunction may be appropriate—and would be binding on the parties—to permit the federal court to preserve its jurisdiction pending a final decision on the constitutionality of the statute. *United States* v. *Mine Workers*, 330 U. S. 258, 289–290. "Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931. Such an injunction does not *continue* to be binding on the parties, however, if it is vacated on appeal; "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties *until it is reversed by orderly and proper proceedings.*" *United States* v. *Mine Workers*, *supra*, at 293 (emphasis added).

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The District Court in this case entered both an injunction restraining certain conduct by the Illinois Secretary of State and a judgment declaring a state statute unconstitutional. It did not—because it could not—grant immunity from the requirements of a valid state law.[7] As a result, this Court has jurisdiction to consider whether the judgment and relief entered by the District Court were proper.[8]

II

On the merits, I agree with the Court that the Illinois Take-Over Act is invalid because it burdens interstate com-

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[7] A conflict between a federal rule of law and a state statute may nullify the state law. Although such invalidity may not be recognized or accepted until it is identified in litigation, in my opinion the conflict with a paramount rule of federal law nullifies a state law whether or not litigation is ever commenced. In other words, it is federal rules of law—and not the actions of federal judges—that may render a state law invalid.

[8] JUSTICE REHNQUIST concludes that this case is moot because the injunction restrains an enforcement proceeding that has not yet begun. If his view were accepted, an injunction against a threatened criminal proceeding, see *Dombrowski* v. *Pfister*, 380 U. S. 479, would never be appropriate, for the controversy between the parties would not yet be "ripe." MITE sought an injunction not only to prevent the Illinois Secretary of State from interfering with its attempted takeover of Chicago Rivet, but also to bar the Secretary from proceeding against MITE for actions taken in violation of the statute. What is critical to the mootness question in this case is not that MITE abandoned the takeover before it was completed, but that MITE engaged in conduct that violated the terms of the Illinois statute. The *extent* of MITE's violation of state law cannot be determinative of its interest in avoiding an enforcement proceeding based on what MITE believed was constitutionally protected activity.

Oil Workers v. *Missouri*, 361 U. S. 363, relied on by JUSTICE REHNQUIST, does not compel a contrary result. In that case, the party subject to the injunction terminated the activity that had been enjoined. As a result, this Court refused to consider whether the injunction had issued properly, even though a resolution of that question would also have resolved other matters—based on similar questions of law—pending in another proceeding between the same parties. In this case, the party subject to the injunction—the Illinois Secretary of State—has not abandoned his desire to do what the injunction currently restrains him from doing.

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merce. I therefore join Part V of its opinion. I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. Accordingly, although I agree with the Court's assessment of the impact of the Illinois statute, I do not join its pre-emption holding.

JUSTICE O'CONNOR, concurring in part.

I agree with the Court that the case is not moot, and that portions of the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121½, ¶ 137.51 *et seq.* (1979), are invalid under the Commerce Clause. Because it is not necessary to reach the pre-emption issue, I join only Parts I, II, and V of the Court's opinion, and would affirm the judgment of the Court of Appeals on that basis.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The jurisdiction of this Court depends upon the existence of a live controversy. We may resolve a particular dispute only if the parties have a real interest in the outcome of that dispute. Otherwise, the case is moot, and must be dismissed. *Roe* v. *Wade*, 410 U. S. 113, 125 (1973); *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 407 (1972). In my view, this case should have been dismissed. The parties to this appeal have no adversary interest in the outcome of this case. Their positions would be the same, whether the Court approved the Illinois Business Take-Over Act or struck it down. Because the Court finds that the Illinois Act is unconstitutional, there will be no further litigation. However, even if the Court had held that the Illinois Act is constitutional, and had lifted the permanent injunction that now restrains enforcement of the Act against MITE, there would be no basis for continued litigation. The Secretary stated that if the decision below were reversed, he would initiate enforcement proceedings against MITE in

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state court, seeking civil and criminal penalties for its failure to comply with the Illinois Act. But a preliminary injunction was in effect at the time the alleged violations occurred. As I explain below, I believe that this injunction would have barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during that period. MITE would have a complete defense to such an action.

I

The Secretary argues that the case is not moot because the preliminary injunction would not be a complete defense to a state enforcement action. He contends that the preliminary injunction merely barred him from commencing an enforcement action during the period the injunction was in effect. Thus, if this Court had decided that the statute is constitutional and had lifted the permanent injunction, the State would have been able to commence an action seeking penalties for any violations that occurred during the period the preliminary injunction was in effect. In other words, argues the Secretary, the preliminary injunction only provided temporary security. It enabled MITE to go forward with the tender offer—subject to the risk that at some later stage, the constitutionality of the statute would be upheld, and the State would commence enforcement proceedings.

Federal courts undoubtedly have the power to issue a preliminary injunction that restrains enforcement of a state statute, subject to the condition that if the statute is later found to be valid, the State is free to seek penalties for violations that occurred during the period the injunction was in effect. In my view, however, federal courts also have the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect.[1] Determining

[1] Unless the federal courts can grant preliminary injunctions that provide permanent protection, challenges to questionable state statutes may be de-

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whether a particular injunction provides temporary or permanent protection becomes a question of interpretation.

I believe that in the ordinary case, unless the order contains specific language to the contrary, it should be presumed that an injunction secures permanent protection from penalties for violations that occurred during the period it was in effect; the burden should be on the State to show that the injunction provided only temporary security.[2] A presumption

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terred. A state statute may be either repugnant to the Constitution, or pre-empted by some federal law. Parties who wish to engage in conduct proscribed by state statutes may be reluctant to challenge their validity unless they can obtain permanent immunity from penalties. But there is a strong federal interest in encouraging such challenges: the Constitution itself provides that the Constitution and federal statutes shall be "the supreme Law of the Land." Grants of permanent immunity help ensure that federal law will remain paramount.

Holding that federal courts have power to grant permanent protection would not substantially limit state power. In fact, the impact on state power will be relatively insignificant. A federal court may grant a preliminary injunction prohibiting the enforcement of a state statute only when there is substantial doubt about the validity of the statute, and when the party seeking relief is able to show that he will suffer irreparable injury if an injunction is not granted. It is true that under the rule I propose, if the statute is later determined to be valid, the State will never be able to prosecute the individual that obtained the preliminary injunction for action taken while the injunction was in effect. However, the State will be free to prosecute him for actions occurring either before or after the injunction, and will also be able to prosecute other persons who violated the statute. In other words, the State will be barred only from prosecuting the particular individual who requested the injunction for conduct undertaken during the pendency of the injunction. Moreover, it will be barred from prosecuting that individual, only because there was serious doubt about the constitutionality of the statute, and because he was able to show that he would suffer irreparable injury, if an injunction was not granted.

[2] It might be argued that because a party seeking a preliminary injunction must ordinarily post bond, there should be a presumption in favor of recovery of damages caused by a wrongfully issued preliminary injunction. However, the fact that an injunction bond is ordinarily required does not necessarily imply that the party against whom the injunction was issued is automatically entitled to damages. That party must still prove that dam-

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in favor of permanent protection is likely to reflect the intentions of the court that granted the motion. In acting upon a request for an injunction, it will recognize that short-term protection is often only marginally better than no protection at all. Parties seek to restrain the enforcement of a state statute, not just because they want short-term protection, but because they desire permanent immunity for actions they take in reliance on the injunction. If they are contemplating action that might violate a state statute, they will take little solace from temporary immunity—when they know that if they decide to act, enforcement proceedings might be initiated at some later stage.[3]

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ages are appropriate; the injunction bond merely provides security, when the party is able to make such a showing.

It is true that when an injunction bond has been posted, and when the party challenging the injunction has a right to recover damages on the bond, the question whether an injunction was properly issued is not moot. See *Liner* v. *Jafco, Inc.*, 375 U. S. 301 (1964). The District Court record does not reveal that a bond was posted in this case. Even if a bond had been posted, however, this case would probably be moot; I believe that the State would not have a cause of action for damages. If this Court had determined that the injunction was wrongfully entered, the State might argue that it was damaged because it was unable to recover penalties for violations of the Take-Over Act that occurred during the period the preliminary injunction was in effect. Such an argument should not prevail. Lost penalties do not constitute the sort of damages recoverable on a bond. In any event, as I suggest in this dissent, I believe that the preliminary injunction should be interpreted as protecting MITE from penalties. Thus, it should also protect MITE from liability for "damages" sustained by the State because it could not bring an action for penalties.

If a bond had been posted, the State might be able to recover costs or nominal damages on the bond. However, where there is no other basis for challenging the validity of an injunction, the possibility of such recovery is not sufficient to keep a case alive. If it were, then almost no case challenging an injunction could become moot. See *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62 (1890) (court costs); *Hernandez* v. *European Auto Collision, Inc.*, 487 F. 2d 378, 387 (CA2 1973) (nominal damages); *Kerrigan* v. *Boucher*, 450 F. 2d 487 (CA2 1971) (nominal damages).

[3] Cf. *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974) (federal-court intervention is appropriate where the applicant for relief is situated "between

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Here, the preliminary injunction does not expressly state that it provides permanent immunity from penalties for violations of the Illinois Act that may occur during its effective period. The injunction provides only that the Secretary of State is enjoined from "issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act" against MITE. Record 16. However, I see no reason why the presumption in favor of permanent protection should not be applied here. In this context, as the District Court must have recognized, permanent protection was needed. MITE sought an injunction, not just because it desired protection from enforcement actions during the period it was actually making the tender offer, but also because it desired protection from such actions in the future. The Act provides for substantial civil and criminal penalties. MITE would have been reluctant to go forward with its offer, which entailed considerable expense, if there were some risk that it would be penalized later. Indeed, in the Schedule 14D–1 filed with the SEC, MITE expressly stated that it would not commence the tender offer unless it obtained injunctive relief. It also reserved the right to withdraw its offer if injunctive relief were initially granted, but later withdrawn. See Record, Plaintiff's Exhibit 14.[4]

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the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"). See also *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500 (1925); *Terrace* v. *Thompson*, 263 U. S. 197, 216 (1923); *Salem Inn, Inc.* v. *Frank*, 501 F. 2d 18, 21 (CA2 1974), aff'd in relevant part *sub nom. Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

[4] I also find it significant that the District Court's final order granting a permanent injunction declares that the Illinois Act is "null and void and of no force and effect." App. to Juris. Statement 41a. A reasonable construction of the order granting a preliminary injunction is that it was also intended to render the act "null and void" while the injunction was in effect.

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Interpreting the injunction to provide permanent protection also ensures that MITE could never be penalized for acting in reliance on the injunction.[5] MITE went forward with the tender offer, reasonably believing that the District Court's order provided complete immunity. Under the circumstances, it would be improper to permit the State to penalize action taken while the injunction was in effect. In the past, this Court has recognized that reasonable reliance on judicial pronouncements may constitute a valid defense to criminal prosecution. See, *e. g.*, *Marks* v. *United States*, 430 U. S. 188 (1977).[6]

In addition to arguing that the preliminary injunction should be interpreted to provide only temporary protection from a state enforcement action, the Secretary argues that resolution of the mootness issue in this case should be controlled by *Leroy* v. *Great Western United Corp.*, 443 U. S. 173 (1979). In that case, Great Western announced its intention to make a tender offer to purchase stock in another corporation. Idaho officials responsible for administering an Idaho statute governing corporate takeovers, see Idaho Code § 30–1501 *et seq.* (1980), objected to the offer and delayed its effective date. Great Western brought an action in

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[5] It is relevant to note that although MITE sought injunctive relief prior to engaging in any action that could subject it to civil or criminal penalties, the State never sought a stay of the District Court's injunction either in that court or in the Court of Appeals, and never expressed an intent to do so.

[6] In *Marks*, a conviction for transporting obscene materials was overturned, where the materials were not obscene at time of transportation, but were rendered obscene at time of trial by an intervening decision of this Court. See also *Cox* v. *Louisiana*, 379 U. S. 559, 569–571 (1965) (conviction for illegal picketing reversed where defendant had relied on permission from police officer); *Raley* v. *Ohio*, 360 U. S. 423, 437–439 (1959) (conviction for refusal to testify before state commission reversed because witness had relied on opinion of commission chairman that he was privileged to remain silent); *United States* v. *Mancuso*, 139 F. 2d 90 (CA3 1943) (defendant could not be held liable for ignoring induction notices issued while *ex parte* order staying induction was in effect).

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Federal District Court, seeking a declaration that the Idaho takeover law was unconstitutional, and an injunction restraining Idaho officials from enforcing the statute. The District Court granted injunctive relief that enabled Great Western to complete the acquisition. This Court, in reviewing the case, held that the controversy was not moot. "[T]he question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed." *Id.*, at 178.[7]

Leroy v. *Great Western United Corp.* is easily distinguishable from this case. Unlike MITE, Great Western took actions that might have violated the state takeover statute before it obtained injunctive relief. If this Court had decided that the Idaho statute was valid, Idaho officials might have been able to seek penalties for those preinjunction violations.[8] *Leroy* v. *Great Western United Corp.* can also be distinguished on the ground that the takeover offer in that case was successful. If the Idaho statute had been found to be valid, then Idaho officials would have been able to seek a rescission of the takeover.[9] Here, since the acquisition was never completed, Illinois officials could not seek rescission.[10]

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[7] The Court did not reach the question whether the Idaho statute was unconstitutional. It concluded that the action should have been dismissed on grounds of improper venue.

[8] See Idaho Code §§ 30–1502 to 30–1504, 1510 (1980).

[9] See Idaho Code § 30–1509 (1980) (allowing State to institute action for rescission). The Illinois Act also empowers the State to seek a court order rescinding sales that are unlawful under the Act. Ill. Rev. Stat., ch. 121½, ¶ 137.62 (1979).

[10] It is true that a rescission action would have been predicated on acts that were taken under cover of the preliminary injunction. However, I believe that injunctions should ordinarily be interpreted only as providing permanent protection from *penalties*. The State should be barred from penalizing the offeror for acts that took place during the period the injunction was in effect. However, if a court determines that the state statute is valid, the State should be free to provide a remedy for the continuing effects of acts that violated the statute. In particular, a State should be permitted to dismantle a successful acquisition that violated a valid statute.

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Finally, this case does not fall within the exception to the mootness doctrine for cases that "are capable of repetition, yet evading review." Unless a class action is involved, that exception applies only when the challenged action is too short to be fully litigated before its cessation, and when there is a reasonable expectation or a demonstrated probability that the same complaining party will be subject to the same action in the future. *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 187 (1979); *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975). The second requirement has not been satisfied here. MITE has agreed not to renew its efforts to acquire Chicago Rivet. Thus, unless MITE breaches its agreement,[11] the State will never again have occasion to prevent MITE from making a takeover offer for Chicago Rivet. In addition, there has been no showing that MITE plans to acquire another corporation with substantial connection to Illinois. Thus, there is no demonstrated probability that the State will have occasion to prevent MITE from making a takeover offer for some other corporation.

II

The majority disposes of the mootness issue in a short paragraph. It concedes that the only possible basis for continued litigation in this case would be a state action for penalties. It further concedes that the preliminary injunction issued by the District Court may be a complete defense to an action for civil or criminal penalties. It argues, however, that the effect to be given the preliminary injunction should not be reached in this case. Rather, that question should be decided in a state enforcement action, if it is raised as a defense. Thus, contends the majority, the case is not moot.

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[11] The possibility that MITE will breach its agreement does not bring this case within the "capable of repetition, yet evading review" exception. The likelihood that such a breach will occur is relatively small. The exception applies only when there is a reasonable expectation that the same action will occur in the future.

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I am completely unpersuaded by the majority's facile analysis. In deciding whether a case is moot, the Court must determine whether there is a live controversy. There is a live controversy in this case only if the State could seek penalties from MITE. Here, the State could not seek penalties from MITE. It may be true that the State could file a complaint if this Court were to lift the permanent injunction. However, this fact is not enough to keep the case alive where, as a matter of federal law, the complaint *must* be dismissed. If the action that the State plans to commence in state court lacks any merit—if MITE has an automatic defense to that action—then there simply is no controversy.

This case is made more difficult because the Court has never before decided what effect should be given to preliminary injunctions. But the fact that we must decide a novel question does not make the case any less moot. Certainly, if the Court had already held that a preliminary injunction provides permanent immunity, the case would be moot even though the State could go into state court and seek penalties. Such a suit, which would be clearly frivolous, could not keep the dispute alive.

The Court's refusal to confront the question whether a preliminary injunction would provide a complete defense is particularly ironic, given its recent decision in *Lane* v. *Williams*, 455 U. S. 624 (1982). Respondents in that case had pleaded guilty in unrelated Illinois state-court prosecutions for burglary, an offense punishable by imprisonment and a mandatory 3-year parole term. Neither respondent was informed during his plea acceptance hearing that the negotiated sentence included the mandatory parole term. Each respondent completed his prison sentence but was reincarcerated for parole violation. While in custody, they filed petitions for federal habeas corpus, alleging that their guilty pleas were invalid because they were not informed of the mandatory parole requirement. The District Court decided to enter an order declaring the parole term void, and the United States

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Court of Appeals for the Seventh Circuit affirmed. By the time the cases reached this Court, both respondents had completed their sentences, and their parole terms had expired. This Court held that the claims for relief were moot. In reaching this conclusion, the Court determined that as a matter of Illinois law, no collateral consequences would flow from the parole revocations. Thus, there would be no point in declaring the parole terms void. In other words, the Court reached out to decide a question of state law in order to hold that the case was moot. Here, by contrast, the Court refuses to confront an important question of *federal* law—deciding instead that the question should be left to a state court—so that it can avoid holding that the case is moot.

III

The parties to this appeal have no adversary interest in the resolution of the merits of this controversy. The majority acts without jurisdiction when it addresses the question whether the Illinois Business Take-Over Act is constitutional. Because I believe the case is moot, I would have vacated the judgment of the Court of Appeals, with instructions that it remand the case to the District Court with instructions to dismiss.

JUSTICE REHNQUIST, dissenting.

I agree with JUSTICE MARSHALL that this case does not present a justiciable controversy, but for a different reason.

MITE obtained an injunction in order to effect a cash tender offer for the stock of Chicago Rivet. The injunction restrained the Illinois Secretary of State from interfering with the Chicago Rivet tender offer by enforcing the Illinois Business Take-Over Act against MITE. Three days after the District Court issued a permanent injunction, MITE and Chicago Rivet reached an agreement and MITE withdrew its extant offer. Approximately one month later, MITE announced its decision not to make any tender offer. MITE is

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not presently engaging in activity that is regulated by the Illinois statute, and there is no indication that MITE intends to engage in any such activity in the future. Therefore, the facts that gave rise to *this controversy* over the constitutionality of Illinois' anti-takeover statutes no longer exist, and it is unlikely that they will be repeated in the future. As the tender offer has met its demise for reasons having nothing to do with the validity of the Illinois statute, the injunction is no longer necessary to accomplish the purposes for which it was obtained. MITE no longer needs an injunction in order to effect a tender offer for the shares of Chicago Rivet or any other corporation subject to the Illinois Act. Nor does MITE need the injunction in order to preclude the Secretary from rescinding a completed tender offer.

Despite these developments which have occurred after the District Court issued the injunction, the Court concludes that the present controversy between the Illinois Secretary of State and MITE over the constitutionality of the Illinois Business Take-Over Act is not moot. According to the Court, the Illinois Secretary of State's intention to bring an enforcement action against MITE keeps the present controversy alive. The possibility of a future enforcement action, however, is insufficient for me to conclude that the controversy that is before the Court is not moot.[1]

This Court has no power over a suit not pending before it. "'Our power only extends over and is limited by the conditions of the case now before us.'" *Oil Workers* v. *Missouri*, 361 U. S. 363, 370 (1960), quoting *American Book Co.* v. *Kansas ex rel. Nichols*, 193 U. S. 49, 52 (1904). A case pending in this Court may not be kept alive simply because similar or identical issues are currently ripe for decision in a controversy between the same parties in another court. See *Oil*

[1] This case is unlike those in which this Court has found justiciable an action to enjoin a threatened criminal prosecution. The plaintiff in the present posture of this case no longer intends to engage in, or is presently engaging in, what is asserted to be federally protected activity.

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Workers v. *Missouri, supra,* at 370–371; *American Book Co.* v. *Kansas ex rel. Nichols, supra,* at 51. *A fortiori,* this case may not be kept alive simply because there may exist a presently unripened controversy between these same parties over the constitutionality of the same Act. This is so even if our resolution of the merits of the instant case will resolve certain defenses that MITE could raise in an enforcement action were one to be brought by the Secretary. It follows that this case is not alive simply because a decision on the merits in this case will determine whether or not the Secretary's threatened enforcement action may ever ripen into a live controversy.

If an enforcement action were brought by the Secretary, "there is no way to know what the outcome of such a proceeding in the [Illinois] courts might be." *Oil Workers* v. *Missouri, supra,* at 371. The Illinois courts may well conclude that the injunction constitutes a defense either on state law grounds or upon the grounds suggested by JUSTICE MARSHALL in his dissent. The Illinois courts may also agree with MITE that the Business Take-Over Act is pre-empted by the Williams Act or that Illinois' regulation of interstate tender offers runs afoul of the Commerce Clause. The possibility that this Court might disagree with the Illinois courts' ultimate resolution of the issues arising in a presently unripe, but threatened enforcement action hardly justifies the Court's resolution of important constitutional issues in the abstract posture in which they are currently presented.[2]

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[2] *Bus Employees* v. *Missouri,* 374 U. S. 74 (1963), and *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974), are clearly distinguishable. In each case, subsequent developments did not moot the controversy because the challenged statute affected the *challenging party's* current or planned activities. There is no suggestion in the instant case that the Illinois Business Take-Over Act has such an effect on MITE. Nor do I believe that this case remains alive merely because it is the enjoined party who seeks appellate review. Otherwise, an enjoined party could always litigate the legal bases for the injunction even though the party who sought

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The Secretary and MITE dispute the propriety of the injunction issued by the District Court in this case only with respect to a controversy that may ripen in another court. Because the controversy that is before the Court is no longer alive, I would vacate the judgment of the Court of Appeals and order that court to remand this case to the District Court with instructions to dismiss the complaint. See *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

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the injunction no longer needs the injunction for the purposes for which it was obtained. Cf. *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981).

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FOREMOST INSURANCE CO. ET AL. *v.* RICHARDSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-2134. Argued January 12, 1982—Decided June 23, 1982

An action to recover for the death of an occupant of a pleasure boat resulting from a collision with another pleasure boat on a river in Louisiana was instituted in Federal District Court on the asserted basis of admiralty jurisdiction under 28 U. S. C. § 1333(1). The court dismissed the complaint, holding that there must be some relationship with traditional maritime activity for an injury sustained on navigable water to fall within federal admiralty jurisdiction, and that *commercial* maritime activity (not present here) is necessary to satisfy this relationship. The Court of Appeals reversed.

Held: In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, a complaint alleging a collision between two vessels—including pleasure boats–on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts. The holding in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249, that claims arising from airplane accidents, although occurring in a maritime locality, are cognizable in admiralty only when the wrong bears a significant relationship to traditional maritime activity also applies to determinations of federal admiralty jurisdiction outside the context of aviation torts. However, there is no requirement that the maritime activity be an exclusively commercial one. The federal interest in protecting maritime commerce can be fully vindicated only if *all* operators of vessels on navigable waters—not just individuals actually *engaged* in commercial maritime activity—are subject to uniform rules of conduct. This interpretation is consistent with congressional activity as to legislation governing "vessels" without regard to whether they engage in commercial activity. Pp. 672–677.

641 F. 2d 314, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dis-

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senting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 677.

Arthur H. Andrews argued the cause and filed a brief for petitioners.

Dorsey C. Martin III argued the cause and filed a brief for respondents.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented in this case is whether the collision of two pleasure boats on navigable waters falls within the admiralty jurisdiction of the federal courts. See 28 U. S. C. § 1333. We granted certiorari to resolve the confusion in the lower courts respecting the impact of *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972), on traditional rules for determining federal admiralty jurisdiction. 454 U. S. 813 (1981). The United States Court of Appeals for the Fifth Circuit held that an accident between two vessels in navigable waters bears a sufficient relationship to traditional maritime activity to fall within federal admiralty jurisdiction. We affirm.

I

Two pleasure boats collided on the Amite River in Louisiana, resulting in the death of Clyde Richardson. The wife and children of the decedent brought this action in the United States District Court for the Middle District of Louisiana, alleging, *inter alia*, that petitioner Shirley Eliser had negligently operated the boat that collided with the vessel occupied by the decedent.[1] Respondents also named petitioner

[1] The wife and children of the decedent also named respondent June Allen as a defendant. They alleged that Allen was operating the vessel at the time of the collision, and that the decedent's death was caused by either the negligence of Allen or that of petitioner Eliser. Allen counterclaimed, alleging that the decedent had been operating the boat, and that her injuries were caused by his negligence. The factual dispute concern-

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Foremost Insurance Co., Eliser's insurer, as a defendant. Jurisdiction was claimed under 28 U. S. C. § 1333(1), which gives federal district courts exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." Petitioners moved to dismiss, arguing that the complaint did not state a cause of action within the admiralty or maritime jurisdiction of the District Court.

In ruling on petitioners' motion, the District Court found the following facts to be undisputed:[2]

> "(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;
>
> "(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;
>
> "(3) Neither boat had ever been used in any 'commercial maritime activity' before the accident;
>
> "(4) At the time of the accident neither boat was involved in any 'commercial maritime activity' of any sort;
>
> "(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way a part of their regular type of employment;
>
> "(6) None of the passengers on either boat were engaged

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ing whether the decedent or Allen was operating the boat is irrelevant to the jurisdictional issue. However, because of the divergent interests and claims of respondent Allen and the respondent family of the decedent below, we refer only to the decedent's family when we use the term "respondents" throughout this opinion.

[2] The District Court assumed that the Amite River is navigable at the site of the collision. Although the issue is not free from doubt, it appears from the opinion and the disposition of the Court of Appeals that the court found that the river is navigable at this site although seldom, if ever, used for commercial traffic. This opinion is premised on our understanding that the river at this point is navigable, see Brief for Petitioners 20, but we leave open the question whether petitioners have preserved the opportunity to argue this issue upon further development of facts in the District Court.

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in any kind of 'traditional maritime activity' either before or at the time of the accident;

"(7) Neither of the boats involved were under hire in any traditional maritime form;

"(8) There is no evidence to indicate that any 'commercial activity', even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as 'purely pleasure craft', not in any way 'involved in commerce', and,

"(9) There was no other instrumentality involved in this accident that had even a minor relationship to 'admiralty' or 'commerce', *i. e.* a buoy, barge, oil drilling apparatus, etc." 470 F. Supp. 699, 700 (1979).

After reviewing decisions of this Court and the Fifth Circuit, as well as relevant commentary, the District Court found that there must be some relationship with traditional maritime activity for an injury sustained on navigable water to fall within federal admiralty jurisdiction. The District Court held that commercial maritime activity is necessary to satisfy this relationship, and granted petitioners' motion to dismiss the complaint for lack of subject-matter jurisdiction because the collision of these two pleasure boats did not involve any commercial activity.

The Court of Appeals reversed. 641 F. 2d 314 (1981). The Court of Appeals agreed that *Executive Jet, supra,* and relevant Fifth Circuit decisions establish that "admiralty jurisdiction requires more than the occurrence of the tort on navigable waters—that additionally there must be a significant relationship between the wrong and traditional maritime activity." 641 F. 2d, at 315. It disagreed with the District Court, however, on the application of this principle to the undisputed facts of this case. Relying on the fact that the "Rules of the Road" govern all boats on navigable waters, and on the uncertainty that would accompany a finding of no admiralty jurisdiction in this case, the Court of Appeals held

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that "two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters." *Id.*, at 316.[3]

II

Prior to our opinion in *Executive Jet*, there was little question that a complaint such as the one filed here stated a cause of action within federal admiralty jurisdiction. Indeed, the *Executive Jet* Court begins its opinion by observing that, under the traditional rule of admiralty jurisdiction, "[i]f the wrong occurred on navigable waters, the action is within admiralty jurisdiction." 409 U. S., at 253 (citing *Thomas* v. *Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813) (Story, J., on Circuit). See also *The Plymouth*, 3 Wall. 20, 36 (1866) ("Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance"). Under this rule, an action arising out of a collision between two pleasure boats on navigable waters clearly falls within the admiralty jurisdiction of the district courts. When presented with this precise situation in the past, this Court has found it unnecessary even to discuss whether the district court's admiralty jurisdiction had been properly invoked, instead assuming the propriety of such jurisdiction merely because the accident occurred on navigable waters. *Levinson* v. *Deupree*, 345 U. S. 648, 651 (1953). See also *Just* v. *Chambers*, 312 U. S. 383 (1941) (injury to guest from carbon monoxide poisoning in the cabin of a pleasure boat). Cf. *Coryell* v. *Phipps*, 317 U. S. 406 (1943). In light of these decisions, we address here only the narrow question whether *Executive Jet* disapproved these earlier decisions *sub silentio*.

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[3] Judge Thornberry, concurring in part and dissenting in part, argued that federal admiralty jurisdiction could not be sustained if the river at the site of the accident, although navigable, did not also function as an integral or major "artery of commerce." 641 F. 2d, at 317.

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In *Executive Jet*, this Court held that a suit for property damage to a jet aircraft that struck a flock of sea gulls upon takeoff and sank in the navigable waters of Lake Erie did not state a claim within the admiralty jurisdiction of the district courts. In reaching this conclusion, the Court observed that the mechanical application of the locality rule as the sole test for determining whether there is admiralty jurisdiction had been widely criticized by commentators, and that the federal courts and Congress had been compelled to make exceptions to this approach in the interests of justice in order to include certain torts with no maritime locality. The Court determined that claims arising from airplane accidents are cognizable in admiralty only when the wrong bears a significant relationship to traditional maritime activity. 409 U. S., at 268. Given the realities of modern-day air travel, the *Executive Jet* Court held that, "in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." *Id.*, at 274.

The express holding of *Executive Jet* is carefully limited to the particular facts of that case. However, the thorough discussion of the theoretical and practical problems inherent in broadly applying the traditional locality rule has prompted several courts and commentators to construe *Executive Jet* as applying to determinations of federal admiralty jurisdiction outside the context of aviation torts. See, *e. g.*, *Kelly* v. *Smith*, 485 F. 2d 520 (CA5 1973); Calamari, The Wake of Executive Jet—A Major Wave or a Minor Ripple, 4 Maritime Law. 52 (1979). We believe that this is a fair construction. Although *Executive Jet* addressed only the unique problems associated with extending admiralty jurisdiction to aviation torts, much of the Court's rationale in rejecting a strict locality rule also applies to the maritime context. Indeed, the *Executive Jet* Court relied extensively on admiralty and maritime decisions of this Court and on congressional action ex-

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tending admiralty jurisdiction to torts with a significant relationship to traditional maritime activity, but with no maritime locality.[4]

We recognize, as did the Court of Appeals, that the *Executive Jet* requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context. We also agree that there is no requirement that "the maritime activity be an exclusively commercial one." 641 F. 2d, at 316. Because the "wrong" here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court.

We are not persuaded by petitioners' argument that a substantial relationship with commercial maritime activity is necessary because commercial shipping is at the heart of the traditional maritime activity sought to be protected by giving the federal courts exclusive jurisdiction over all admiralty suits. This argument is premised on the faulty assumption that, absent this relationship with *commercial* activity, the need for uniform rules to govern conduct and liability disappears, and "federalism" concerns dictate that these torts be litigated in the state courts.

Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdic-

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[4] In addition to noting these examples where strict application of the locality rule would have deprived the courts of admiralty jurisdiction despite a clear connection to maritime activity, the Court noted the difficulties of extending jurisdiction to torts with a maritime locality, but absolutely no connection to maritime activity. See 409 U. S., at 255–256 (disapproving decisions sustaining admiralty jurisdiction over claims by swimmers injured by other swimmers or submerged objects in shallow waters near shore); *id.*, at 256–257 (approving decisions requiring some connection with traditional maritime activity).

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tion is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. For example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. Furthermore, admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its "navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters." *Executive Jet*, 409 U. S., at 270. The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation,[5] compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Yet, under the strict commercial rule proffered by petitioners, the status of the boats as "pleasure" boats, as opposed to "commercial" boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in *Executive Jet*. Under the commercial rule, fortuitous circum-

[5] Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet*, for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.

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stances such as whether the boat was, or had ever been, rented, or whether it had ever been used for commercial fishing, control the existence of federal-court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities. Adopting the strict commercial rule would frustrate the goal of promoting the smooth flow of maritime commerce, because the duties and obligations of noncommercial navigators traversing navigable waters flowing through more than one State would differ "depending upon their precise location within the territorial jurisdiction of one state or another." 641 F. 2d, at 316.

Finally, our interpretation is consistent with congressional activity in this area. First, Congress defines the term "vessel," for the purpose of determining the scope of various shipping and maritime transportation laws, to include all types of waterborne vessels, without regard to whether they engage in commercial activity. See, *e. g.*, 1 U. S. C. § 3 ("'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"). Second, the federal "Rules of the Road," designed for preventing collisions on navigable waters, see, *e. g.*, 94 Stat. 3415, 33 U. S. C. § 2001 *et seq.* (1976 ed., Supp. IV), apply to all vessels without regard to their commercial or noncommercial nature.[6] Third, when it ex-

[6] Petitioners argue that admiralty jurisdiction in the federal courts is unnecessary to ensure the uniform application of the Rules of the Road to boat navigation because state courts are bound by the construction federal courts give to statutes relating to navigation. Assuming that petitioners

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tended admiralty jurisdiction to injuries on land caused by ships on navigable waters, Congress directed that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury . . . *caused by a vessel on navigable water*. . . ." Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740.[7]

In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts. Therefore, the judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

No trend of decisions by this Court has been stronger—for two decades or more—than that toward expanding federal jurisdiction at the expense of state interests and state-court jurisdiction. Of course, Congress also has moved steadily and expansively to exercise its Commerce Clause and preemptive power to displace state and local authority. Often decisions of this Court and congressional enactments have been necessary in the national interest. The effect, never-

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are correct, this fact does not negate the importance that Congress has attached to the federal interest in having all vessels operating on navigable waters governed by uniform rules and obligations, which is furthered by consistent application of federal maritime legislation under federal admiralty jurisdiction.

[7] We refer to this language only to demonstrate that Congress did not require a commercial-activity nexus when it extended admiralty jurisdiction. We express no opinion on whether this Act could be construed to provide an independent basis for jurisdiction.

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theless, has been the erosion of federalism—a basic principle of the Constitution and our federal Union.

Today's Court decision, an example of this trend, is not necessary to further any federal interest. On its face, it is inexplicable. The issue is whether the federal law of admiralty, rather than traditional state tort law, should apply to an accident on the Amite River in Louisiana between two small boats. "One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot 'bass boat' powered by an outboard motor that was used exclusively for pleasure fishing." 470 F. Supp. 699, 700 (MD La. 1979). It also is undisputed that both boats were used "exclusively for pleasure"; that neither had ever been used in any "commercial maritime activity"; that none of the persons aboard the boats had ever been engaged in any such activity; and that neither of the boats was used for hire. *Ibid.* The Court of Appeals conceded that "the place where the accident occurred is seldom, if ever, used for commercial activity." 641 F. 2d 314, 316 (CA5 1981).

The absence of "commercial activity" on this waterway was held by the Court of Appeals to be immaterial. While recognizing that there was substantial authority to the contrary, the court held that federal admiralty law applied to this accident. This Court now affirms in a decision holding that "all operators of vessels on navigable waters are subject to uniform [federal] rules of conduct," conferring federal admiralty jurisdiction over *all* accidents. *Ante*, at 675 (emphasis deleted). In my view there is no substantial federal interest that justifies a rule extending admiralty jurisdiction to the edge of absurdity. I dissent.

I

Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U. S. 249 (1972), established that admiralty jurisdiction does

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not extend to every accident on navigable waters. The Court today misconstrues *Executive Jet*. We emphasized in that case that it is "consistent with the history and purpose of admiralty to require . . . that the wrong bear a *significant* relationship to *traditional maritime activity*." *Id.*, at 268 (emphasis added). We acknowledged that "in a literal sense there may be some similarities between the problems posed for a plane downed on water and those faced by a sinking ship." *Id.*, at 269. But, recalling that "[t]he law of admiralty has evolved over many centuries," *ibid.*, we noted that admiralty was "concerned with [matters such as] maritime liens, the general average,[1] captures and prizes, limitation of liability, cargo damage, and claims for salvage." *Id.*, at 270. "It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence 'occurs' while a plane is flying over such waters is enough to create such a relationship to *traditional maritime activity* as to justify the invocation of admiralty jurisdiction." *Id.*, at 270–271 (emphasis added).

Executive Jet's recognition that "[t]he law of admiralty has evolved over many centuries," *id.*, at 269, provides the appropriate understanding of that case's "traditional maritime activity" test. Admiralty is a specialized area of law that, since its ancient inception, has been concerned with the problems of seafaring *commercial* activity.[2] As Professor Stolz

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[1] The doctrine of general average refers to rules for dividing the loss suffered when cargo must be thrown overboard in order to lighten a ship. See generally G. Gilmore & C. Black, The Law of Admiralty 244–271 (2d ed. 1975).

[2] "Maritime courts, differing somewhat in name and somewhat in jurisdiction, have been established in all civilized nations at various periods in their history. The dates of their establishment may be said, because of the circumstances which brought them into being, to afford a very fair test of the advancement in civilization of their respective nations.

"In every case their establishment has been due to the same cause, the necessities of *commerce*." T. Etting, The Admiralty Jurisdiction in America 7–8 (1879) (emphasis added).

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has demonstrated, "[t]here can be no doubt that historically the civil jurisdiction of admiralty was exclusively concerned with matters arising from maritime commerce." Stolz, Pleasure Boating and Admiralty: *Erie* at Sea, 51 Calif. L. Rev. 661, 667 (1963). "The only valid criterion of the admiralty jurisdiction is the relation of the matter—whether it be tortious or contractual in nature—to *maritime commerce*." 7A J. Moore & A. Pelaez, Federal Practice, Admiralty ¶.325[5], p. 3606 (2d ed. 1982) (emphasis in original).[3]

This case involves only pleasure craft. Neither of these boats had ever been used in any commercial activity. There is, therefore, no connection with any historic federal admiralty interest. In centuries past—long before modern means of transportion by land and air existed—rivers and oceans were the basic means of commerce, and the vessels that used the waterways were limited primarily to commercial and naval purposes.[4] "Pleasure boating is basically a

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[3] See also Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 280 (1950) ("The main thing is that if the court of admiralty is to exist at all, it should exist because the *business of river, lake, and ocean shipping* calls for supervision by a tribunal enjoying a particular expertness in regard to the more complicated concerns of that *business*") (emphasis added); Swaim, Yes, Virginia, There is an Admiralty: The *Rodrigue* Case, 16 Loyola L. Rev. 43, 44 (1970) ("Maritime commerce—and nothing more—is the *raison d'etre* for the courts and rules of admiralty"); Bridwell & Whitten, Admiralty Jurisdiction: The Outlook for the Doctrine of *Executive Jet*, 1974 Duke L. J. 757, 793; Comment, 12 Cal. Western L. Rev. 535, 558, n. 133 (1976) ("The historical justification for admiralty law and courts is commercial. Its law was designed to meet commercial needs and practice"); Note, 34 Wash. & Lee L. Rev. 121, 139–140 (1977) ("Those pleasure craft torts occurring on commercially navigable waters must be considered in light of the historical design of admiralty jurisdiction to determine whether the exercise of jurisdiction furthers the commercial interests which admiralty courts were created to serve").

[4] At the beginning of the 19th century, "the commerce of the country was almost entirely limited to the foreign and coasting trade. The only roads which existed led from the woods to the principal towns on navigable

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new phenomenon, the product of a technology that can produce small boats at modest cost and of an economy that puts such craft within the means of almost everyone."[5] Stolz, *supra*, at 661. Thus, the "traditional" connection emphasized in *Executive Jet* is absent where pleasure boats are concerned. Moreover, even the Court today is hard put to identify an arguably substantial federal admiralty interest *of any kind*. I now comment briefly on the Court's reasoning.

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waters. There was but one connected route from North to South at the commencement of the Revolution, and this was true also when the Constitution was framed. Even in 1796 the only roads with which the States were much concerned were those which led to navigable waters; the care of 'cross roads,' as the roads leading from State to State were called by one who had been a member of the Constitutional Convention, the States were unwilling to assume. 'Fifty miles back from the waters of the Atlantic the country was an unbroken jungle.' In the vigorous phrase used by Henry Clay, 'the country had scarcely any interior.' Turnpike roads did not come into general use until the nineteenth century." E. Prentice, The Federal Power over Carriers and Corporations 59–60 (1907) (footnotes omitted).

[5] For this reason, the jurisdictional issue in this case is relatively new and, until today, has not been addressed by this Court. The Court's contrary suggestion, *ante*, at 672, relies on irrelevant dicta from decisions of the last century that do not involve pleasure craft. *E. g.*, *The Plymouth*, 3 Wall. 20, 36 (1866) (holding admiralty jurisdiction does *not* include adjudication of a loss of packing-houses on a wharf that arose from fire on an adjacent *merchant* ship at anchor). The Court also cites cases apparently involving pleasure boats in which the jurisdictional question was not at issue. See *Levinson* v. *Deupree*, 345 U. S. 648, 651 (1953); *Coryell* v. *Phipps*, 317 U. S. 406 (1943); *Just* v. *Chambers*, 312 U. S. 383 (1941). "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974).

The jurisdictional issue has both a constitutional and a statutory element, since both Art. III and 28 U. S. C. § 1333 must support the exercise of jurisdiction in this case. The Court necessarily must find that both provisions are satisfied. Because construction of the statute is sufficient to support the result I would reach, I intimate no views on the constitutional extent of Art. III admiralty jurisdiction.

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II

The Court's justification for extending federal admiralty jurisdiction to the use of millions[6] of small pleasure boats on the countless rivers, streams, and inlets of our country is the need for "uniform rules of conduct." *Ante*, at 675. I agree, of course, that standard codes should govern traffic on waterways, just as it is crucial that certain uniform rules of traffic prevail on neighborhood streets as well as interstate highways. But this is no reason for admiralty jurisdiction to be extended to all boating activity. Congress has provided some rules governing water traffic, just as it has done for some land traffic. See 23 U. S. C. § 154 (55 m.p.h. speed limit). Yet no one suggests that federal jurisdiction is needed to prevent chaos in automobile traffic, or that only federal courts are qualified to try accident cases.

State courts are duty bound to apply federal as well as local "uniform rules of conduct." See *Testa* v. *Katt*, 330 U. S. 386 (1947). The Court does not suggest that state courts lack competency to apply federal as well as state law to this type of water traffic. And this Court stands ready, if necessary, to review state decisions to ensure that important issues of federal law are resolved correctly. As Judge Thornberry said in dissent in this case, "the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern . . . ." 641 F. 2d, at 317. Consequently the Court's premise that there is a need for uniform traffic rules fails to support its conclusion that federal jurisdiction must be extended to cover the type of activity that typically involves small pleasure craft.

In an effort to rescue its logic, the Court refers to the "potential disruptive impact of a collision between boats on navigable waters . . . ." *Ante*, at 675. Yet this reasoning is

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[6] There were 14.3 million pleasure boats in the United States in 1980. See U. S. Dept. of Transportation, U. S. Coast Guard, Boating Statistics 1980, p. 8 (1981).

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countered by *Executive Jet*—a decision that the Court acknowledges to be a key authority for this case. For if "potential disruptive impact" on traffic in navigable waters provides a sufficient connection with "traditional maritime activity," then the crash of an *airplane* "in the navigable waters of Lake Erie," 409 U. S., at 250, necessarily would support admiralty jurisdiction. The holding of *Executive Jet* is precisely to the contrary. The Court's reasoning in essence resurrects the locality rule that *Executive Jet* rejected, for *any* accident "located" on navigable waters has a "potential disruptive impact" on traffic there.[7]

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[7] If a "potential disruptive effect" on interstate traffic in fact implicated a federal interest strong enough to support federal jurisdiction, then federal courts also should hear cases in which accidents disrupt similar *land* traffic. Cf. "71 Feared Dead as Plane Hits Bridge, Smashes Cars, Plunges Into Potomac," Washington Post, Jan. 14, 1982, p. A1, col. 1.

According to the Court, the interest in expanding admiralty jurisdiction is supported by the difficulty of defining "pleasure boating." *Ante*, at 675. In view of the myriad of definitional tasks performed regularly by state and federal courts, determining in a particular case whether the boating at issue is essentially for pleasure rather than commerce rarely would present a difficult problem for any court.

The Court also states that its action "is consistent with congressional activity in this area," *ante*, at 676, citing a number of federal statutes. This point is of course wholly irrelevant to the *constitutional* extent of admiralty jurisdiction. Moreover, the only statute cited having any relation to jurisdictional matters is the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740. This Act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.*

"In any such case suit may be brought in rem or in personam according to the principles of law and rules of practice obtaining in cases *where the injury or damage has been done and consummated on navigable water*" (emphasis added).

As its text makes plain, "[t]his Act was passed specifically to overrule cases, such as *The Plymouth*, *supra*, holding that admiralty does not provide a remedy for damage done to land structures by ships on navigable

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Oral argument in this case revealed the degree to which the Court's decision displaces state authority. The Court posed a hypothetical in which children, for their own amusement, used rowboats to net crawfish from a stream. Two of the boats collide and sink near the water's edge, forcing the children to wade ashore. Counsel for respondents replied that this accident *would* fall within the admiralty jurisdiction of the federal courts, provided that the waterway was navigable. Tr. of Oral Arg. 24. Today the Court agrees.

For me, however, this example illustrates the substantial—and *purposeless*—expansion of federal authority and federal-court jurisdiction accomplished by the Court's holding. In this respect I agree with Chief Judge Haynsworth:

> "The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states. The operation of small pleasure craft on inland waters which happen to be navigable has no more apparent relationship to that kind of concern than the operation of the same kind of craft on artificial inland lakes which are not navigable waters." *Crosson* v. *Vance*, 484 F. 2d 840 (CA4 1973).

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waters." *Executive Jet*, 409 U. S., at 260. This purpose—and not any intent to expand or affect admiralty jurisdiction respecting pleasure boats—consistently appears in the Act's legislative history. See, *e. g.*, S. Rep. No. 1593, 80th Cong., 2d Sess., 1–6 (1948); H. R. Rep. No. 1523, 80th Cong., 2d Sess., 1–6 (1948). See also Farnum, Admiralty Jurisdiction and Amphibious Torts, 43 Yale L. J. 34, 44–45 (1933); Note, 63 Harv. L. Rev. 861, 868 (1950); Note, The Extension of Admiralty Jurisdiction to Include Amphibious Torts, 37 Geo. L. J. 252 (1949); Note, Effects of Recent Legislation Upon the Admiralty Law, 17 Geo. Wash. L. Rev. 353 (1949). And this Court has never sustained the constitutionality of this Act.

With respect, the Court's statutory arguments must be regarded as makeweights.

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In the rowboat example, as in the case at bar, the Federal Government has little or no genuine interest in the resolution of a garden variety tort case. "Only the burdening of the federal courts and the frustration of the purposes of state tort law would be thereby served." *Adams* v. *Montana Power Co.*, 528 F. 2d 437, 440–441 (CA9 1975).[8]

The Court's opinion largely ignores the fact that expansions of federal admiralty jurisdiction are accompanied by application of substantive—and *pre-empting*—federal admiralty law. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 214–218 (1917); see *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 738–742 (1961).[9] "The chief objection to application of admiralty law to pleasure boating is that it implicitly prohibits the exercise of state legislative power in an area in which local legislatures have generally been thought competent and in which Congress cannot be expected either to be interested or to be responsive to local needs." Stolz, 51 Calif. L. Rev., at 664. For me, this federalism concern is the dominating issue in the case. I agree that "the law of pleasure boating will develop faster and more rationally if the creative capacities of the state courts and legislatures are freed of an imaginery *[sic]* federal concern with anything that floats on navigable waters." *Id.*, at 719.

Federal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal con-

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[8] In construing the extent of 28 U. S. C. § 1333 admiralty jurisdiction, see n. 5, *supra*, I would prefer to leave to Congress an extension of federal authority of this magnitude. See n. 6, *supra*. Congress has the power to hold hearings and to weigh factors beyond the proper competency of a court.

[9] "It should be emphasized . . . that, in the law of admiralty, the term 'jurisdiction' denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those courts considering the controversy. This is so because a court of admiralty sits solely to administer and apply the maritime law." Swaim, *supra* n. 3, at 43 (footnotes and emphasis omitted).

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cerns that in truth are only "imaginary." In accord with the teaching of *Executive Jet*, I would not extend federal admiralty jurisdiction beyond its traditional roots and reason for existence. I dissent from the Court's decision to sever a historic doctrine from its historic justification.

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TAYLOR v. ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 81-5152. Argued March 23, 1982—Decided June 23, 1982

Petitioner was arrested on a grocery-store robbery charge without a warrant or probable cause, based on an uncorroborated informant's tip, and was taken to the police station, where he was given *Miranda* warnings, fingerprinted, questioned, and placed in a lineup. After being told that his fingerprints matched those on grocery items handled by one of the participants in the robbery and after a short visit with his girlfriend, petitioner signed a written confession. Over petitioner's objection, the confession was admitted into evidence at his trial in an Alabama state court, and he was convicted. The Alabama Court of Criminal Appeals reversed, holding that the confession should not have been admitted, but was in turn reversed by the Alabama Supreme Court.

Held: Petitioner's confession should have been suppressed as the fruit of an illegal arrest. *Brown* v. *Illinois*, 422 U. S. 590; *Dunaway* v. *New York*, 442 U. S. 200. Pp. 689-694.

(a) A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Pp. 689-690.

(b) Here, there was no meaningful intervening event. The illegality of the initial arrest was not cured by the facts that six hours elapsed between the arrest and confession; that the confession may have been "voluntary" for Fifth Amendment purposes because *Miranda* warnings were given; that petitioner was permitted a short visit with his girlfriend; or that the police did not physically abuse petitioner. Nor was the fact that an arrest warrant, based on a comparison of fingerprints, was filed after petitioner had been arrested and while he was being interrogated a significant intervening event, such warrant being irrelevant to whether the confession was the fruit of an illegal arrest. The initial fingerprints, which were themselves the fruit of the illegal arrest and were used to extract the confession, cannot be deemed sufficient "attenuation" to break the connection between the illegal arrest and the confession merely because they formed the basis for the arrest warrant. Pp. 690-693.

399 So. 2d 881, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dis-

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senting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 694.

Robert M. Beno argued the cause and filed briefs for petitioner.

Thomas R. Allison, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick*, Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the narrow question whether petitioner's confession should have been suppressed as the fruit of an illegal arrest. The Supreme Court of Alabama held that the evidence was properly admitted. Because the decision below is inconsistent with our decisions in *Dunaway* v. *New York*, 442 U. S. 200 (1979), and *Brown* v. *Illinois*, 422 U. S. 590 (1975), we reverse.

I

In 1978, a grocery store in Montgomery, Ala., was robbed. There had been a number of robberies in this area, and the police had initiated an intensive manhunt in an effort to apprehend the robbers. An individual who was at that time incarcerated on unrelated charges told a police officer that "he had heard that [petitioner] Omar Taylor was involved in the robbery." App. 4. This individual had never before given similar information to this officer, did not tell the officer where he had heard this information, and did not provide any details of the crime. This tip was insufficient to give

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**Arthur F. Mathews* and *James E. Coleman, Jr.*, filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Fred E. Inbau, Wayne W. Schmidt, James P. Manak, Patrick F. Healy, William K. Lambie, Richard J. Brzeczek, Frank G. Carrington, Courtney A. Evans, Robert K. Corbin, Attorney General of Arizona, and *Steven J. Twist*, Chief Assistant Attorney General, *Tyrone C. Fahner*, Attorney General of Illinois, and *Melbourne Noel*, Chief Assistant Attorney General, and *William L. Parker, Jr.*, filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

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the police probable cause to obtain a warrant or to arrest petitioner.

Nonetheless, on the basis of this information, two officers arrested petitioner without a warrant. They told petitioner that he was being arrested in connection with the grocery-store robbery, searched him, and took him to the station for questioning. Petitioner was given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). At the station, he was fingerprinted, readvised of his *Miranda* rights, questioned, and placed in a lineup. The victims of the robbery were unable to identify him in the lineup. The police told petitioner that his fingerprints matched those on some grocery items that had been handled by one of the participants in the robbery. After a short visit with his girlfriend and a male companion, petitioner signed a waiver-of-rights form and executed a written confession. The form and the signed confession were admitted into evidence.

Petitioner objected to the admission of this evidence at his trial. He argued that his warrantless arrest was not supported by probable cause, that he had been involuntarily transported to the police station, and that the confession must be suppressed as the fruit of this illegal arrest. The trial court overruled this objection, and petitioner was convicted. On appeal, the Alabama Court of Criminal Appeals reversed, 399 So. 2d 875 (1980), holding that the facts of this case are virtually indistinguishable from those presented to this Court in *Dunaway* v. *New York*, *supra*, and that the confession should not have been admitted into evidence. The Alabama Supreme Court reversed the Court of Criminal Appeals, 399 So. 2d 881 (1981), and we granted certiorari, 454 U. S. 963 (1981).

II

In *Brown* v. *Illinois*, *supra*, and *Dunaway* v. *New York*, *supra*, the police arrested suspects without probable cause. The suspects were transported to police headquarters, advised of their *Miranda* rights, and interrogated. They con-

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fessed within two hours of their arrest. This Court held that the confessions were not admissible at trial, reasoning that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "'sufficiently an act of free will to purge the primary taint.'" *Brown* v. *Illinois*, *supra*, at 602 (quoting *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963)). See also *Dunaway* v. *New York*, *supra*, at 217. This Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct." *Brown* v. *Illinois*, *supra*, at 603–604 (citations and footnote omitted); *Dunaway* v. *New York*, 442 U. S., at 218. The State bears the burden of proving that a confession is admissible. *Ibid.*

In *Brown* and *Dunaway*, this Court firmly established that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. See *Dunaway* v. *New York*, *supra*, at 217. The reason for this approach is clear: "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth" Amendment. *Brown* v. *Illinois*, 422 U. S., at 601. If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere "'form of words.'" *Id.*, at 603 (quoting *Mapp* v. *Ohio*, 367 U. S. 643, 648 (1961)).

This case is a virtual replica of both *Brown* and *Dunaway*.

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Petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event. The State's arguments to the contrary are unpersuasive. The State begins by focusing on the temporal proximity of the arrest and the confession. It observes that the length of time between the illegal arrest and the confession was six hours in this case, while in *Brown* and *Dunaway* the incriminating statements were obtained within two hours. However, a difference of a few hours is not significant where, as here, petitioner was in police custody, unrepresented by counsel, and he was questioned on several occasions, fingerprinted, and subjected to a lineup. The State has not even demonstrated the amount of this time that was spent in interrogation, arguing only that petitioner "had every opportunity to consider his situation, to organize his thoughts, to contemplate his constitutional rights, and to exercise his free will." Brief for Respondent 11.

The State points to several intervening events that it argues are sufficient to break the connection between the illegal arrest and petitioner's confession. It observes that petitioner was given *Miranda* warnings three times. As our foregoing discussion of *Brown* and *Dunaway* demonstrates, however, the State's reliance on the giving of *Miranda* warnings is misplaced. The State also observes that petitioner visited with his girlfriend and a male companion before he confessed. This claim fares no better. According to the officer and petitioner, these two visitors were outside the interrogation room where petitioner was being questioned. After petitioner signed a waiver-of-rights form, he was allowed to meet with these visitors. The State fails to explain how this 5- to 10-minute visit, after which petitioner immediately recanted his former statements that he knew nothing about the robbery and signed the confession, could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will. This sugges-

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tion is particularly dubious in light of petitioner's uncontroverted testimony that his girlfriend was emotionally upset at the time of this visit.[1] If any inference could be drawn, it would be that this visit had just the opposite effect.

The State points to an arrest warrant filed after petitioner had been arrested and while he was being interrogated as another significant "intervening event." While petitioner was in custody, the police determined that the fingerprints on some grocery items matched those that they had taken from petitioner immediately after his arrest. Based on this comparison, an arrest warrant was filed. The filing of this warrant, however, is irrelevant to whether the confession was the fruit of the illegal arrest. This case is not like *Johnson v. Louisiana*, 406 U. S. 356 (1972), where the defendant was brought before a committing magistrate who advised him of his rights and set bail. Here, the arrest warrant was filed *ex parte*, based on the comparison of the fingerprints found at the scene of the crime and petitioner's fingerprints, which had been taken immediately after his arrest. The initial fin-

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[1] According to petitioner, his girlfriend became upset upon hearing the officer advise petitioner to cooperate. App. 16. Contrary to the allegations in the dissent, at no point did the officer contradict petitioner's version of his girlfriend's emotional state or petitioner's statement that his girlfriend was present at the time the officer advised him to cooperate. In fact, the testimony from both petitioner and the officer with respect to this visit are consistent. The officer testified only that he advised petitioner to cooperate between the time petitioner signed a rights form at the commencement of this interrogation period and the time that petitioner signed the statement of confession. Tr. 31, 136–137. He also testified that during this same interval, he allowed the short visit between petitioner and his girlfriend. *Ibid.* The District Court made no findings of fact with respect to these incidents. In any event, even assuming the accuracy of the dissent's version of the facts, compare *post*, at 695, and n. 2, with Tr. 31, 136–137, the dissent offers no explanation for its conclusion that this 5- to 10-minute visit should be viewed as an intervening event that purges the taint of the illegal arrest.

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gerprints, which were themselves the fruit of petitioner's illegal arrest, see *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and which were used to extract the confession from petitioner, cannot be deemed sufficient "attenuation" to break the connection between the illegal arrest and the confession merely because they also formed the basis for an arrest warrant that was filed while petitioner was being interrogated.[2]

Finally, the State argues that the police conduct here was not flagrant or purposeful, and that we should not follow our decisions in *Brown* and *Dunaway* for that reason. However, we fail to see any relevant distinction between the conduct here and that in *Dunaway*. In this case, as in *Dunaway*, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up. The fact that the police did not physically abuse petitioner, or that the confession they obtained may have been "voluntary" for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest. Alternatively, the State contends that the police conduct here argues for adopting a "good faith" exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here.

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[2] Petitioner also raises an ambiguous objection to the admission of fingerprint evidence at his trial. The trial court granted petitioner's motion to suppress the initial fingerprints as the fruit of his illegal arrest under *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and granted the State's motion to take petitioner's fingerprints at trial. The nature of petitioner's objection to the admission of any fingerprint evidence at trial is unclear, and it is also uncertain whether an objection to the procedure used for taking the second set of fingerprints has been properly preserved for our review. In any event, we need not reach this issue because we reverse the decision on the ground that the confession should not have been admitted. To the extent that petitioner still may challenge the fingerprinting procedure employed below, the state courts should be given the opportunity to address this challenge in the first instance.

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III

In sum, petitioner's confession was the fruit of his illegal arrest. Under our decisions in *Brown* v. *Illinois* and *Dunaway* v. *New York*, the confession clearly should not have been admitted at his trial. Accordingly, we reverse the decision of the Alabama Supreme Court and remand this case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

The Court holds today that Omar Taylor's detailed confession was the fruit of an illegal arrest, and consequently, should be suppressed. Because I conclude that neither the facts nor the law supports the Court's analysis, I respectfully dissent.

I

In the course of their investigation of the Moseley robbery, Montgomery police questioned Charles Martin, who was being held on unrelated rape and robbery charges. Martin stated that "he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery," Tr. 6, but the police made no attempt to establish either Martin's credibility as an informant or the reliability of the information he provided.[1]

Based only on this tip, which did not provide probable cause, Sergeants Alford and Rutland arrested Taylor a little before 3 p.m. on January 4, 1979. At that time, they told him why he was being arrested and advised him of his *Miranda* rights, but asked him no questions regarding the robbery. Tr. 20, 24. When they arrived at the police station, the officers turned Taylor over to detectives.

After Taylor had been fingerprinted and signed a form

[1] The police, however, suspected Martin of complicity in the Moseley robbery, Tr. 15. It later developed that Martin had instigated, planned, and participated in the robbery.

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acknowledging his *Miranda* rights, Detective Wilson questioned him for about 15 minutes, Tr. 48, and placed him in a lineup before one of the victims, Mrs. Moseley. *Id.*, at 37–38. At the lineup, which lasted about an hour, *id.*, at 48, Mrs. Moseley was unable to identify the petitioner. Following the lineup, Detective Wilson told Taylor that his fingerprints matched the fingerprints removed from grocery items handled by one of the robbers. Nevertheless, the petitioner denied knowledge of the robbery.

Toward 9 p.m. that evening, Detective Hicks readvised Taylor of his *Miranda* rights, *id.*, at 25, and Taylor once again read and signed a form setting forth his *Miranda* rights. *Id.*, at 28, 125. At no time did Taylor ask for a lawyer or indicate that he did not want to talk to police. *Id.*, at 28–29, 35, 40. During his 5- to 10-minute interview with Taylor, Detective Hicks confronted him with the fingerprint evidence. *Id.*, at 36. Hicks urged the petitioner to cooperate with the police, but carefully refrained from making him any promises, stating that at most he could inform the judge of the petitioner's cooperation. *Id.*, at 31, 34. Taylor continued to deny involvement in the robbery. *Id.*, at 35–36.

Following this conversation, both the petitioner's girlfriend and his neighbor came to the police station and requested to speak with him. When Taylor indicated that he wanted to speak with his friends, Detective Hicks left them alone in his office for several minutes.[2] After that meeting,

[2] The Court's rather different account of this meeting apparently stems from a decision to accept the testimony most favorable to the holding it wants to reach. That decision, however, runs counter to the longstanding practice of federal appellate courts to uphold the denial of the motion to suppress if, in the absence of any express findings by the district court, there is any reasonable view of the evidence to support it. See *United States* v. *Payton*, 615 F. 2d 922, 923 (CA1), cert. denied, 446 U. S. 969 (1980); *United States* v. *Vicknair*, 610 F. 2d 372, 376, n. 4 (CA5), cert. denied, 449 U. S. 823 (1980). In the present case, the officer testified that Taylor's "girlfriend came to us and said she wanted to talk to Omar, and we told Omar she was outside and he wanted to talk to her. And at that time, we let him talk to her." Tr. 35. Detective Hicks specifically denied that

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the petitioner confessed to the crime, and signed a detailed written confession.[3]

Before trial, the petitioner moved to suppress his confes-

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he had urged Taylor to talk to his girlfriend. *Id.*, at 35, 133–134. The detective acknowledged that he had told the petitioner that he could inform the judge of the petitioner's cooperation, but he expressly denied making any other statements to Taylor or his girlfriend about "cooperation." *Id.*, at 31, 134.

The petitioner, of course, had a vastly different version. He testified that the police had brought his girlfriend into the room and told him, in her presence, that he was facing 10 years to life in prison, but that if he cooperated they might be able to arrange a suspended sentence or probation. Upon hearing that remark, the petitioner's girlfriend became upset and began to cry, at which point the police left the petitioner alone with his friends. *Id.*, at 52. As we noted above, the police expressly denied making any such statements. More importantly, upon comparing the two versions, it becomes clear that in an effort to support its holding, the Court has parsed through the petitioner's story and plucked those tidbits that the police did not expressly contradict. This method of setting forth the facts of a case on appellate review hardly comports with the rule that an appellate court must adopt any reasonable view of the evidence that supports the trial court's ruling.

Since there is nothing unreasonable about the police account of the meeting between the petitioner and his friends, that version is the one we must accept on review. At the hearing, Detective Hicks testified that after Taylor asked to speak with his friends, the police left them alone together. There is no suggestion, other than the petitioner's discredited version of the meeting, that the police said anything to the petitioner's girlfriend, or that she became upset. Thus, the Court errs in stating that the petitioner's girlfriend became upset because of statements made by the police, and in intimating that the police created a coercive atmosphere in which the petitioner could not carefully consider his options and, on the basis of his friends' advice, decide to confess to the robbery.

[3] In that confession, the petitioner stated that Charles Martin approached him with guns and a plan to rob Moseley's Grocery. Taylor's role in the robbery was to distract Mr. Moseley by buying some groceries. Just before his accomplices pulled out their guns, Taylor put down the groceries and walked outside to see whether an approaching car was a police car. When he saw that it was not a police car, he began to reenter the store, but stopped when he saw the robbery taking place. Thereafter he fled, met his cofelons at a preassigned place, and took his share of the money. *Id.*, at 128–132.

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sion, arguing that it was the product of an illegal arrest, and that it had been obtained in violation of his Fifth and Sixth Amendment rights. The trial judge assumed that the arrest was illegal,[4] but found that the confession was voluntary, consistent with the Fifth and Sixth Amendments, and that "there were enough intervening factors between the arrest and confession" to overcome the taint of the illegal arrest. *Id.*, at 116. Accordingly, he admitted the confession.

II

Although the Court misapprehends the facts of the present case, it has stated correctly the controlling substantive law. In the Court's words, "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Ante*, at 690 (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)).

In *Brown*, this Court emphasized that "*Miranda* warnings are an important factor . . . in determining whether the confession [was] obtained by exploitation of an illegal arrest." *Id.*, at 603.[5] The Court did not discount the significance

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[4] In fact, the State did not seriously contend that the arrest had been based on probable cause. See *id.*, at 8, 10.

[5] The holding in *Brown* was derived from this Court's seminal decision in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), in which we rejected a "but for" test for determining whether to suppress evidence gathered following a Fourth Amendment violation.

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Id.*, at 487–488.

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of other factors, however, noting that "*Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Ibid.* *Brown* holds, therefore, that not only *Miranda* warnings, but also "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Id.*, at 603–604 (footnotes and citations omitted).

In light of those factors, the *Brown* Court reviewed the record and found that "Brown's first statement was separated from his illegal arrest by less than two hours, and [that] there was no intervening event of significance whatsoever." *Id.*, at 604. Moreover, the police conduct in arresting Brown was particularly egregious. The "impropriety of the arrest was obvious," and the "manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.*, at 605. The Court held that as a consequence the confession should have been suppressed.

Four Terms later, in *Dunaway* v. *New York*, 442 U. S. 200, 204 (1979), this Court reaffirmed the *Brown* rule that in order to use at trial statements obtained following an arrest on less than probable cause

> "the prosecution must show not only that the statements meet the Fifth Amendment voluntariness standard, but also that the causal connection between the statements and the illegal arrest is broken sufficiently to purge the primary taint of the illegal arrest."

Finding the facts in *Dunaway* to be "virtually a replica of the situation in *Brown*," *id.*, at 218, the Court held that the petitioner's confession should have been suppressed. Critical to the Court's holding was its observation that the petitioner

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"confessed without any intervening event of significance." *Ibid.* See *id.*, at 219 ("No intervening events broke the connection between petitioner's illegal detention and his confession").

III

Our task is to apply the law as articulated in *Brown* and *Dunaway* to the facts of this case.

The first significant consideration is that following his unlawful arrest, Taylor was warned on three separate occasions that he

> "had a right to remain silent, [and] anything he said could be used against him in a court of law[;] he had the right to have an attorney present, [and] if he could not afford one, the State would appoint one for him[;] he could answer questions but he could stop answering at any time." Tr. 23.

Under *Brown* and *Dunaway*, these warnings must be counted as "an important factor . . . in determining whether the confession [was] obtained by exploitation of an illegal arrest," *Brown* v. *Illinois*, *supra*, at 603, though they are, standing alone, insufficient to prove that the primary taint of an illegal arrest had been purged.

Second, in contrast to the facts in *Brown*, the facts in the present case show that the petitioner was not subjected to intimidating police misconduct. In *Brown*, police had broken into the petitioner's house and searched it. When the petitioner later came home, two officers pointed their guns at him and arrested him, leading the Court to conclude that "[t]he manner in which [the petitioner's] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U. S., at 605. By contrast, nothing in the record before us indicates that the petitioner's arrest was violent, or designed to "cause surprise, fright, and confusion." Instead, Montgomery officers ap-

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proached Taylor, asked him his name, and told him that he was under arrest for the Moseley robbery. They then searched him, advised him of his rights, and took him to the police station.

Third, while in both *Brown* and *Dunaway* there was "no intervening event of significance whatsoever," 422 U. S., at 604, in the present case Taylor's girlfriend and neighbor came to the police station and asked to speak with him. Before meeting with his two friends, the petitioner steadfastly had denied involvement in the Moseley robbery. Immediately following the meeting, the petitioner gave a complete and detailed confession of his participation in the armed robbery. This meeting between the petitioner and his two friends, as described by the police in their testimony at the suppression hearing, plainly constituted an intervening circumstance.

Finally, the record reveals that the petitioner spent most of the time between his arrest and confession by himself.[6] In *Dunaway* and *Brown*, by contrast, the defendants were interrogated continuously before they made incriminating statements.

In sum, when these four factors are considered together,[7] it is obvious that there is no sufficient basis on which to overturn the trial court's finding that "there were enough intervening factors" to overcome the taint of the illegal arrest. In fact, I believe it is clear that the State carried its burden of proof. The petitioner was warned of his rights to remain si-

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[6] The petitioner confessed some six hours after his arrest. As JUSTICE STEVENS noted in his concurring opinion in *Dunaway*, the "temporal relationship between the arrest and the confession may be an ambiguous factor," 442 U. S., at 220, for a lengthy detention could be used to exploit an illegal arrest at least as easily as a brief detention. In the present case, there seems to be nothing remarkable, one way or the other, about the length of detention.

[7] The Court has taken each circumstance out of context and examined it to see whether it alone would be enough to purge the taint of the illegal arrest. The Court's failure to consider the circumstances of this case as a whole may have contributed to its erroneous conclusion.

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lent and to have a lawyer present, and there is no dispute that he understood those rights or that he waived them voluntarily and without coercion. After receiving three sets of such warnings, he met with his girlfriend and neighbor, *at his request*. Following that meeting, at which no police officers were present, the petitioner decided to confess to his participation in the robbery. The petitioner's confession was not proximately caused by his illegal arrest, but was the product of a decision based both on knowledge of his constitutional rights and on the discussion with his friends. Accordingly, I respectfully dissent.

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JACKSONVILLE BULK TERMINALS, INC., ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1045. Argued January 18, 1982—Decided June 24, 1982

After President Carter announced certain trade restrictions with the Soviet Union because of its intervention in Afghanistan, respondent International Longshoremen's Association announced that its members would not handle any cargo bound to, or coming from, the Soviet Union. When an affiliated local union refused to load certain goods (not included in the Presidential embargo) bound for the Soviet Union, petitioners (hereafter collectively referred to as the Employer) brought suit in Federal District Court against respondents, the international union, its officers and agents, and the local union (hereafter collectively referred to as the Union), pursuant to § 301(a) of the Labor Management Relations Act. The Employer alleged that the Union's work stoppage violated the terms of a collective-bargaining agreement which contained a no-strike clause and a provision requiring arbitration of disputes. As requested by the Employer, the court ordered the Union to arbitrate the question whether the work stoppage violated the collective-bargaining agreement, and granted a preliminary injunction pending arbitration. The court reasoned that the political motivation behind the work stoppage rendered inapplicable § 4 of the Norris-La Guardia Act, which prohibits injunctions against strikes "in any case involving or growing out of any labor dispute." The Court of Appeals affirmed the District Court's order insofar as it required arbitration, but disagreed with the conclusion that the Norris-La Guardia Act was not applicable.

Held:

1. The Norris-La Guardia Act applies to this case, which involves a "labor dispute" even though the work stoppage was politically motivated. Pp. 709-720.

(a) The plain language of the Act—prohibiting injunctions in "any" labor dispute and defining "labor dispute" to include "any controversy concerning terms or conditions of employment"—does not except labor disputes having their genesis in political protests. Here, the Employer sought injunctive relief as to the dispute over whether the work stoppage violated the no-strike clause of the bargaining agreement, not as to

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the event that triggered the stoppage. The term "labor dispute" must not be narrowly construed, the critical element in determining whether the Act applies being whether, as here, "the employer-employee relationship [is] the matrix of the controversy." *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143, 147. The existence of noneconomic motives does not make the Act inapplicable. Pp. 710–715.

(b) The legislative history of both the Norris-La Guardia Act and the 1947 amendments to the National Labor Relations Act indicates that the Norris-La Guardia Act was intended to apply to politically motivated work stoppages. Pp. 715–719.

(c) The Norris-La Guardia Act's broad prohibitions will not be constricted, except in narrowly defined situations where accommodation of the Act to specific congressional policy is necessary. Pp. 719–720.

2. Nor may the Union's work stoppage here be enjoined, pending arbitration, under the rationale of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235, and *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, on the asserted ground that the dispute underlying the stoppage is arbitrable under the collective-bargaining agreement. While *Boys Markets* recognized an exception to the anti-injunction provisions of the Norris-La Guardia Act when the employer sought to enforce the union's contractual obligation to arbitrate grievances rather than to strike over them, *Buffalo Forge* makes it clear that a *Boys Markets* injunction pending arbitration may not issue unless the dispute underlying the work stoppage is arbitrable. Here the underlying dispute, whether viewed as an expression of the Union's "moral outrage" at Soviet military policy or as an expression of sympathy for the people of Afghanistan, is plainly not arbitrable under the collective-bargaining agreement. Thus the strike may not be enjoined pending the arbitrator's ruling on the legality of the strike under the no-strike clause of the collective-bargaining agreement. Pp. 720–723.

626 F. 2d 455, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 724. BURGER, C. J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 724. POWELL, J., *post*, p. 729, and STEVENS, J., *post*, p. 730, filed dissenting opinions.

Thomas P. Gies argued the cause for petitioners. With him on the briefs were *Andrew M. Kramer*, *Zachary D. Fasman*, and *Kenneth A. McGaw*.

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Ernest L. Mathews, Jr., argued the cause for respondents. With him on the brief were *Thomas W. Gleason* and *Charles R. Goldburg.**

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we consider the power of a federal court to enjoin a politically motivated work stoppage in an action brought by an employer pursuant to § 301(a) of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U. S. C. § 185(a), to enforce a union's obligations under a collective-bargaining agreement. We first address whether the broad anti-injunction provisions of the Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*, apply to politically motivated work stoppages. Finding these provisions applicable, we then consider whether the work stoppage may be enjoined under the rationale of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970), and *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), pending an arbitrator's decision on whether the strike violates the collective-bargaining agreement.

I

On January 4, 1980, President Carter announced that, due to the Soviet Union's intervention in Afghanistan, certain trade with the Soviet Union would be restricted. Superphosphoric acid (SPA), used in agricultural fertilizer, was not included in the Presidential embargo.[1] On January 9, 1980,

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**Solicitor General McCree, Acting Assistant Attorney General Schiffer, Elinor Hadley Stillman*, and *Anthony J. Steinmeyer* filed a brief for the United States as *amicus curiae* urging reversal.

J. Albert Woll, Marsha S. Berzon, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] On February 25, 1980, the embargo was extended to include SPA along with other products. On April 24, 1981, President Reagan lifted the SPA embargo as part of his decision to remove restrictions on the sale of grain to the Soviets. By telegrams dated April 24, 1981, and June 5, 1981, the ILA has recommended to its members that they resume handling goods to

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respondent International Longshoremen's Association (ILA) announced that its members would not handle any cargo bound to, or coming from, the Soviet Union or carried on Russian ships.[2] In accordance with this resolution, respondent local union, an ILA affiliate, refused to load SPA bound for the Soviet Union aboard three ships that arrived at the shipping terminal operated by petitioner Jacksonville Bulk Terminals, Inc. (JBT), at the Port of Jacksonville, Fla., during the month of January 1980.

In response to this work stoppage, petitioners JBT, Hooker Chemical Corp., and Occidental Petroleum Co. (collectively referred to as the Employer)[3] brought this ac-

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and from the Soviet Union. Although the work stoppage is no longer in effect, there remains a live controversy over whether the collective-bargaining agreement prohibits politically motivated work stoppages, and the Union may resume such a work stoppage at any time. As a result, this case is not moot. See *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, 403, n. 8 (1976).

[2] The President of the ILA made the following announcement:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of the ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

. . . . .

"The reason for this action should be apparent in light of international events that have affected relations between the U. S. & Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions of the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs." Brief for Respondents 2, n. 2.

[3] JBT is a wholly owned subsidiary of Oxy Chemical Corp., which is a subsidiary of Hooker. Ownership of all these corporations is ultimately vested in Occidental. Hooker Chemical Co. manufactures SPA at a manufacturing facility in Florida. Pursuant to a bilateral trade agreement between Occidental and the Soviet Union, SPA is shipped to the Soviet Union from the JBT facility in Jacksonville.

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tion pursuant to § 301(a) of the LMRA, 29 U. S. C. § 185(a), against respondents ILA, its affiliated local union, and its officers and agents (collectively referred to as the Union). The Employer alleged that the Union's work stoppage violated the collective-bargaining agreement between the Union and JBT. The Employer sought to compel arbitration under the agreement, requested a temporary restraining order and a preliminary injunction pending arbitration, and sought damages.

The agreement contains both a broad no-strike clause and a provision requiring the resolution of all disputes through a grievance procedure, ending in arbitration.[4] The no-strike clause provides:

> "During the term of this Agreement, . . . the Union agrees there shall not be any strike of any kind or degree whatsoever, . . . for any cause whatsoever; such causes including but not limited to, unfair labor practices by the Employer or violation of this Agreement. The right of employees not to cross a bona fide picket line is recognized by the Employer. . . ."

The United States District Court for the Middle District of Florida ordered the Union to process its grievance in accordance with the contractual grievance procedure. The District Court also granted the Employer's request for a preliminary injunction pending arbitration, reasoning that the political

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[4] The grievance and arbitration clause provides in relevant part:

"Matters under dispute which cannot be promptly settled between the Local and an individual Employer shall . . . be referred . . . to a Port Grievance Committee . . . . In the event this Port Grievance Committee cannot reach an agreement . . . the dispute shall be referred to the Joint Negotiating Committee . . . .

. . . . .

"A majority decision of this Committee shall be final and binding on both parties and on all Employers signing this Agreement. In the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case, it shall employ a professional arbitrator . . . ."

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motivation behind the work stoppage rendered the Norris-La Guardia Act's anti-injunction provisions inapplicable.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's order to the extent it required arbitration of the question whether the work stoppage violated the collective-bargaining agreement. *New Orleans Steamship Assn.* v. *General Longshore Workers*, 626 F. 2d 455 (1980).[5] However, the Court of Appeals disagreed with the District Court's conclusion that the provisions of the Norris-La Guardia Act are inapplicable to politically motivated work stoppages. Relying on *Buffalo Forge*, the Court of Appeals further held that the Employer was not entitled to an injunction pending arbitration because the underlying dispute was not arbitrable. We granted certiorari, 450 U. S. 1029 (1981), and agree with the Court of Appeals that the provisions of the Norris-La Guardia Act apply to this case, and that, under *Buffalo Forge*, an injunction pending arbitration may not issue.

II

Section 4 of the Norris-La Guardia Act provides in part:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> "(a) Ceasing or refusing to perform any work or to remain in any relation of employment." 47 Stat. 70, 29 U. S. C. § 104.

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[5] The Union concedes that the question whether the work stoppage violates the no-strike clause is arbitrable. In a consolidated case, the Court of Appeals upheld an injunction issued by the United States District Court for the Eastern District of Louisiana enforcing an arbitrator's decision that the ILA work stoppage violated a collective-bargaining agreement. 626 F. 2d, at 469.

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Congress adopted this broad prohibition to remedy the growing tendency of federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade, see 29 U. S. C. § 52. See, *e. g.*, H. R. Rep. No. 669, 72d Cong., 1st Sess., 7–8, 10–11 (1932). This Court has consistently given the anti-injunction provisions of the Norris-La Guardia Act a broad interpretation, recognizing exceptions only in limited situations where necessary to accommodate the Act to specific federal legislation or paramount congressional policy. See, *e. g.*, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S., at 249–253; *Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30, 39–42 (1957).

The *Boys Markets* exception, as refined in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), is relevant to our decision today. In *Boys Markets*, this Court re-examined *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), which held that the Norris-La Guardia Act precludes a federal district court from enjoining a strike in breach of a collective-bargaining agreement, even where that agreement contains provisions for binding arbitration of the grievance concerning which the strike was called. 398 U. S., at 237–238. The Court overruled *Sinclair* and held that, in order to accommodate the anti-injunction provisions of Norris-La Guardia to the subsequently enacted provisions of § 301(a) and the strong federal policy favoring arbitration, it was essential to recognize an exception to the anti-injunction provisions for cases in which the employer sought to enforce the union's contractual obligation to arbitrate grievances rather than to strike over them. 398 U. S., at 249–253.[6]

After *Boys Markets*, the Courts of Appeals divided on the question whether a strike could be enjoined under the *Boys*

[6] In *Boys Markets*, the underlying dispute was clearly subject to the grievance and arbitration procedures of the collective-bargaining agreement, and the strike clearly violated the no-strike clause.

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Markets exception to the Norris-La Guardia Act pending arbitration, when the strike was not over a grievance that the union had agreed to arbitrate.[7] In *Buffalo Forge*, the Court resolved this conflict and held that the *Boys Markets* exception does not apply when only the question whether the strike violates the no-strike pledge, and not the dispute that precipitated the strike, is arbitrable under the parties' collective-bargaining agreement.[8]

The Employer argues that the Norris-La Guardia Act does not apply in this case because the political motivation underlying the Union's work stoppage removes this controversy from that Act's definition of a "labor dispute." Alternatively, the Employer argues that this case fits within the exception to that Act recognized in *Boys Markets* as refined in *Buffalo Forge*. We review these arguments in turn.

III

At the outset, we must determine whether this is a "case involving or growing out of any labor dispute" within the meaning of § 4 of the Norris-La Guardia Act, 29 U. S. C. § 104. Section 13(c) of the Act broadly defines the term "labor dispute" to include "any controversy concerning terms or conditions of employment." 47 Stat. 73, 29 U. S. C. § 113(c).[9]

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[7] See cases cited in *Buffalo Forge*, 428 U. S., at 404, n. 9.

[8] In *Buffalo Forge*, the strike at issue was a sympathy strike in support of sister unions negotiating with the employer. The Court reasoned that there was no need to accommodate the policies of the Norris-La Guardia Act to § 301 and to the federal policy favoring arbitration when a strike is not called over an arbitrable dispute, because such a strike does not directly frustrate the arbitration process by denying or evading the union's promise to arbitrate. 428 U. S., at 407–412.

[9] Section 13(c) provides:

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to

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The Employer argues that the existence of political motives takes this work stoppage controversy outside the broad scope of this definition. This argument, however, has no basis in the plain statutory language of the Norris-La Guardia Act or in our prior interpretations of that Act. Furthermore, the argument is contradicted by the legislative history of not only the Norris-La Guardia Act but also the 1947 amendments to the National Labor Relations Act (NLRA).

A

An action brought by an employer against the union representing its employees to enforce a no-strike pledge generally involves two controversies. First, there is the "underlying dispute," which is the event or condition that triggers the work stoppage. This dispute may or may not be political, and it may or may not be arbitrable under the parties' collective-bargaining agreement. Second, there is the parties' dispute over whether the no-strike pledge prohibits the work stoppage at issue. This second dispute can always form the basis for federal-court jurisdiction, because § 301(a) gives federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U. S. C. § 185(a).

It is beyond cavil that the second form of dispute—whether the collective-bargaining agreement either forbids or permits the union to refuse to perform certain work—is a "controversy concerning the terms or conditions of employment." 29 U. S. C. § 113(c). This § 301 action was brought to resolve just such a controversy. In its complaint, the Employer did not seek to enjoin the intervention of the Soviet Union in Afghanistan, nor did it ask the District Court to decide whether the Union was justified in expressing disapproval of the Soviet Union's actions. Instead, the Employer

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arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

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sought to enjoin the Union's decision not to provide labor, a decision which the Employer believed violated the terms of the collective-bargaining agreement. It is this contract dispute, and not the political dispute, that the arbitrator will resolve, and on which the courts are asked to rule.

The language of the Norris-La Guardia Act does not except labor disputes having their genesis in political protests. Nor is there any basis in the statutory language for the argument that the Act requires that *each* dispute relevant to the case be a labor dispute. The Act merely requires that the case involve "any" labor dispute. Therefore, the plain terms of § 4(a) and § 13 of the Norris-La Guardia Act deprive the federal courts of the power to enjoin the Union's work stoppage in this § 301 action, without regard to whether the Union also has a nonlabor dispute with another entity.[10]

The conclusion that this case involves a labor dispute within the meaning of the Norris-La Guardia Act comports with this Court's consistent interpretation of that Act.[11] Our

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[10] Of course, there are exceptions to the Act's prohibitions against enjoining work stoppages. See, *e. g.*, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). The employer may obtain an injunction to enforce an arbitrator's decision that the strike violates the collective-bargaining agreement and can recover damages for the violation, pursuant to § 301 of the LMRA, 29 U. S. C. § 185. See, *e. g.*, *Buffalo Forge*, *supra*, at 405. See also *infra*, at 718–719, and n. 18 (discussing Board's authority under 29 U. S. C. §§ 160(k), 160(*l*), to petition for an injunction upon finding reasonable cause to believe that the strike is an unfair labor practice).

[11] The Employer's reliance on *Eastex, Inc.* v. *NLRB*, 437 U. S. 556 (1978), to argue that a politically motivated strike is not a labor dispute is misplaced. In *Eastex*, we addressed whether certain concerted activity was protected under § 7 of the National Labor Relations Act (NLRA), 29 U. S. C. § 157, and we recognized that "[t]here may well be types of conduct or speech that are so purely political or so remotely connected to the concerns of employees as employees as to be beyond the protection of [§ 7]." *Id.*, at 570, n. 20. Although the definition of a "labor dispute" in § 2(9) of the NLRA, 29 U. S. C. § 152(9), is virtually identical to that in § 13(c) of the Norris-La Guardia Act, 29 U. S. C. § 113(c), and the two provisions have been construed consistently with one another, *e. g.*, *United*

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decisions have recognized that the term "labor dispute" must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition to overrule judicial decisions that had unduly restricted the Clayton Act's labor exemption from the antitrust laws. For example, in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365, 369 (1960), the Court observed:

> "Th[e] Act's language is broad. The language is broad because *Congress was intent upon taking the federal courts out of the labor injunction business* except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act. The history and background that led Congress to take this view have been adverted to in a number of prior opinions of this Court in which we refused to give the Act narrow interpretations that would have restored many labor dispute controversies to the courts" (emphasis added; footnote omitted).

The critical element in determining whether the provisions of the Norris-La Guardia Act apply is whether "the employer-employee relationship [is] the matrix of the contro-

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States v. *Hutcheson*, 312 U. S. 219, 234, n. 4 (1941), this similarity does not advance the Employer's argument. Union activity that prompts a "labor dispute" within the meaning of these sections may be protected by § 7, prohibited by § 8(b), 29 U. S. C. § 158(b), or neither protected nor prohibited. The objective of the concerted activity is relevant in determining whether such activity is protected under § 7 or prohibited by § 8(b), but *not* in determining whether the activity is a "labor dispute" under § 2(9).

Moreover, the conclusion that a purely political work stoppage is not protected under § 7 means simply that the employer is not prohibited by § 8(a)(1) of the NLRA, 29 U. S. C. § 158(a)(1), from discharging or disciplining employees for this activity. It hardly establishes that no "labor dispute" existed within the meaning of § 2(9). Similarly, if the employees protested such sanctions under the collective-bargaining agreement, an arbitrator might ultimately conclude that the sanctions were proper, but this would not alter the obvious fact that the matter is a labor dispute.

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versy." *Columbia River Packers Assn., Inc.* v. *Hinton*, 315 U. S. 143, 147 (1942). In this case, the Employer and the Union representing its employees are the disputants, and their dispute concerns the interpretation of the labor contract that defines their relationship.[12] Thus, the employer-employee relationship is the matrix of this controversy.

Nevertheless, the Employer argues that a "labor dispute" exists only when the Union's action is taken in its own "economic self-interest." The Employer cites *Musicians* v. *Carroll*, 391 U. S. 99 (1968), and *Columbia River Packers Assn.*, *supra*, for this proposition. In these cases, however, the Court addressed the very different question whether the relevant parties were "labor" groups involved in a labor dispute for the purpose of determining whether their actions were exempt from the antitrust laws.[13] These cases do not hold

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[12] A labor dispute might be present under the facts of this case even in the absence of the dispute over the scope of the no-strike clause. Regardless of the political nature of the Union's objections to handling Soviet-bound cargo, these objections were expressed in a work stoppage by employees against their employer, which focused on particular work assignments. Thus, apart from the collective-bargaining agreement, the employer-employee relationship would be the matrix of the controversy. We need not decide this question, however, because this case does involve a dispute over the interpretation of the parties' collective-bargaining agreement.

[13] In *Musicians*, the Court held that, although orchestra leaders acted as independent contractors with respect to certain "club-date" engagements, the union's involvement with the leaders was not a combination with a nonlabor group in violation of the Sherman Act. In finding that the leaders were a "labor group," and a party to a labor dispute, the Court relied on the "'presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors.'" 391 U. S., at 106 (quoting the opinion of the District Court). In *Columbia River Packers Assn.*, the Court found that the union was merely an association of independent fish sellers involved in a controversy with fish buyers over a contract for the sale of fish; they were not employees of the buyers, nor did they seek to be. 315 U. S., at 147.

The Employer's reliance on *Bakery Drivers* v. *Wagshal*, 333 U. S. 437 (1948), is similarly misplaced. In that case, the Court held only that a con-

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that a union's noneconomic motive inevitably takes the dispute out of the Norris-La Guardia Act, but only that the protections of that Act do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with nonlabor groups in restraint of trade.[14] Here, there is no question that the Union is a labor group, representing its own interests in a dispute with the Employer over the employees' obligation to provide labor.

Even in cases where the disputants did not stand in the relationship of employer and employee, this Court has held that the existence of noneconomic motives does not make the Norris-La Guardia Act inapplicable. For example, in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938), this Court held that the Norris-La Guardia Act prohibited an injunction against picketing by members of a civic group, which was aimed at inducing a store to employ Negro employees. In determining that the group and its members were "persons interested in a labor dispute" within the meaning of § 13, the Court found it immaterial that the picketers, who were neither union organizers nor store employees, were not asserting economic interests commonly associated with labor unions—*e. g.*, terms and conditions of employment in the narrower sense of wages, hours, unionization, or betterment of working conditions. *Id.*, at 560. Although the lower courts found Norris-La Guardia inapplicable because the picketing was motivated by the group's "political" or "social" goals of improving the position of Negroes generally, and not by the desire to improve specific conditions of employment, this Court reasoned: "The Act does not concern it-

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troversy between two businessmen over delivery times or methods of payment does not become a labor dispute merely because a union representative, with or without his employer's consent, sought to obtain payment pursuant to a particular method. *Id.*, at 443–444.

[14] The Employer's economic-motive analysis also leads to the untenable result that strikes in protest of unreasonably unsafe conditions and some sympathy strikes are not "labor disputes."

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self with the background or the motives of the dispute." *Id.*, at 561.

B

The Employer's argument that the Union's motivation for engaging in a work stoppage determines whether the Norris-La Guardia Act applies is also contrary to the legislative history of that Act. The Act was enacted in response to federal-court intervention on behalf of employers through the use of injunctive powers against unions and other associations of employees. This intervention had caused the federal judiciary to fall into disrepute among large segments of this Nation's population. See generally S. Rep. No. 163, 72d Cong., 1st Sess., 8, 16–18 (1932); 75 Cong. Rec. 4915 (1932) (remarks of Sen. Wagner).

Apart from the procedural unfairness of many labor injunctions, one of the greatest evils associated with them was the use of tort-law doctrines, which often made the lawfulness of a strike depend upon judicial views of social and economic policy. See, *e. g.*, Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mountain L. Rev. 247, 256 (1958). In debating the Act, its supporters repeatedly expressed disapproval of this Court's interpretations of the Clayton Act's labor exemption—interpretations which permitted a federal judge to find the Act inapplicable based on his or her appraisal of the "legitimacy" of the union's objectives.[15] See, *e. g.*, 75 Cong. Rec. 4916 (1932) (remarks of Sen. Wagner) (definition of labor dispute expanded to override *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921) (holding a strike and picketing with the purpose of unionizing a plant not a labor dispute because the objectives were not legitimate and there was no employer-employee relationship between the disputants)); 75 Cong. Rec., at

[15] See *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 468–469 (1921). See also *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37, 54–55 (1927).

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5487–5488 (remarks of Rep. Celler) (bill brought forth to remedy decisions allowing injunction in *Duplex* and in *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37 (1927) (holding that decision by workers not to work on nonunion goods not a labor dispute)). See also 75 Cong. Rec., at 4686 (remarks of Sen. Hebert) (Committee minority agreed that injunctions should not have issued in *Bedford* and *Duplex*). See generally H. R. Rep. No. 669, 72d Cong., 1st Sess., 8, 10–11 (1932). The legislative history is replete with criticisms of the ability of powerful employers to use federal judges as "strike-breaking" agencies; by virtue of their almost unbridled "equitable discretion," federal judges could enter injunctions based on their disapproval of the employees' objectives, or on the theory that these objectives or actions, although lawful if pursued by a single employee, became unlawful when pursued through the "conspiracy" of concerted activity. See, *e. g.*, 75 Cong. Rec., at 4928–4938, 5466–5468, 5478–5481, 5487–5490.

Furthermore, the question whether the Norris-La Guardia Act would apply to politically motivated strikes was brought to the attention of the 72nd Congress when it passed the Act. Opponents criticized the definition of "labor dispute" in § 13(c) on the ground that it would cover politically motivated strikes. Representative Beck argued that federal courts should have jurisdiction to enjoin political strikes like those threatened by labor unions in Europe. *Id.*, at 5471–5473 (discussing threatened strike by British unions protesting the cancellation of leases held by Communist Party members, and threatened strikes by Belgian unions protesting a decision to supply military aid to Poland).[16] In response, Representative Oliver argued that the federal courts should not have the power to enjoin such strikes. *Id.*, at 5480–5481.

[16] The thrust of this objection was that the Act's definition of a labor dispute "takes no account whatever of the motives and purposes with which a nation-wide strike or boycott can be commenced and prosecuted." 75 Cong. Rec. 5472 (1932) (remarks of Rep. Beck).

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Finally, Representative Beck offered an amendment to the Act that would have permitted federal courts to enjoin strikes called for ulterior purposes, including political motives. This amendment was defeated soundly. See *id.*, at 5507.

Further support for our conclusion that Congress believed that the Norris-La Guardia Act applies to work stoppages instituted for political reasons can be found in the legislative history of the 1947 amendments to the NLRA. That history reveals that Congress rejected a proposal to repeal the Norris-La Guardia Act with respect to one broad category of political strikes.[17] The House bill included definitions of various kinds of labor disputes. See H. R. 3020, 80th Cong., 1st Sess., § 2, 1 Legislative History of the LMRA 158, 160 (1947) (Leg. Hist.); H. R. Rep. No. 245, 80th Cong., 1st Sess., 1, 18–19 (1947), 1 Leg. Hist. 292, 309–310. Of relevance here, § 2(13) defined a "sympathy" strike as a strike "called or conducted not by reason of any dispute between the employer and the employees on strike or participating in such concerted interference, but rather by reason of either (A) a dispute involving another employer or other employees of the same employer, or (B) *disagreement with some governmental policy.*" H. R. 3020, § 2(13), 1 Leg. Hist. 168 (emphasis added). Section 12 of the House bill made this kind of strike "unlawful concerted activity," and "it remove[d] the immunities that the present laws confer upon persons who engage in them." H. R. Rep. No. 245, *supra*, at 23, 1 Leg. Hist.

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[17] In relying on this history, we do not argue that congressional rejection of a broad repeal of the Norris-La Guardia Act precludes accommodation of that Act to the LMRA. See *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 204–210 (1962). In *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S., at 249, this Court put that argument to rest. Rather, we rely on this legislative history because it demonstrates that Congress believed that the Norris-La Guardia Act did apply to controversies concerning politically motivated work stoppages. Furthermore, in this case, unlike *Boys Markets*, we are not asked to accommodate the Norris-La Guardia Act to a specific federal Act or to the strong policy favoring arbitration.

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314. In particular, the Norris-La Guardia Act would not apply to suits brought by private parties to enjoin such activity, and damages could be recovered. See H. R. Rep. No. 245, *supra*, at 23–24, 43–44, 1 Leg. Hist. 314–315, 334–335. In explaining these provisions, the House Report stated that strikes "against a policy of national or local government, which the employer cannot change," should be made unlawful, and that "[t]he bill makes inapplicable in such suits the Norris-La Guardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness." H. R. Rep. No. 245, *supra*, at 24, 44, 1 Leg. Hist. 315, 335.

The Conference Committee accepted the Senate version, which had eliminated these provisions of the House bill.[18] The House Managers' statement accompanying the Conference Report explained that its recommendation did not go as far as the House bill, that § 8(b) prohibits jurisdictional strikes and illegal secondary boycotts, and that the Board, *not private parties*, may petition a district court under § 10(k) or § 10(*l*) to enjoin these activities notwithstanding the provisions of the Norris-La Guardia Act. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36, 42–43, 57, 58–59 (1947), 1 Leg. Hist. 540, 546–547, 561, 562–563. In short, Congress declined in 1947 to adopt a broad "political motivation" exception to the Norris-La Guardia Act for strikes in protest of some governmental policy. Instead, if a strike of this nature

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[18] The Senate had declined to adopt these provisions of the House bill. The Senate Report explained that it did not want to impair labor's social gains under the Norris-La Guardia Act and the NLRA of 1935, but instead wanted to remedy "specific types of injustice" or "clear inequities" by "precise and carefully drawn legislation." S. Rep. No. 105, 80th Cong., 1st Sess., 1 (1947), 1 Leg. Hist. 407. Some of the concerted activities listed in § 12 of the House bill were made unfair labor practices, and the National Labor Relations Board, *not private parties*, could petition a district court for injunctions against certain unfair labor practices. See S. Rep. No. 105, *supra*, at 35, 40, 1 Leg. Hist., 441, 446 (reciting proposed revisions to NLRA, §§ 8(b), 10(k), 10(*l*)).

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takes the form of a secondary boycott prohibited by § 8(b), Congress chose to give the Board, not private parties, the power to petition a federal district court for an injunction. See 29 U. S. C. §§ 160(k), 160(*l*). Cf. *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212 (1982).

C

This case, brought by the Employer to enforce its collective-bargaining agreement with the Union, involves a "labor dispute" within any common-sense meaning of that term. Were we to ignore this plain interpretation and hold that the political motivation underlying the work stoppage removes this controversy from the prohibitions of the Norris-La Guardia Act, we would embroil federal judges in the very scrutiny of "legitimate objectives" that Congress intended to prevent when it passed that Act. The applicability not only of § 4, but also of all of the procedural protections embodied in that Act, would turn on a single federal judge's perception of the motivation underlying the concerted activity.[19] The Employer's interpretation is simply inconsistent with the

[19] This proposed exception does not limit the judge's discretion to consideration of specified external conduct or of provisions in a collective-bargaining agreement, as does the *Boys Markets* exception. It provides no guidance to judges in dealing with concerted activity arguably designed to achieve both political and labor-related goals. Such mixed-motivation cases are bound to arise. For example, in *United States Steel Corp.* v. *United Mine Workers*, 519 F. 2d 1236 (CA5 1975), miners picketed another employer for importing coal from South Africa. The Court of Appeals held that the Norris-La Guardia Act applied, and that the *Boys Markets* exception was not available, because "the miners' action was not aimed at [their employer] at all, but rather at the national policy of this country's permitting the importation of South African coal." 519 F. 2d, at 1247 (footnote omitted). Under the political-motivation exception, even if the miners had picketed because slave labor was employed to mine the imported coal, the Norris-La Guardia Act might not apply. Minor variations in the facts would endow the courts with, or divest them of, jurisdiction to issue an injunction, and would create difficult line-drawing problems.

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need, expressed by Congress when it enacted the Norris-La Guardia Act, for clear "mileposts for judges to follow." 75 Cong. Rec. 4935 (1932) (remarks of Sen. Bratton).

In essence, the Employer asks us to disregard the legislative history of the Act and to distort the definition of a labor dispute in order to reach what it believes to be an "equitable" result. The Employer's real complaint, however, is not with the Union's political objections to the conduct of the Soviet Union, but with what the Employer views as the Union's breach of contract. The Employer's frustration with this alleged breach of contract should not be remedied by characterizing it as other than a labor dispute. We will not adopt by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA. See generally n. 17, *supra*. In the past, we have consistently declined to constrict Norris-La Guardia's broad prohibitions except in narrowly defined situations where accommodation of that Act to specific congressional policy is necessary. We refuse to deviate from that path today.

IV

Alternatively, the Employer argues that the Union's work stoppage may be enjoined under the rationale of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970), and *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), because the dispute underlying the work stoppage is arbitrable under the collective-bargaining agreement. In making this argument, the Employer disavows its earlier argument that the underlying dispute is purely political, and asserts that the Union's work stoppage was motivated by a disagreement with the Employer over the management-rights clause in the collective-bargaining agreement. The Solicitor General, in an *amicus* brief filed on behalf of the United States, agrees with the Employer that the work stoppage may be enjoined pending arbitration. He contends that in addition to the political dispute, disputes concerning both the management-rights

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clause and the work-conditions clause underlie the work stoppage, and that at least one of these disputes is arguably arbitrable.[20]

We disagree. *Buffalo Forge* makes it clear that a *Boys Markets* injunction pending arbitration should not issue unless the dispute underlying the work stoppage is arbitrable. The rationale of *Buffalo Forge* compels the conclusion that the Union's work stoppage, called to protest the invasion of Afghanistan by the Soviet Union, may not be enjoined pending the arbitrator's decision on whether the work stoppage violates the no-strike clause in the collective-bargaining agreement. The underlying dispute, whether viewed as an expression of the Union's "moral outrage" at Soviet military policy or as an expression of sympathy for the people of Afghanistan, is plainly not arbitrable under the collective-bargaining agreement.

The attempts by the Solicitor General and the Employer to characterize the underlying dispute as arbitrable do not withstand analysis. The "underlying" disputes concerning the management-rights clause or the work-conditions clause simply did not trigger the work stoppage. To the contrary, the applicability of these clauses to the dispute, if any, was triggered by the work stoppage itself. Consideration of

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[20] The management-rights clause provides:

"The Management of the Employer's business and the direction of the work force in the operation of the business are exclusively vested in the Employer as functions of Management. Except as specifically provided in the Agreement, all of the rights, powers, and authority Employer had prior to signing of this Agreement are retained by the Employer."

The work-conditions clause provides:

"Where hardship is claimed by the Union because of unreasonable or burdensome conditions or where work methods or operations materially change in the future, the problem shall first be discussed between the local and Management involved. In the event an agreement cannot be reached, either party may refer the dispute to the Joint Negotiating Committee and, if the matter cannot be resolved by that Committee, either party may then refer the question to an arbitrator in accordance with the procedure set forth in Clause 15(B)."

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whether the strike intruded on the management-rights clause or was permitted by the work-conditions clause may inform the arbitrator's ultimate decision on whether the strike violates the no-strike clause. Indeed, the question whether striking over a nonarbitrable issue violates other provisions of the collective-bargaining agreement may itself be an arbitrable dispute. The fact remains, however, that the strike itself was not over an arbitrable dispute and therefore may not be enjoined pending the arbitrator's ruling on the legality of the strike under the collective-bargaining agreement.

The weaknesses in the analysis of the Employer and the Solicitor General can perhaps best be demonstrated by applying it to a pure sympathy strike, which clearly cannot be enjoined pending arbitration under the rationale of *Buffalo Forge*. If this work stoppage were a pure sympathy strike, it could be characterized alternatively as a dispute over the Employer's right to choose to do business with the employer embroiled in a dispute with a sister union, as a dispute over management's right to assign and direct work, or as a dispute over whether requiring the union to handle goods of the employer whose employees are on strike is an unreasonable work condition.[21] None of these characterizations, however, alters the fact, essential to the rationale of *Buffalo Forge*, that the strike was not over an arbitrable issue and therefore did not directly frustrate the arbitration process.

The Employer's argument that this work stoppage may be enjoined pending arbitration really reflects a fundamental

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[21] In fact, the employer in *Buffalo Forge* made just such a claim. In addition to alleging breach of the no-strike clause, it claimed that the strike was caused by "refusal to follow a supervisor's instructions to cross the . . . picket line." *Buffalo Forge*, 428 U. S., at 401. The District Court found that the strike was in sympathy with the sister union and was not over a dispute that the parties were contractually bound to arbitrate. *Id.*, at 402–403. On appeal, the employer did not press its argument that the work stoppage was in part a protest over truckdriving assignments. *Id.*, at 403, n. 8.

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disagreement with the rationale of *Buffalo Forge*, and not a belief that this rationale permits an injunction in this case. The Employer apparently disagrees with the *Buffalo Forge* Court's conclusion that, in agreeing to broad arbitration and no-strike clauses, the parties do not bargain for injunctive relief to restore the status quo pending the arbitrator's decision on the legality of the strike under the collective-bargaining agreement, without regard to what triggered the strike. Instead, they bargain only for specific enforcement of the union's promise to arbitrate the underlying grievance before resorting to a strike. See 428 U. S., at 410–412. The Employer also apparently believes that *Buffalo Forge* frustrates the arbitration process and encourages industrial strife. But see *id.*, at 412.[22] However, this disagreement with *Buffalo Forge* only argues for reconsidering that decision.[23] It does not justify distorting the rationale of that case beyond recognition in order to reach the result urged by the Employer.

V

In conclusion, we hold that an employer's § 301 action to enforce the provisions of a collective-bargaining agreement allegedly violated by a union's work stoppage involves a "labor dispute" within the meaning of the Norris-La Guardia Act, without regard to the motivation underlying the union's

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[22] The Employer argues that industrial strife is encouraged because employers are given the incentive to discharge or discipline the workers for refusing to work, which is likely to precipitate further strikes. According to this argument, the strike, which began over a nonarbitrable dispute, is transformed into a dispute over an arbitrable issue, *i. e.*, the employer's right under the collective-bargaining agreement to discipline these workers, and may be enjoined under the *Boys Markets/Buffalo Forge* exception. See, *e. g.*, *Complete Auto Transit, Inc.* v. *Reis*, 614 F. 2d 1110, 1113–1114 (CA6 1980), aff'd on other grounds, 451 U. S. 401 (1981). This Court has not addressed the validity of this "transformation" analysis. See *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S., at 405, n. 4.

[23] The Employer has also requested that we reconsider our decision in *Buffalo Forge Co.* v. *Steelworkers*. We decline this invitation.

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decision not to provide labor. Under our decisions in *Boys Markets* and *Buffalo Forge*, when the underlying dispute is not arbitrable, the employer may not obtain injunctive relief pending the arbitrator's ruling on the legality of the strike under the collective-bargaining agreement. Accordingly, the decision of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, concurring in the judgment.

Based on the legislative history of the Norris-La Guardia Act, 29 U. S. C. § 101 *et seq.*, and our previous cases interpreting it, *e. g.*, *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938), the Court correctly concludes that this case involves a labor dispute within the meaning of § 4 of the Act, 29 U. S. C. § 104. The Court also correctly determines that under *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976), no injunction may issue pending arbitration because the underlying political dispute is not arbitrable under the collective-bargaining agreement. Unless the Court is willing to overrule *Buffalo Forge*, the conclusion reached by the Court in this case is inescapable. Therefore, I concur in the judgment.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL joins, dissenting.

I

This case in no sense involves or grows out of a labor dispute as that term is defined in § 13(c) of the Norris-La Guardia Act, 29 U. S. C. § 113(c). See *ante*, at 709–710, n. 9. Section 13(c) defines a labor dispute as "any controversy concerning terms or conditions of employment . . . ."[1] The dispute in this case is a political dispute and has no relation to any controversy concerning terms or conditions of em-

[1] Section 13(c) also includes union organizational activity within its definition of labor dispute, but this case clearly does not involve such activity.

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ployment. If Congress had intended to bar federal courts from issuing injunctions in political disputes, it could have simply prohibited federal courts from enjoining strikes rather than limiting its prohibition to controversies concerning terms or conditions of employment. Accordingly, I disagree with the Court's conclusion that the Norris-La Guardia Act bars a federal court from enjoining this politically motivated work stoppage.

The International Longshoremen's Association objects to the Soviet Union's invasion of Afghanistan. As a consequence, it announced that it would not handle any cargo bound to, or coming from, the Soviet Union, or any cargo carried on Soviet ships. This case commenced after the union, pursuant to its political position, refused to load superphosphoric acid onto certain ships bound for the Soviet Union. The union has no objection to any terms or conditions of employment; it would have loaded the superphosphoric acid on any non-Soviet ship bound for a destination other than the Soviet Union. No one has suggested that the union's action is actually motivated to obtain concessions concerning employment conditions. The union refused to handle the cargo simply because a foreign country invaded a neighboring country and the union desired to express its opposition to the invasion. Thus the plain meaning of § 13(c) leads to the conclusion that this case does not involve or grow out of a labor dispute because the union members are not seeking to change their terms or conditions of employment.

As the Court recognizes, we have held that the test of whether the Norris-La Guardia Act applies is whether "the employer-employee relationship [is] the matrix of the controversy." *Columbia River Packers Assn., Inc.* v. *Hinton*, 315 U. S. 143, 147 (1942); quoted *ante*, at 712–713. Federal Courts of Appeals have stated that unions are protected by the Norris-La Guardia Act when they act to advance the economic interests of their members. See, *e. g.*, *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d

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649, 654 (CA5 1966). These cases illustrate the plain meaning of § 13(c)'s definition of labor dispute—the Norris-La Guardia Act protects union organizational efforts and efforts to improve working conditions.

The Court errs gravely in finding that the matrix of this controversy is the union's relationship with the petitioners. The union's dispute with the petitioners merely flows from its decision to demonstrate its opposition to the invasion of Afghanistan. No economic interests of union members are involved; indeed, the union's policy is contrary to its members' economic interests since it reduces the amount of available work.[2] Thus, the cases generally explicating the meaning of § 13(c) lend no support to the notion that this case involves a labor dispute.

The federal courts have consistently recognized that the Norris-La Guardia Act does not apply to politically motivated work stoppages concerning subjects over which employers have no control. These courts, in cases which are for all practical purposes indistinguishable from this case—and which often involved the International Longshoremen's Association—properly concluded that the Act only applies to economic disputes.[3] This Court has never before held, as it

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[2] The Court's reliance on *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938), is misplaced. *Ante*, at 714–715. The picketers in that case might not have been seeking to better their own personal economic position, but their purpose was to affect the terms and conditions of employment of the picketed store, since their object was to persuade the store to employ Negroes. Section 13(c) explicitly states that the coverage of the Act does not depend on whether "the disputants stand in the proximate relation of employer and employee." *Ante*, at 710, n. 9.

[3] See *Khedivial Line, S. A. E.* v. *Seafarers International Union*, 278 F. 2d 49, 50–51 (CA2 1960) (politically motivated blacklist of Egyptian ships to retaliate for Egyptian blacklist of American ships that dealt with Israel is not "labor dispute" triggering Norris-La Guardia); *West Gulf Maritime Assn.* v. *International Longshoremen's Assn.*, 413 F. Supp. 372 (SD Tex. 1975), summarily aff'd, 531 F. 2d 574 (CA5 1976) (union's refusal, on political grounds, in violation of a no-strike agreement, to load grain on a ship bound for the Soviet Union does not present a "labor dispute").

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holds here, that the Norris-La Guardia Act protects strikes resulting from political disputes rather than from labor disputes. Since the meaning of the words of the statute is plain, and since the applicable precedent supports the conclusion that this is not a labor dispute, we ought to conclude that politically motivated strikes are outside the coverage of the Norris-La Guardia Act.[4]

Finally, the Court argues that a common-sense interpretation of the meaning of the term "labor dispute" supports its conclusion. But the "common-sense" meaning of a term is not controlling when Congress has provided, as it provided in § 13(c), an explicit definition of a labor dispute. "Common sense" and legislative history ought not change the meaning of the unambiguous words of a statute. It is not contended that any act of petitioners to improve the terms or conditions

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[4] The excerpts from the legislative history relied upon by the Court fall short of the clear evidence required to overcome the plain language of § 13(c). See, *e. g.*, *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 581 (1982). In 1947, Congress declined to amend the federal labor laws so that strikes protesting "disagreement with some governmental policy" would not be protected by the Norris-La Guardia Act. H. R. 3020, 80th Cong., 1st Sess., § 2(13)(B) (1947), 1 Legislative History of the LMRA 168 (1947); *ante*, at 717. However, the language of the rejected House version of the amendment was quite broad. There are cases in which unions might disagree with governmental policy and properly take collective action protesting it in order to advance the legitimate economic interests of union members if the terms or conditions of their employment would be affected. Congress might have rejected the House version because of fear that its broad reach would render legitimate union activity unprotected.

In 1932, Congress rejected an amendment which would have permitted federal courts to enjoin acts "performed or threatened for an unlawful purpose or with an unlawful intent . . . ." 75 Cong. Rec. 5507 (1932); *ante*, at 716–717. This amendment would have swept more broadly than the plain language of § 13(c) as adopted. Indeed, Representative Beck's amendment could have rendered the Norris-La Guardia Act a nullity, since federal judges in the 1930's would have been able to enjoin a strike merely by finding it motivated by an "unlawful purpose." Thus the legislative history does not lead to or compel a conclusion in this case contrary to the plain language of § 13(c).

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of employment would have persuaded the union to load the ships. Hence there is no labor dispute under the Norris-La Guardia Act.

II

This case, together with our recent decision in *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212 (1982), illustrates the inherent flaw in the holding in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976). If the Court cannot give to ordinary words their ordinary meaning and grasp that the dispute in this case is a purely political dispute rather than having any relation to a labor dispute, it should overrule *Buffalo Forge*.

The controversy in *Allied International* also resulted from the International Longshoremen's Association's protest over the Soviet invasion of Afghanistan. There we held that the union's refusal to unload shipments from the Soviet Union was a secondary boycott prohibited by § 8(b)(4) of the National Labor Relations Act, 29 U. S. C § 158(b)(4). The union is therefore liable for damages as a result of its refusal to unload the shipments. Yet the Court today holds that the union may not be enjoined from refusing to load cargo onto ships bound for the Soviet Union.

This is all the more perplexing because the union entered into an agreement with petitioners which contained an unequivocal no-strike clause: "During the term of this Agreement, . . . the Union agrees there shall not be any strike *of any kind* or degree whatsoever, . . . for *any cause whatsoever*." (Emphasis added.) *Ante*, at 706. In *Allied International* this union was found liable for damages caused to a party with which it had no such agreement. Here, however, despite the existence of the no-strike agreement between petitioners and the union, the Court holds that the union's illegal acts may not be enjoined.

To reach this strange result, the Court first decides that this case involves a labor dispute rather than a political dispute, and therefore is within the scope of the Norris-

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La Guardia Act. The Court then contradicts itself and concludes that, since the dispute is really a political protest over Soviet aggression, it may not be enjoined under the *Buffalo Forge* exception to the rule of *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970), since a federal court cannot resolve the actual dispute. This case, together with *Allied International*, persuades me that the artificial *Buffalo Forge* exception should be abolished. Rather than continuing to engage in mechanical and contradictory analyses as to the character of disputes such as this one, we should hold that a federal court may enjoin a strike pending arbitration when the striking union has agreed to a contract with a no-strike clause such as the one agreed to by petitioners and the ILA. That is what we seemed to hold in *Boys Markets*, and we should not have tinkered with that holding in *Buffalo Forge*.

There is no rational way to reconcile this holding with *Allied International*. If we must overrule *Buffalo Forge* to come to a consistent result, we should do so.

JUSTICE POWELL, dissenting.

The no-strike clause agreed to by the parties in this case could scarcely be more emphatic: "During the term of this Agreement, . . . the Union agrees there shall not be any strike of any kind or degree whatsoever, . . . for *any cause whatsoever*" (emphasis added). *Ante*, at 706. Such a clause is one of the most significant provisions in the bargaining agreement. One can fairly assume that the employer gave considerable ground in other areas of the agreement to gain this apparent guarantee that all disagreements would go first to arbitration. Thus, under the plain language of the agreement of the parties, the strike by the respondents should have been enjoined pending arbitration.

But in labor law—since this Court's decision in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976)—plain language agreed to by a union does not bind it. *Buffalo Forge* is an aberration. It cannot be reconciled with labor law pol-

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icy of encouraging industrial peace through arbitration. It severely undercuts *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). In a word, *Buffalo Forge* should be overruled.

The internal contradictions in today's decision by the Court further illustrate absence of principle in *Buffalo Forge*'s reasoning. The Court argues that now we must divide the dispute in this case into the "underlying" dispute over Soviet policy and the "other" dispute over the scope of the no-strike clause. I consider this method of analysis artificial and unprincipled. On the one hand, the Court must characterize the dispute in this case as a labor dispute—involving the scope of the no-strike clause—to bring the dispute within the scope of the Norris-La Guardia Act. But on the other hand, *Buffalo Forge* requires the Court to contradict itself by insisting that the dispute is "really" over Soviet aggression and therefore that the rule of *Boy's Market*, and the federal policy in support of arbitration, are inapplicable.

The Court should not have it both ways. So long as it adheres to the aberrant analysis in *Buffalo Forge*, I agree with THE CHIEF JUSTICE that the dispute in this case must be viewed as a political dispute outside the scope of the Norris-La Guardia Act. I therefore join his dissenting opinion.

JUSTICE STEVENS, dissenting.

For the reasons stated in Part I of THE CHIEF JUSTICE's dissenting opinion in this case, as well as the reasons stated in Part I of my dissenting opinion in *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397, 415–424, I respectfully dissent.

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NIXON v. FITZGERALD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1738. Argued November 30, 1981—Decided June 24, 1982

During the waning months of the Presidency of Lyndon B. Johnson in 1968, respondent, a management analyst with the Department of the Air Force, testified before a congressional Subcommittee about cost-overruns and unexpected technical difficulties concerning the development of a particular airplane. In January 1970, during the Presidency of petitioner Richard M. Nixon, respondent was dismissed from his job during a departmental reorganization and reduction in force, in which his job was eliminated. Respondent complained to the Civil Service Commission, alleging that his separation represented unlawful retaliation for his congressional testimony. The Commission rejected this claim, but concluded that respondent's dismissal offended applicable regulations because it was motivated by "reasons purely personal to" respondent. Respondent thereafter filed suit for damages in Federal District Court against various Defense Department officials and White House aides allegedly responsible for his dismissal. An amended complaint later named petitioner as a defendant. After earlier judicial rulings and extensive pretrial discovery, only three defendants were involved: petitioner and two White House aides (petitioners in *Harlow* v. *Fitzgerald*, *post*, p. 800). Denying the defendants' motion for summary judgment, the court held that respondent had stated triable causes of action under two federal statutes and the First Amendment, and that petitioner was not entitled to claim absolute Presidential immunity. Petitioner took a collateral appeal of the immunity decision to the Court of Appeals, which dismissed summarily.

Held:

1. This Court has jurisdiction to determine the immunity question. Pp. 741-744.

(a) The case was "in" the Court of Appeals for purposes of 28 U. S. C. § 1254, which authorizes this Court's review of "[c]ases in" the courts of appeals. The Court of Appeals here dismissed the appeal for lack of jurisdiction. However, petitioner's appeal to the Court of Appeals falls within the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, as raising a "serious and unsettled

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question" of law. Although the Court of Appeals had previously ruled in another case that the President was not entitled to absolute immunity, this Court had never so held. Pp. 741–743.

(b) Nor was the controversy mooted by an agreement to liquidate damages entered into between the parties after the petition for certiorari was filed and respondent had entered his opposition. Under the terms of the agreement, petitioner paid respondent $142,000; respondent agreed to accept liquidated damages of $28,000 if this Court ruled that petitioner was not entitled to absolute immunity; and no further payments would be made if the decision upheld petitioner's immunity claim. The limited agreement left both parties with a considerable financial stake in the resolution of the question presented in this Court. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363. Pp. 743–744.

2. Petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. Pp. 744–758.

(a) Although there is no blanket recognition of absolute immunity for all federal executive officials from liability for civil damages resulting from constitutional violations, certain officials—such as judges and prosecutors—because of the special nature of their responsibilities, require absolute exemption from liability. Cf. *Butz* v. *Economou*, 438 U. S. 478. Determination of the immunity of particular officials is guided by the Constitution, federal statutes, history, and public policy. Pp. 744–748.

(b) The President's absolute immunity is a functionally mandated incident of his unique office, rooted in the constitutional tradition of the separation of powers and supported by the Nation's history. Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. While the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President, a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. The exercise of jurisdiction is not warranted in the case of merely private suits for damages based on a President's official acts. Pp. 748–754.

(c) The President's absolute immunity extends to all acts within the "outer perimeter" of his duties of office. Pp. 755–757.

(d) A rule of absolute immunity for the President does not leave the Nation without sufficient protection against his misconduct. There remains the constitutional remedy of impeachment, as well as the deterrent effects of constant scrutiny by the press and vigilant oversight by Congress. Other incentives to avoid misconduct may include a desire to

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earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature. Pp. 757–758.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 758. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 764. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 797.

Herbert J. Miller, Jr., argued the cause for petitioner. With him on the briefs was *R. Stan Mortenson.*

John E. Nolan, Jr., argued the cause for respondent. With him on the brief were *Samuel T. Perkins* and *Arthur B. Spitzer.**

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in

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**Louis Alan Clark* filed a brief for the Government Accountability Project of the Institute for Policy Studies as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Solicitor General Lee* for the United States; by *Roger J. Marzulla* and *William H. Mellor III* for the Mountain States Legal Foundation; by *John C. Armor* and *H. Richard Mayberry* for the National Taxpayers Legal Fund, Inc.; and by *Thomas J. Madden* for Senator Orrin G. Hatch et al.

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which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the Armed Forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the Presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently,

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[1] See Economics of Military Procurement: Hearings before the Subcommittee on Economy in Government of the Joint Economic Committee, 90th Cong., 2d Sess., pt. I, pp. 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209a–211a (memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings before the Subcommittee on Economy in Government of the Joint Economic Committee, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the

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as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from Government service.[3] The President responded by promising to look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H. R. Haldeman to arrange for Fitzgerald's assignment to another job within the administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "'Fitzgerald is no doubt a top-notch cost expert, but he must be given very low

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"firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269a (memorandum of Patrick Buchanan to Richard Nixon, Dec. 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

[4] *Id.*, at 228a.

[5] See *id.*, at 109a–112a (deposition of H. R. Haldeman); *id.*, at 137a–141a (deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. *Id.*, at 275a.

[6] See *id.*, at 126a (deposition of Robert Mayo); *id.*, at 141a (deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high-level positions were presently unavailable within the Bureau of the Budget. See *id.*, at 126a (deposition of Robert Mayo); *id.*, at 146a–147a (deposition of James Schlesinger).

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marks in loyalty; and after all, loyalty is the name of the game.'"[8] Butterfield therefore recommended that "'[w]e should let him bleed, for a while at least.'"[9] There is no evidence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional Committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 152 U. S. App. D. C. 1, 467 F. 2d 755 (1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before

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[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (Sept. 18, 1973) *(CSC Decision)*, reprinted in App. 60a, 84a. (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix.)

[9] *Id.*, at 85a. The memorandum added that "'[w]e owe "first choice on Fitzgerald" to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns].'" Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra:*

"While Mr. Fitzgerald has denied that he was 'Senator Proxmier's *[sic]* boy in the Air Force', and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83a.

[10] *Id.*, at 61a.

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Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision

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[11] See *id.*, at 83a–84a.

[12] See *ibid.*

[13] *Id.*, at 185a. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. *Id.*, at 214a–215a (recorded conversation of Jan. 31, 1973).

[14] *Id.*, at 196a (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see n. 13, *supra*, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." *Id.*, at 218a (recorded conversation of Jan. 31, 1973). See *id.*, at 220a. It was after this conversation that the retraction was ordered.

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in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App. 60a. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. *Id.*, at 86a–87a.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86a. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17]

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[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 152 U. S. App. D. C. 1, 4, 467 F. 2d 755, 758 (1972); see *CSC Decision*, App. 63a–64a. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans' Preference Act. See 152 U. S. App. D. C., at 4–14, 467 F. 2d, at 758–768. Among these were the benefits of the reduction-in-force procedures established by civil service regulation. See *id.*, at 4, 467 F. 2d, at 758.

[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86a–87a. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" *Id.*, at 83a. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86a, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR pt. 752 (1982), implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87a.

[17] The Commission also ordered that Fitzgerald should receive backpay. *Id.*, at 87a–88a. Following the Commission's order, respondent was offered a new position with the Defense Department, but not one that he regarded as equivalent to his former employment. Fitzgerald accordingly filed an enforcement action in the District Court. This litigation ultimately culminated in a settlement agreement. Under its terms the United States Air Force agreed to reassign Fitzgerald to his former position as Management Systems Deputy to the Assistant Secretary of the Air

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The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence of record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81a.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight officials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's 3-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (DC 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 180 U. S. App. D. C. 75, 553 F. 2d 220 (1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dismissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the administration. *Id.*, at 80, 84, 553 F. 2d, at 225, 229. Holding that concealment of illegal activ-

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Force, effective June 21, 1982. See Settlement Agreement in *Fitzgerald* v. *Hampton et al.*, Civ. No. 76–1486 (DC June 15, 1982).

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

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ity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a second amended complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The court also

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[19] The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint in *Fitzgerald* v. *Butterfield*, Civ. No. 74-78 (DC), p. 6.

[20] See App. to Pet. for Cert. 1a-2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (1976 ed., Supp. IV), provides generally that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law

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ruled that petitioner was not entitled to claim absolute Presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 606 F. 2d 1192 (1979), aff'd in pertinent part by an equally divided Court, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 959 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the nonfinal order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the peti-

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of the District of Columbia, but respondent subsequently abandoned his common-law cause of action. See Supplemental Brief in Opposition 2.

[21] See Brief in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

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tioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "presen[t] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 186 U. S. App. D. C. 179, 227–229, 569 F. 2d 10, 58–60 (1977) (Wilkey, J., dissenting on the appealability issue); *McSurely* v. *McClellan*, 172 U. S. App. D. C. 364, 372, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 180 U. S. App. D. C. 101, 107–108, n. 18, 553 F. 2d 1277, 1283–1284, n. 18 (1976), cert. dism'd *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay

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outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger, supra.*

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court never had so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for certiorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his brief in opposition to a motion of

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its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration, Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract: "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 371 (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise

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Morton, Ina, David, Mark, and Gary Halperin to intervene and for other relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

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their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint." *Id.*, at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions

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with independence and without fear of consequences.'" *Id.*, at 554, quoting *Scott* v. *Stansfield*, L. R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." 386 U. S., at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith." This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Econo-*

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mou, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common-law torts, that all high federal officials have a right to absolute immunity from constitutional damages actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, *id.*, at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421. This Court necessarily also has weighed concerns of public policy, especially as illuminated

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[25] *Spalding* v. *Vilas*, 161 U. S. 483 (1896), was distinguished on the ground that the suit against the Postmaster General had asserted a common-law—and not a constitutional—cause of action. See *Butz* v. *Economou*, 438 U. S., at 493–495.

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by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, 161 U. S., at 498.[26]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

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[26] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

[27] In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. Reviewing this case under the "collateral order" doctrine, see *supra*, at 742, we assume for purposes of this opinion that private causes of action may be inferred both under the First Amendment and the two statutes on which respondent relies. But it does not follow that we

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Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1st ed. 1833).

A

The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of

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must—in considering a *Bivens* (*Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing § 1983 in light of the immunity doctrine, the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language before us," and therefore would not address issues that would arise if Congress had undertaken to deprive state legislators of absolute immunity). Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

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the United States . . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, 438 U. S. 478 (1978); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974). We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

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[28] U. S. Const., Art. II, § 3.

[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the Speech and Debate Clause provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall. 335 (1872); *Stump* v. *Sparkman*, 435 U. S. 349 (1978). Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (extending immunity to prosecutorial

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Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—

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officials within the Executive Branch). Third, there is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams—both delegates to the Convention—that "the President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." Journal of William Maclay 167 (E. Maclay ed. 1890). Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits. 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1st ed. 1833) (quoted *supra*, at 749). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807), that a subpoena *duces tecum* can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President: "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404 n. (P. Ford ed. 1905) (quoting a letter

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for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's

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from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original).

See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

In light of the fragmentary character of the most important materials reflecting the Framers' intent, we do think that the most compelling arguments arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine. See text *supra*. But our primary reliance on constitutional structure and judicial precedent should not be misunderstood. The best historical evidence clearly supports the Presidential immunity we have upheld. JUSTICE WHITE's dissent cites some other materials, including ambiguous comments made at state ratifying conventions and the remarks of a single publicist. But historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth. Other powerful support derives from the actual history of private lawsuits against the President. Prior to the litigation explosion commencing with this Court's 1971 *Bivens* decision, fewer than a handful of damages actions ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the

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office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint.[34] For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege,[35] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S., at 708. It is settled law that the separation-of-powers doctrine does not bar every exercise of juris-

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burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute . . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 4 Wall. 475, 501 (1866) ("[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us"); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power").

[35] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 323–324 (DC 1966), aff'd *sub nom. V. E. B. Carl Zeiss, Jena* v. *Clark*, 128 U. S. App. D. C. 10, 384 F. 2d 979, cert. denied, 389 U. S. 952 (1967) (Department of Justice officials).

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diction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 F. Cas. 187, 191, 196 (No. 14,694) (CC Va. 1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[36] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, *supra*, at 703–713. When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[37]

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[36] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

[37] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, 418 U. S., at 711–712, and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of JUSTICE WHITE's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal

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C

In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office. See *Butz* v. *Economou*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, 424 U. S., at 430–431. But the Court also has refused to draw functional lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, 360 U. S. 564, 575 (1959) (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege ap-

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court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). JUSTICE WHITE does not refer to the jurisprudence of implied rights of action. Moreover, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that there would be no damages relief in circumstances "counseling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, at 396; *Carlson* v. *Green*, 446 U. S. 14, 19 (1980) (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which JUSTICE WHITE places principal reliance, *Marbury* v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek a remedy before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 736–739, and n. 17.

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plicable . . ."); *Stump* v. *Sparkman*, 435 U. S., at 363, and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the kind of "functional" theory asserted both by respondent and the dissent. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the outer perimeter of his duties by ordering the discharge of an employee who was lawfully entitled to retain his job in the absence of "'such cause as will promote the efficiency of the service.'" Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within the outer perimeter of his duties of office, cause Fitzgerald to be dismissed without satisfying this standard in prescribed statutory proceedings.

This construction would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

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It clearly is within the President's constitutional and statutory authority to prescribe the manner in which the Secretary will conduct the business of the Air Force. See 10 U. S. C. § 8012(b). Because this mandate of office must include the authority to prescribe reorganizations and reductions in force, we conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive.[38] There remains the constitutional remedy of impeachment.[39] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[40] Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

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[38] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g., Imbler* v. *Pachtman*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs").

[39] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L. J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[40] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon, President of the United States, H. R. Rep. No. 93–1305 (1974).

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The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[41] For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the case is remanded for action consistent with this opinion.

So ordered.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers. Indeed, it has been taken for granted for nearly two centuries.[1] In reaching this conclusion we do well to bear in mind that the focus must not be simply on the matter of judg-

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[41] The dissenting opinions argue that our decision places the President "above the law." This contention is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissents do not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simple error to characterize an official as "above the law" because a particular remedy is not available against him.

[1] Presidential immunity for official acts while in office has never been seriously questioned until very recently. *Ante*, at 750–752, n. 31. I can find only one instance in which, prior to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), a citizen sued a former President for acts committed while in office. A suit against Thomas Jefferson was dismissed for being improperly brought in Virginia, thus precluding the necessity of reaching any immunity issue. *Livingston* v. *Jefferson*, 15 F. Cas. 660 (No. 8,411) (CC Va. 1811).

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ing individual conduct in a fact-bound setting; rather, in those familiar terms of John Marshall, it is a *Constitution* we are expounding. Constitutional adjudication often bears unpalatable fruit. But the needs of a system of government sometimes must outweigh the right of individuals to collect damages.

It strains the meaning of the words used to say this places a President "above the law." *United States* v. *Nixon*, 418 U. S. 683 (1974). The dissents are wide of the mark to the extent that they imply that the Court today recognizes sweeping immunity for a President for all acts. The Court does no such thing. The immunity is limited to civil damages claims. Moreover, a President, like Members of Congress, judges, prosecutors, or congressional aides—all having absolute immunity—are not immune for acts outside official duties.[2] *Ante*, at 753–755. Even the broad immunity of the Speech and Debate Clause has its limits.[3]

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[2] In their "parade of horribles" and lamentations, the dissents also wholly fail to acknowledge why the same perils they fear are not present in the absolute immunity the law has long recognized for numerous other officials. At least 75,000 public officers have absolute immunity from civil damages suits for acts within the scope of their official functions. The dissenting opinions manifest an astonishing blind side in pointing to that old reliable that "no man is above the law." The Court has had no difficulty expanding the absolute immunity of Members of Congress, and in granting derivative absolute immunity to numerous aides of Members. *Gravel* v. *United States*, 408 U. S. 606 (1972).

We have since recognized absolute immunity for judges, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), and for prosecutors, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), yet the Constitution provides no hint that either judges, prosecutors, or congressional aides should be so protected. Absolute immunity for judges and prosecutors is seen to derive from the common law and public policy, which recognize the need to protect judges and prosecutors from harassment. The potential danger to the citizenry from the malice of thousands of prosecutors and judges is at once more pervasive and less open to constant, public scrutiny than the actions of a President.

[3] In *United States* v. *Brewster*, 408 U. S. 501 (1972), we held that the Speech and Debate Clause does not prohibit prosecution of a Senator for accepting a bribe designed to influence his legislative acts.

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In his dissenting opinion, JUSTICE WHITE confuses "judicial process" in the subpoena sense with a civil damages suit. *Post*, at 778, n. 23. He quotes language from *United States* v. *Nixon*, *supra*, at 706, as though that language has some relevance to the matter of immunity from civil damages:

> "[N]either the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified Presidential privilege of immunity from *judicial process* under all circumstances." *Post*, at 782. (Emphasis added.)

First, it is important to remember that the context of that language is a *criminal* prosecution. Second, the "judicial process" referred to was, as in *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J., sitting at trial as Circuit Justice), a *subpoena* to the President to produce relevant evidence in a criminal prosecution. No issue of damages immunity was involved either in *Burr* or *United States* v. *Nixon*. In short, the quoted language has no bearing whatever on a *civil* action for damages. It is one thing to say that a President must produce evidence relevant to a criminal case, as in *Burr* and *United States* v. *Nixon*, and quite another to say a President can be held for civil damages for dismissing a federal employee. If the dismissal is wrongful the employee can be reinstated with backpay, as was done here. See n. 5, *infra*.

The immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Absolute immunity for a President for acts within the official duties of the Chief Executive is either to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity and I agree.

The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of

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government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches. *United States* v. *Nixon, supra; Gravel* v. *United States*, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. *Den on the Dem. of Bayard & Wife* v. *Singleton*, 3 N. C. 42 (1787); *Cases of the Judges of the Court of Appeals*, 8 Va. 135 (1788). Cf. *Marbury* v. *Madison*, 1 Cranch 137 (1803). However, the Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking, just as other branches should be hesitant to probe into judicial decisionmaking. Such judicial intervention is not to be tolerated absent imperative constitutional necessity. *United States* v. *Nixon, supra*, at 709–716.[4] The Court's opinion correctly observes that judicial intrusion through private damages actions improperly impinges on and hence interferes with the independence that is imperative to the functioning of the office of a President.

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[4] JUSTICE WHITE suggests that prior to today, Presidents, prosecutors, judges, congressional aides, and other officials, "could have been *held liable* for the kind of claim put forward by Fitzgerald—a personnel decision allegedly made for unlawful reasons." *Post*, at 767, n. 2 (emphasis added). But the law does not permit a plaintiff to recite "magic" words in pleadings and have the incantation operate to make these immunities vanish. JUSTICE WHITE errs fundamentally in treating all of the above officials as if the scope of their authority were identical. The authority of a President as head of the Executive Branch of our Government—a wholly unique office—is far broader than that of any other official. As the Court notes, a President has authority in the course of personnel changes in an executive department to make personnel decisions. If the decision is wrong, statutory remedies are provided. See n. 5, *infra*. This is not to say that, in a given case, it would not be appropriate to raise the question *whether* an official—even a President—had acted within the scope of the official's constitutional and statutory duties. The doctrine of absolute immunity does not extend beyond such actions.

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Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment. The enormous range and impact of Presidential decisions—far beyond that of any one Member of Congress—inescapably means that many persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved would be free to bring a suit for damages, and each suit—especially those that proceed on the merits—would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur if civil damages actions were made available to private individuals. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims. We have decided that in a similar sense Members of both Houses of Congress—and their aides—must be totally free from judicial scrutiny for legislative acts; the public interest, in other words, outweighs the need for private redress of one claiming injury from legislative acts of a Member or aide of a Member.[5] The Court's concern (and the even more emphatic con-

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[5] *Gravel* v. *United States*, 408 U. S. 606 (1972). The Federal Tort Claims Act of 1946 reflects this policy distinction; in it Congress waived sovereign immunity for certain damages claims, but pointedly excepted any "discretionary function or duty . . . whether or not the discretion involved be abused." 28 U. S. C. § 2680(a). Under the Act, damage resulting from *discretionary* governmental action is not subject to compensation. See, *e. g.*, *Dalehite* v. *United States*, 346 U. S. 15 (1953). For uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills.

In this case Fitzgerald received substantial relief through the route provided by Congress: the Civil Service Commission ordered him reinstated with backpay. App. 87a–88a. Similarly situated persons are therefore

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cerns expressed by JUSTICE WHITE's dissent) over "unremedied wrongs" to citizens by a President seem odd when one compares the potential for "wrongs" which thousands of congressional aides, prosecutors, and judges can theoretically inflict—with absolute immunity—on the same citizens for whom this concern is expressed. See n. 2, *supra*.

Judicial intervention would also inevitably inhibit the processes of Executive Branch decisionmaking and impede the functioning of the Office of the President. The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. This very case graphically illustrates the point. When litigation processes are not tightly controlled—and often they are not—they can be and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.[6]

I fully agree that the constitutional concept of separation of independent coequal powers dictates that a President be immune from civil damages actions based on acts within the scope of Executive authority while in office.[7] Far from plac-

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not without an adequate remedy. But see *post*, at 797 (WHITE, J., dissenting). In addition, respondent Fitzgerald has also received a settlement of $142,000. It can hardly be said he has had no remedy.

[6] Judge Learned Hand described his feelings:

"After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." 3 Lectures on Legal Topics, Association of the Bar of the City of New York 105 (1926).

[7] The Court suggests that "we need not address directly" whether Congress could create a damages action against a President. *Ante*, at 748, n. 27. However, the Court's holding, in my view, effectively resolves that issue; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court's opinion is to be read as suggesting that a constitu-

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ing a President above the law, the Court's holding places a President on essentially the same footing with judges and other officials whose absolute immunity we have recognized.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The four dissenting Members of the Court in *Butz* v. *Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in *Butz* to the Office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other fed-

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tional holding of this Court can be legislatively overruled or modified. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

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eral officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.[1]

The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress cannot provide a remedy against Presidential misconduct and the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. I do not agree that if the Office of President is to operate effectively, the holder of that Office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

We have not taken such a scatter-gun approach in other cases. *Butz* held that absolute immunity did not attach to the office held by a member of the President's Cabinet but only to those specific functions performed by that officer for which absolute immunity is clearly essential. Members of Congress are absolutely immune under the Speech or Debate Clause of the Constitution, but the immunity extends only to their legislative acts. We have never held that in order for legislative work to be done, it is necessary to immunize all of the tasks that legislators must perform. Constitutional immunity does not extend to those many things that Senators and Representatives regularly and necessarily do that are not legislative acts. Members of Congress, for example, repeatedly importune the executive branch and administrative agencies outside hearing rooms and legislative halls, but they are not immune if in connection with such activity they de-

[1] This, of course, is not simply a hypothetical example. See *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 606 F. 2d 1192 (1979), aff'd by an equally divided Court, 452 U. S. 713 (1981).

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liberately violate the law. *United States* v. *Brewster*, 408 U. S. 501 (1972), for example, makes this clear. Neither is a Member of Congress or his aide immune from damages suits if in order to secure information deemed relevant to a legislative investigation, he breaks into a house and carries away records. *Gravel* v. *United States*, 408 U. S. 606 (1972). Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liability. See *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980); *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

In *Marbury* v. *Madison*, 1 Cranch 137, 165 (1803), the Court, speaking through The Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the Government.

Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the Government itself and against Government offi-

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cials, but only when the suit against the latter actually seeks relief against the sovereign. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 687 (1949). Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. *Id.*, at 698. Now, however, the Court clothes the Office of the President with sovereign immunity, placing it beyond the law.[2]

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[2] It is ironic that this decision should come out at the time of the tenth anniversary of the Watergate affair. Even the popular press has drawn from that affair an insight into the character of the American constitutional system that is bound to be profoundly shaken by today's decision: "The important lesson that Watergate established is that no President is above the law. It is a banality, a cliche, but it is a point on which many Americans . . . seem confused." 119 Time, No. 24, p. 28 (June 14, 1982). A majority of the Court shares this confusion.

The majority vigorously protests this characterization of its position, *ante*, at 758, n. 41, arguing that the President remains subject to law in the form of impeachment proceedings. But the abandonment of the rule of law here is not in the result reached, but in the manner of reaching it. The majority fails to apply to the President those principles which we have consistently used to determine the scope and credibility of an absolute immunity defense. It does this because of some preconceived notion of the inapplicability of general rules of law to the President.

Similarly, THE CHIEF JUSTICE, like the majority, misses the point in his wholly unconvincing contentions that the Court today does no more than extend to the President the same sort of immunity that we have recognized with respect to Members of Congress, judges, prosecutors, and legislative aides. In none of our previous cases have we extended absolute immunity to all actions "within the scope of the official's constitutional and statutory duties." Concurring opinion of THE CHIEF JUSTICE, *ante*, at 761, n. 4. Indeed, under the immunity doctrine as it existed prior to today's decision, each of these officials could have been held liable for the kind of claim put forward by Fitzgerald—a personnel decision allegedly made for unlawful reasons. Although such a decision falls within the scope of an official's duties, it does not fall within the judicial, legislative, or prosecutorial functions to which absolute immunity attaches. THE CHIEF JUSTICE's failure to grasp the difference between the functional approach to absolute immunity that we have previously adopted and the nature of today's decision accounts for his misunderstanding of this dissent.

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In *Marbury* v. *Madison*, *supra*, at 163, The Chief Justice, speaking for the Court, observed: "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Until now, the Court has consistently adhered to this proposition. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), a unanimous Court held that the Governor of a State was entitled only to a qualified immunity. We reached this position, even though we recognized that

> "[i]n the case of higher officers of the executive branch . . . the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. . . . In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Id.*, at 246–247.

As JUSTICE BRENNAN observed in *McGautha* v. *California*, 402 U. S. 183, 252–253 (1971) (dissenting opinion): "The principle that our Government shall be of laws and not of men is so strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution" (footnote omitted). And as THE CHIEF JUSTICE said in *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S. 401, 429 (1981) (dissenting opinion):

> "Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from 'The King can do no wrong.' This

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> principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice."

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

We have previously stated that "the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making.'" *Butz* v. *Economou*, 438 U. S., at 501–502, quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959). But this does not mean that the Court has simply "enacted" its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts have been guided and constrained by common-law tradition, the relevant statutory background, and our constitutional structure and history. Our cases dealing with the immunity of Members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve the question of whether and to what extent Congress intended to abolish the common-law privileges by providing a remedy in the predecessor of 42 U. S. C. § 1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials—including absolute immunity for judges, prosecutors, and those officials doing similar work—also in large part reflect common-law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

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Unfortunately, there is little of this approach in the Court's decision today. The Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. *Ante*, at 755–756. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with officewide, absolute immunity. This is policy, not law, and in my view, very poor policy.

I

In declaring the President to be absolutely immune from suit for any deliberate and knowing violation of the Constitution or of a federal statute, the Court asserts that the immunity is "rooted in the constitutional tradition of the separation of powers and supported by our history."[3] *Ante*, at 749. The decision thus has all the earmarks of a constitutional pronouncement—absolute immunity for the President's office is mandated by the Constitution. Although the Court appears to disclaim this, *ante*, at 748–749, n. 27, it is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts through a *Bivens* (*Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) proceeding would violate the separation of powers.[4] Such a generalized absolute immunity cannot be sustained when examined in the traditional manner and in light of the traditional judicial sources.

The petitioner and the United States, as *amicus*,[5] rely principally on two arguments to support the claim of absolute

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[3] Although the majority opinion initially claims that its conclusion is based substantially on "our history," historical analysis in fact plays virtually no part in the analysis that follows.

[4] On this point, I am in agreement with the concurring opinion of THE CHIEF JUSTICE.

[5] The Solicitor General relies entirely upon the brief filed by his office for petitioners in *Kissinger* v. *Halperin*, 452 U. S. 713 (1981).

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immunity for the President from civil liability: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation-of-powers doctrine. I will address each of these contentions.

A

The Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to Members of Congress; nowhere, however, does the Constitution directly address the issue of Presidential immunity.[6] Petitioner nevertheless argues that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute Presidential immunity. In support of this position, petitioner relies primarily on three separate items: First, preratification remarks made during the discussion of Presidential impeachment at the Convention and in The Federalist; second, remarks made during the meeting of the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dangers of subjecting the President to the control of another branch, the Legislature.[7] Gouverneur Morris, for example, complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence."[8] Colonel Mason

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[6] In fact, insofar as the Constitution addresses the issue of Presidential liability, its approach is very different from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions; the Constitution further states that impeachment does not bar criminal prosecution.

[7] The debate is recorded in 2 M. Farrand, Records of the Federal Convention of 1787, pp. 64–69 (1911) (hereinafter Farrand).

[8] *Id.*, at 64.

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responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice."[9] Madison agreed that "it [is] indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate."[10] Pinckney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[11]

Petitioner concludes from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting Presidential independence, the delegates voted 8 to 2 in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather on whether there should be a method of holding him accountable for what might be termed wrongs against the state.[12] Thus, examples of the abuses that concerned delegates were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be "tumults & insurrections" by the people in response to such

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[9] *Id.*, at 65.

[10] *Ibid.*

[11] *Id.*, at 66.

[12] In The Federalist No. 65, p. 439 (J. Cooke ed. 1961), Alexander Hamilton described impeachable offenses as follows: "They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

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abuses. 2 Farrand 67. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.[13]

Much the same can be said in response to petitioner's reliance on The Federalist No. 77. In that essay, Hamilton asked whether the Presidency combines "the requisites to safety in the republican sense—a due dependence on the people—a due responsibility." The Federalist No. 77, p. 520 (J. Cooke ed. 1961). He answered that the constitutional plan met this test because it subjected the President to both the electoral process and the possibility of impeachment, including subsequent criminal prosecution. Petitioner concludes from this that these were intended to be the exclusive means of restraining Presidential abuses. This, by no means follows. Hamilton was concerned in The Federalist No. 77, as were the delegates at the Convention, with the larger political abuses—"wrongs against the state"—that a President might commit. He did not consider what legal means might be available for redress of individualized grievances.[14]

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[13] The majority's use of the historical record is in line with its other arguments: It puts the burden on respondent to demonstrate no Presidential immunity, rather than on petitioner to prove the appropriateness of this defense. Thus, while noting that the doubts of some of the Framers were not sufficient to prevent the adoption of the Impeachment Clause, the majority nevertheless states that "nothing in [the] debates suggests an expectation that the President would be subjected to [civil damages actions]." *Ante*, at 751, n. 31. Of course, nothing in the debates suggests an expectation that the President would not be liable in civil suits for damages either. Nevertheless, the debates are one element that the majority cites to support its conclusion that "[t]he best historical evidence clearly supports the Presidential immunity we have upheld." *Ante*, at 752, n. 31.

[14] Other commentary on the proposed Constitution did, however, consider the subject of Presidential immunity. In fact, the subject was discussed in the first major defense of the Constitution published in the United States. In his essays on the Constitution, published in the Inde-

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That omission should not be taken to imply exclusion in these circumstances is well illustrated by comparing some of the remarks made in the state ratifying conventions with Hamilton's discussion in No. 77. In the North Carolina ratifying convention, for example, there was a discussion of the adequacy of the impeachment mechanism for holding executive officers accountable for their misdeeds. Governor Johnson defended the constitutional plan by distinguishing three legal mechanisms of accountability:

> "If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public."[15]

Governor Johnson surely did not contemplate that the availability of an impeachment mechanism necessarily implied the exclusion of other forms of legal accountability; rather, the method of accountability was to be a function of the character of the wrong. Mr. Maclaine, another delegate to the North Carolina Convention, clearly believed that the courts would remain open to individual citizens seeking redress from injuries caused by Presidential acts:

> "The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his

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pendent Gazetteer in September 1787, Tench Coxe included the following statement in his description of the limited power of the proposed Office of the President: "*His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.*" Quoted in 2 The Documentary History of the Ratification of the Constitution 141 (1976) (emphasis in original).

[15] 4 J. Elliot, Debates on the Federal Constitution 48 (1876 ed.).

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> deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law."[16]

A similar distinction between different possible forms of Presidential accountability was drawn by Mr. Wilson at the Pennsylvania ratifying convention:

> "[The President] is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*."[17]

There is no more reason to respect the views of Hamilton than those of Wilson: both were members of the Constitutional Convention; both were instrumental in securing the ratification of the Constitution. But more importantly, there is simply no express contradiction in their statements. Petitioner relies on an inference drawn from silence to create this contradiction. The surrounding history simply does not support this inference.

The second piece of historical evidence cited by petitioner is an exchange at the first meeting of the Senate, involving Vice President Adams and Senators Ellsworth and Maclay. The debate started over whether or not the words "the President" should be included at the beginning of federal writs, similar to the manner in which English writs ran in the King's name. Senator Maclay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice President Adams defended the proposition that

> "the President, personally, was not subject to any process whatever; could have no action, whatever, brought

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[16] *Id.*, at 47.

[17] 2 *id.*, at 480.

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> against him; was above the power of all judges, justices, &c. For [that] would . . . put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government."[18]

In their view the impeachment process was the exclusive form of process available against the President. Senator Maclay ardently opposed this view and put the case of a President committing "murder in the street." In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was "loyal justice." Senator Maclay, who recorded the exchange, concludes his notes with the remark that none of this "is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are."[19] In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British Monarch. Again, nothing more can be concluded from this than that the proper scope of Presidential accountability, including the question whether the President should be subject to judicial process, was no clearer then than it is now.

The final item cited by petitioner clearly supports his position, but is of such late date that it contributes little to understanding the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

> "Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases

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[18] W. Maclay, Sketches of Debate in the First Senate of the United States in 1789–1791, p. 152 (1969).

[19] *Ibid.*

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at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[20]

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800.[21]

Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to Members of Congress by the Constitution with the lack of any such privileges extended to the President.[22] He argued that this was a deliberate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." 10 Annals of

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[20] 2 J. Story, Commentaries on the Constitution of the United States § 1569, p. 372 (4th ed. 1873).

[21] It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 Farrand 559.

[22] Senator Pinckney's comments are recorded at 10 Annals of Cong. 69–83 (1800). Petitioner contends that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an allegedly libelous newspaper article. Reply Brief for Petitioner 7. Although this was the occasion for the remarks, Pinckney did discuss the immunity of Members of Congress as a privilege embodied in the Speech or Debate Clause: "[O]ur Constitution supposes no man . . . to be infallible, but considers them all as mere men, and subject to all the passions, and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion . . . ." 10 Annals of Cong. 71 (1800). This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

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Cong. 72 (1800). Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that . . . for your Legislature." *Id.*, at 74.[23]

In previous immunity cases the Court has emphasized the importance of the immunity afforded the particular government official at common law. See *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). Clearly this sort of analysis is not possible when dealing with an office, the Presidency, that did not exist at common law. To the extent that historical inquiry is appropriate in this context, it is constitutional history, not

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[23] The majority cites one additional piece of historical evidence, a letter by President Jefferson, which it contends demonstrates that Jefferson believed "that the President was not intended to be subject to judicial process." *Ante*, at 751, n. 31.

Thomas Jefferson's views on the relation of the President to the judicial process are, however, not quite so clear as the majority suggests. Jefferson took a variety of positions on the proper relation of Executive and Judicial authority, at different points in his career. It would be surprising if President Jefferson had not argued strongly for such immunity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be of a good deal more significance. In this regard, it is significant that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "[H]e shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360 (1950). Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804–1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See E. Corwin, The President: Office and Powers 113 (4th ed. 1957). Finally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature [the Chief Justice] may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." 10 The Works of Thomas Jefferson 407 n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).

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common law, that is relevant. From the history discussed above, however, all that can be concluded is that absolute immunity from civil liability for the President finds no support in constitutional text or history, or in the explanations of the earliest commentators. This is too weak a ground to support a declaration by this Court that the President is absolutely immune from civil liability, regardless of the source of liability or the injury for which redress is sought. This much the majority implicitly concedes since history and text, traditional sources of judicial argument, merit only a footnote in the Court's opinion. *Ante*, at 750–752, n. 31.

B

No bright line can be drawn between arguments for absolute immunity based on the constitutional principle of separation of powers and arguments based on what the Court refers to as "public policy." This necessarily follows from the Court's functional interpretation of the separation-of-powers doctrine:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977).

See also *United States* v. *Nixon*, 418 U. S. 683, 706–707 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). Petitioner argues that public policy favors absolute immunity because absent such immunity the President's ability to execute his constitutionally mandated obligations will be impaired. The convergence of these two lines of argument is superficially apparent from the very fact that in both instances the approach of the Court has been characterized as a "functional" analysis.

The difference is only one of degree. While absolute immunity might maximize executive efficiency and therefore be

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a worthwhile policy, lack of such immunity may not so disrupt the functioning of the Presidency as to violate the separation-of-powers doctrine. Insofar as liability in this case is of congressional origin, petitioner must demonstrate that subjecting the President to a private damages action will prevent him from "accomplishing [his] constitutionally assigned functions." Insofar as liability is based on a *Bivens* action, perhaps a lower standard of functional disruption is appropriate. Petitioner has surely not met the former burden; I do not believe that he has met the latter standard either.

Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the States for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment and Punishment, according to Law." Art. I, § 3, cl. 7. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra*, at 765–766.

Neither can there be a serious claim that the separation-of-powers doctrine insulates Presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. See, *e. g.*, *Youngstown Sheet & Tube Co.*, *supra; Korematsu* v. *United States*, 323 U. S. 214 (1944); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). Petitioner's attempt to draw an analogy to the Speech or Debate Clause, Brief for Petitioner 45, one purpose of which is "to prevent . . . accountability before a possibly hostile judiciary," *Gravel* v. *United States*, 408 U. S., at 617, breaks

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down at just this point. While the Speech or Debate Clause guarantees that "for any Speech or Debate" Congressmen "shall not be questioned in any other Place," and, thus, assures that Congressmen, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review.[24] Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain Presidential actions. The President has been held to be subject to judicial process at least since 1807. *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, C. J., sitting as Circuit Justice). *Burr* "squarely ruled that a subpoena may be directed to the President." *Nixon* v. *Sirica*, 159 U. S. App. D. C. 58, 67, 487 F. 2d 700, 709 (1973). Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an unwarranted interference in the Presidency:

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[24] The Solicitor General, in fact, argues that the possibility of judicial review of Presidential actions supports the claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's powers," making private damages actions unnecessary in order to achieve the same end. Brief for Petitioners in *Kissinger* v. *Halperin*, O. T. 1980, No. 79-880, p. 31. See n. 5, *supra*.

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> "The guard, furnished to this high officer, to protect him from being harassed by *vexatious* and *unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." 25 F. Cas., at 34 (emphasis added).

This position was recently rearticulated by the Court in *United States* v. *Nixon*, 418 U. S., at 706:

> "[N]either the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish, then, that neither subjecting Presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation-of-powers doctrine. Similarly, neither has been held to be sufficiently intrusive to justify a judicially declared rule of immunity. With respect to intrusion by the judicial process itself on executive functions, subjecting the President to private claims for money damages involves no more than this. If there is a separation-of-powers problem here, it must be found in the nature of the *remedy* and not in the *process* involved.

We said in *Butz* v. *Economou*, 438 U. S. 478 (1978), that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.*, at 506–507. Today's decision in *Harlow* v. *Fitzgerald*, *post*, p. 800, makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power. In such circumstances, the question that must be answered is who should bear the cost of the resulting injury—the wrongdoer or the victim.

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The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch, at 163. Much more recently, the Court considered the role of a damages remedy in the performance of the courts' traditional function of enforcing federally guaranteed rights: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 395.[25] To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him "the protection of the laws."[26]

That the President should have the same remedial obligations toward those whom he injures as any other federal officer is not a surprising proposition. The fairness of the remedial principle the Court has so far followed—that the wrongdoer, not the victim, should ordinarily bear the costs of the injury—has been found to be outweighed only in instances where potential liability is "thought to injure the governmental decisionmaking process." *Imbler* v. *Pachtman*, 424 U. S., at 437 (WHITE, J., concurring in judgment). The argument for immunity is that the possibility of a damages action will, or at least should, have an effect on the per-

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[25] See also Justice Harlan's discussion of the appropriateness of the damages remedy in order to redress the violation of certain constitutional rights. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 407–410 (concurring in judgment).

[26] Contrary to the suggestion of the majority, *ante*, at 754–755, n. 37, I do not suggest that there must always be a remedy in civil damages for every legal wrong or that *Marbury* v. *Madison* stands for this proposition. *Marbury* does, however, suggest the importance of the private interests at stake within the broader perspective of a political system based on the rule of law. The functional approach to immunity questions, which we have previously followed but which the majority today discards, represented an appropriate reconciliation of the conflicting interests at stake.

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formance of official responsibilities. That effect should be to deter unconstitutional, or otherwise illegal, behavior. This may, however, lead officers to be more careful and "less vigorous" in the performance of their duties. Caution, of course, is not always a virtue and undue caution is to be avoided.

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. See *Imbler*, *supra*, at 436 (WHITE, J., concurring in judgment).[27] Inevitably, this reduces the public policy argument to nothing more than an expression of judicial inclination as to which officers should be encouraged to perform their functions with "vigor," although with less care.[28]

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decision-making within that function, in light of the substantive ends that are to be encouraged or discouraged. In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.

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[27] The Court has never held that the "public policy" conclusions it reaches as to the appropriateness of absolute immunity in particular instances are not subject to reversal through congressional action. Implicitly, therefore, the Court has already rejected a constitutionally based, separation-of-powers argument for immunity for federal officials.

[28] Surely the fact that officers of the court have been the primary beneficiaries of this Court's pronouncements of absolute immunity gives support to this appearance of favoritism.

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II

The functional approach to the separation-of-powers doctrine and the Court's more recent immunity decisions[29] converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all Presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States* v. *Nixon*, 418 U. S. 683 (1974). Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility,[30] the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.

Respondent has so far proceeded in this action on the basis of three separate causes of action: two federal statutes—5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505—and the First Amendment. At this point in the litigation, the availability of these causes of action is not before us. Assuming the correctness of the lower court's determination that the two federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing. The attempt to found such immunity upon a separation-of-powers argument is particularly unconvincing.

The first of these statutes, 5 U. S. C. § 7211 (1976 ed., Supp. IV), states that "[t]he right of employees . . . to . . .

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[29] See *Supreme Court of Virginia* v. *Consumers Union of United States*, 446 U. S. 719 (1980); *Butz* v. *Economou*, 438 U. S. 478, 511 (1978).

[30] I will not speculate on the Presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.

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furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, makes it a crime to obstruct congressional testimony. It does not take much insight to see that at least one purpose of these statutes is to assure congressional access to information in the possession of the Executive Branch, which Congress believes it requires in order to carry out its responsibilities.[31] Insofar as these statutes implicate a separation-of-powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive.[32] Thus, the separation-of-powers problem addressed by these statutes was first of all Presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the

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[31] See, *e. g.*, 48 Cong. Rec. 4653 (1912) ("During my first session of Congress I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these civil-service employees could not give me any information") (remarks of Rep. Calder); *id.*, at 4656 ("I believe it is high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances without the fear of losing their official positions") (remarks of Rep. Reilly); *id.*, at 5157 ("I have always requested employees to consult with me on matters affecting their interest and believe that it is my duty to listen to all respectful appeals and complaints") (remarks of Rep. Evans). Indeed, it is for just this reason that petitioners in *Harlow* v. *Fitzgerald*, *post*, p. 800, argue that the statutes do not create a private right of action: "5 U. S. C. § 7211 and 18 U. S. C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages." Brief for Petitioners, O. T. 1981, No. 80–945, p. 26, n. 11.

[32] Indeed, the impetus for passage of what is now 5 U. S. C. § 7211 (1976 ed., Supp. IV) was the imposition of "gag rules" upen testimony of civil servants before congressional committees. See Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909).

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furtherance of his responsibilities. That approach ignores the separation-of-powers problem that lies behind the congressional action; it assumes that Presidential functions are to be valued over congressional functions.

The argument that Congress, by providing a damages action under these statutes (as is assumed in this case), has adopted an unconstitutional means of furthering its ends, must rest on the premise that Presidential control of executive employment decisions is a constitutionally assigned Presidential function with which Congress may not significantly interfere. This is a frivolous contention. In *United States* v. *Perkins*, 116 U. S. 483, 485 (1886), this Court held that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Whatever the rule may be with respect to high officers, see *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), with respect to those who fill traditional bureaucratic positions, restrictions on executive authority are the rule and not the exception.[33] This case itself demonstrates the severe statutory restraints under which the President operates in this area.

Fitzgerald was a civil service employee working in the Office of the Secretary of the Air Force. Although his position was such as to fall within the "excepted" service, which would ordinarily mean that civil service rules and regulations applicable to removals would not protect him, 5 CFR § 6.4 (1978), his status as a veteran entitled him to special protections. Veterans are entitled to certain civil service benefits afforded to "preference eligibles." 5 U. S. C. § 2108 (1976 ed. and Supp. IV). These benefits include that set forth in 5 U. S. C. § 7513(a) (1976 ed., Supp. IV): "[A]n agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the serv-

[33] Thus, adverse action may generally be taken against civil servants only "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7503, 7513, and 7543 (1976 ed., Supp. IV).

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ice." Similarly, his veteran status entitled Fitzgerald to the protection of the reduction-in-force procedures established by civil service regulation. 5 U. S. C. §§3501, 3502 (1976 ed. and Supp. IV). It was precisely those procedures that the Chief Examiner for the Civil Service Commission found had been violated, in his 1973 recommendation that respondent be reappointed to his old position or to a job of comparable authority.

This brief review is enough to illustrate my point: Personnel decisions of the sort involved in this case are emphatically not a constitutionally assigned Presidential function that will tolerate no interference by either of the other two branches of Government. More important than this "quantitative" analysis of the degree of intrusion in Presidential decision-making permitted in this area, however, is the "qualitative" analysis suggested in Part I–B above.

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. That is, the very steps that Congress has taken to assure that executive employees will be able freely to testify in Congress and to assure that they will not be subject to arbitrary adverse actions indicate that those policy arguments that have elsewhere justified absolute immunity are not applicable here. Absolute immunity would be nothing more than a judicial declaration of policy that directly contradicts the policy of protecting civil servants reflected in the statutes and regulations.

If respondent could, in fact, have proceeded on his two statutory claims, the *Bivens* action would be superfluous. Respondent may not collect damages twice, and the same injuries are put forward by respondent as the basis for both the statutory and constitutional claims. As we have said before, "were Congress to create equally effective alternative

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remedies, the need for damages relief [directly under the Constitution] might be obviated." *Davis* v. *Passman*, 442 U. S. 228, 248 (1979). Nevertheless, because the majority decides that the President is absolutely immune from a *Bivens* action as well, I shall express my disagreement with that conclusion.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), we held that individuals who have suffered a compensable injury through a violation of the rights guaranteed them by the Fourth Amendment may invoke the general federal-question jurisdiction of the federal courts in a suit for damages. That conclusion rested on two principles: First, "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,'" *id.*, at 397, quoting *Marbury* v. *Madison*, 1 Cranch, at 163; second, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395. In *Butz* v. *Economou*, 438 U. S. 478 (1978), we rejected the argument of the Federal Government that federal officers, including Cabinet officers, are absolutely immune from civil liability for such constitutional violations—a position that we recognized would substantially undercut our conclusion in *Bivens*. We held there that although the performance of certain limited functions will be protected by the shield of absolute immunity, the general rule is that federal officers, like state officers, have only a qualified immunity. Finally, in *Davis* v. *Passman*, *supra*, we held that a Congressman could be held liable for damages in a *Bivens*-type suit brought in federal court alleging a violation of individual rights guaranteed the plaintiff by the Due Process Clause. In my view, these cases have largely settled the issues raised by the *Bivens* problem here.

These cases established the following principles. First, it is not the exclusive prerogative of the legislative branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal

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courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury. Second, exercise of this "judicial" function does not create a separation-of-powers problem: We have held both executive and legislative officers subject to this judicially created cause of action and in each instance we have rejected separation-of-powers arguments. Holding federal officers liable for damages for constitutional injuries no more violates separation-of-powers principles than does imposing equitable remedies under the traditional function of judicial review. Third, federal officials will generally have a "qualified immunity" from such suits; absolute immunity will be extended to certain functions only on the basis of a showing that exposure to liability is inconsistent with the proper performance of the official's duties and responsibilities. Finally, Congress retains the power to restrict exposure to liability, and the policy judgments implicit in this decision should properly be made by Congress.

The majority fails to recognize the force of what the Court has already done in this area. Under the above principles, the President could not claim that there are no circumstances under which he would be subject to a *Bivens*-type action for violating respondent's constitutional rights. Rather, he must assert that the absence of absolute immunity will substantially impair his ability to carry out particular functions that are his constitutional responsibility. For the reasons I have presented above, I do not believe that this argument can be successfully made under the circumstances of this case.

It is, of course, theoretically possible that the President should be held to be absolutely immune because each of the functions for which he has constitutional responsibility would be substantially impaired by the possibility of civil liability. I do not think this argument is valid for the simple reason that the function involved here does not have this character.

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On which side of the line other Presidential functions would fall need not be decided in this case.

The majority opinion suggests a variant of this argument. It argues, not that every Presidential function has this character, but that distinguishing the particular functions involved in any given case would be "difficult." *Ante*, at 756.[34] Even if this were true, it would not necessarily follow that the President is entitled to absolute immunity: That would still depend on whether, in those unclear instances, it is likely to be the case that one of the functions implicated deserves the protection of absolute immunity. In this particular case, I see no such function.[35]

I do not believe that subjecting the President to a *Bivens* action would create separation-of-powers problems or "public policy" problems different from those involved in subjecting the President to a statutory cause of action.[36] Relying upon

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[34] The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante*, at 756 ("an inquiry into the President's motives could not be avoided under the . . . 'functional' theory . . ."). I do not read our cases that way. In *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz* v. *Economou*, 438 U. S., at 512–516, when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

[35] The majority seems to suggest that responsibility for governmental reorganizations is one such function. *Ante*, at 756. I fail to see why this should be so.

[36] Although our conclusions differ, the majority opinion reflects a similar view as to the relationship between the two sources of the causes of action in this case: It does not believe it necessary to differentiate in its own analysis between the statutory and constitutional causes of action.

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the history and text of the Constitution, as well as the analytic method of our prior cases, I conclude that these problems are not sufficient to justify absolute immunity for the President in general, nor under the circumstances of this case in particular.

III

Because of the importance of this case, it is appropriate to examine the reasoning of the majority opinion.

The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." *Ante*, at 748. We are never told, however, how or why congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

In the end, the majority seems to overcome its initial hesitation, for it announces that, "[w]e consider [absolute] immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history," *ante*, at 749. See also *ante*, at 757 ("A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive").[37] While the majority opinion recognizes that "[i]t is

[37] THE CHIEF JUSTICE leaves no doubt that he, at least, reads the majority opinion as standing for the broad proposition that the President is absolutely immune under the Constitution:

"I write separately to underscore that the Presidential immunity [as spelled out today] derives from and is mandated by the constitutional doctrine of separation of powers." Concurring opinion of THE CHIEF JUSTICE, *ante*, at 758.

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settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States," it bases its conclusion, at least in part, on a suggestion that there is a special jurisprudence of the Presidency. *Ante*, at 753–754.[38]

But in *United States* v. *Nixon*, 418 U. S. 683 (1974), we upheld the power of a Federal District Court to issue a subpoena *duces tecum* against the President. In other cases we have enjoined executive officials from carrying out Presidential directives. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Not until this case has there ever been a suggestion that the mere formalism of the name appearing on the complaint was more important in resolving separation-of-powers problems than the substantive character of the judicial intrusion upon executive functions.

Similarly, THE CHIEF JUSTICE dismisses the majority's claim that it has not decided the question of whether Congress could create a damages action against the President: "[T]he Court's holding . . . effectively resolves that issue; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result." *Ante*, at 763, n. 7.

[38] Contrary to the suggestion of the majority, *Mississippi* v. *Johnson*, 4 Wall. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues . . . whether, in any case, the President . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." *Id.*, at 498.

Similarly, *Kendall* v. *United States*, 12 Pet. 524 (1838), also cited by the majority, did not indicate that the President could never be subject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control." *Id.*, at 610.

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The majority suggests that the separation-of-powers doctrine permits exercising jurisdiction over the President only in those instances where "judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Ante*, at 754. Without explanation, the majority contends that a "merely private suit for damages" does not serve this function. *Ibid.*

The suggestion that enforcement of the rule of law—*i. e.*, subjecting the President to rules of general applicability—does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument.

Similarly, the majority implies that the assertion of a constitutional cause of action—the whole point of which is to assure that an officer does not transgress the constitutional limits on his authority—may offend separation-of-powers concerns. This is surely a perverse approach to the Constitution: Whatever the arguments in favor of absolute immunity may be, it is untenable to argue that subjecting the President to constitutional restrictions will undercut his "unique" role in our system of government. It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds surprisingly little. As I read the relevant section of the

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Court's opinion, I find just three contentions from which the majority draws this conclusion. Each of them is little more than a makeweight; together they hardly suffice to justify the wholesale disregard of our traditional approach to immunity questions.

First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. *Ante*, at 749–750. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

For some reason, the majority believes that this uniqueness of the President shifts the burden to respondent to prove that a rule of absolute immunity does not apply. The respondent has failed in this effort, the Court suggests, because the President's uniqueness makes "inapposite" any analogy to our cases dealing with other executive officers. *Ante*, at 750. Even if this were true, it would not follow that the President is entitled to absolute immunity; it would only mean that a particular argument is out of place. But the fact is that it is not true. There is nothing in the President's unique role that makes the arguments used in those other cases inappropriate.

Second, the majority contends that because the President's "visibility" makes him particularly vulnerable to suits for civil damages, *ante*, at 753, a rule of absolute immunity is required. The force of this argument is surely undercut by the majority's admission that "there is no historical record of numerous suits against the President." *Ante*, at 753, n. 33. Even granting that a *Bivens* cause of action did not become available until 1971, in the 11 years since then there have

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been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department. There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Indeed, given the decision today in *Harlow* v. *Fitzgerald*, *post*, p. 800, there is even more reason to believe that frivolous claims will not intrude upon the President's time. Even if judicial procedures were found not to be sufficient, Congress remains free to address this problem if and when it develops.

Finally, the Court suggests that potential liability "frequently could distract a President from his public duties." *Ante*, at 753. Unless one assumes that the President himself makes the countless high-level executive decisions required in the administration of government, this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. See *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, *post*, p. 800. Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As I argued in Part I, our concern in fashioning absolute immunity rules has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. Except for the empty generality that the President should have "'the maximum ability to deal fearlessly and impartially with' the duties of his office," *ante*, at 752, the majority nowhere suggests a particular, disadvantageous effect on a specific Presidential function. The caution that comes from requiring reasonable choices in areas that

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may intrude on individuals' legally protected rights has never before been counted as a cost.

IV

The majority may be correct in its conclusion that "[a] rule of absolute immunity . . . will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive." *Ante*, at 757. Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims. The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury* v. *Madison*, 1 Cranch, at 163, in the name of protecting the principle of separation of powers. Accordingly, I dissent.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I join JUSTICE WHITE's dissent. For me, the Court leaves unanswered his unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law. See *United States* v. *Lee*, 106 U. S. 196, 220 (1882),[1] and *Marbury* v. *Madison*, 1 Cranch 137, 163

[1] "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

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(1803).[2] Until today, I had thought this principle was the foundation of our national jurisprudence. It now appears that it is not.

Nor can I understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open, *ante*, at 748, and n. 27, the possibility that the President nevertheless may be fully subject to congressionally created forms of liability. These two concepts, it seems to me, cannot coexist.

I also write separately to express my unalleviated concern about the parties' settlement agreement, the key details of which were not disclosed to the Court by counsel until the veritable "last minute," and even then, only because the Halperins' motion to intervene had directed the Court's attention to them. See *ante*, at 743–744, n. 24. The Court makes only passing mention of this agreement in Part II–B of its opinion.

For me, the case in effect was settled before argument by petitioner's payment of $142,000 to respondent. A much smaller sum of $28,000 was left riding on an outcome favorable to respondent, with nothing at all to be paid if petitioner prevailed, as indeed he now does. The parties publicly stated that the amount of any payment would depend upon subsequent proceedings in the District Court; in fact, the parties essentially had agreed that, regardless of this Court's ruling, no further proceedings of substance would occur in the District Court. Surely, had the details of this agreement been known at the time the petition for certiorari came before the Court, certiorari would have been denied. I cannot escape the feeling that this long-undisclosed agreement

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[2] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

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comes close to being a wager on the outcome of the case, with all of the implications that entails.

Havens Realty Corp. v. *Coleman*, 455 U. S. 363 (1982), most recently—and, it now appears, most conveniently—decided, affords less than comfortable support for retaining the case.[3] The pertinent question here is not whether the case is moot, but whether this is the *kind* of case or controversy over which we should exercise our power of discretionary review. Cf. *United States* v. *Johnson*, 319 U. S. 302 (1943).

Apprised of all developments, I therefore would have dismissed the writ as having been improvidently granted. The Court, it seems to me, brushes by this factor in order to resolve an issue of profound consequence that otherwise would not be here. Lacking support for such a dismissal, however, I join the dissent.

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[3] The agreement in *Havens* was not final until approved by the District Court, 455 U. S., at 370–371. In the present case, the parties made their agreement and presented it to the District Court only after the fact. Further, there was no preliminary payment in *Havens*. Each respondent there was to receive $400 if the Court denied certiorari or affirmed, and nothing if the Court reversed. Here, $142,000 changed hands regardless of the subsequent disposition of the case, with the much smaller sum of $28,000 resting on the Court's ultimate ruling. For me, this is not the kind of case or controversy contemplated by Art. III of the Constitution.

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HARLOW ET AL. *v.* FITZGERALD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-945. Argued November 30, 1981—Decided June 24, 1982

In respondent's civil damages action in Federal District Court based on his alleged unlawful discharge from employment in the Department of the Air Force, petitioners, White House aides to former President Nixon, were codefendants with him and were claimed to have participated in the same alleged conspiracy to violate respondent's constitutional and statutory rights as was involved in *Nixon* v. *Fitzgerald*, *ante*, p. 731. After extensive pretrial discovery, the District Court denied the motions of petitioners and the former President for summary judgment, holding, *inter alia*, that petitioners were not entitled to absolute immunity from suit. Independently of the former President, petitioners appealed the denial of their immunity defense, but the Court of Appeals dismissed the appeal.

Held:

1. Government officials whose special functions or constitutional status requires complete protection from suits for damages—including certain officials of the Executive Branch, such as prosecutors and similar officials, see *Butz* v. *Economou*, 438 U. S. 478, and the President, *Nixon* v. *Fitzgerald*, *ante*, p. 731—are entitled to the defense of absolute immunity. However, executive officials in general are usually entitled to only qualified or good-faith immunity. The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority. *Scheuer* v. *Rhodes*, 416 U. S. 232. Federal officials seeking absolute immunity from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. Pp. 806–808.

2. Public policy does not require a blanket recognition of absolute immunity for Presidential aides. Cf. *Butz*, *supra*. Pp. 808–813.

(a) The rationale of *Gravel* v. *United States*, 408 U. S. 606—which held the Speech and Debate Clause derivately applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself—does not mandate "derivative" absolute

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immunity for the President's chief aides. Under the "functional" approach to immunity law, immunity protection extends no further than its justification warrants. Pp. 809–811.

(b) While absolute immunity might be justified for aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. To establish entitlement to absolute immunity, a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted. Under the record in this case, neither petitioner has made the requisite showing for absolute immunity. However, the possibility that petitioners, on remand, can satisfy the proper standards is not foreclosed. Pp. 811–813.

3. Petitioners are entitled to application of the qualified immunity standard that permits the defeat of insubstantial claims without resort to trial. Pp. 813–820.

(a) The previously recognized "subjective" aspect of qualified or "good faith" immunity—whereby such immunity is not available if the official asserting the defense "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," *Wood* v. *Strickland*, 420 U. S. 308, 322—frequently has proved incompatible with the principle that insubstantial claims should not proceed to trial. Henceforth, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. Pp. 815–819.

(b) The case is remanded for the District Court's reconsideration of the question whether respondent's pretrial showings were insufficient to withstand petitioners' motion for summary judgment. Pp. 819–820.

Vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 820. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed a separate concurring statement, *post*, p. 821. REHNQUIST, J., filed a concurring opinion, *post*, p. 822. BURGER, C. J., filed a dissenting opinion, *post*, p. 822.

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Elliot L. Richardson argued the cause for petitioners. With him on the briefs was *Glenn S. Gerstell.*

John E. Nolan, Jr., argued the cause for respondent. With him on the brief were *Samuel T. Perkins* and *Arthur B. Spitzer.**

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. As the alleged conspiracy is the same as that involved in *Nixon* v. *Fitzgerald, ante*, p. 731, the facts need not be repeated in detail.

Respondent claims that Harlow joined the conspiracy in his role as the Presidential aide principally responsible for congressional relations.[1] At the conclusion of discovery the

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**Louis Alan Clark* filed a brief for the Government Accountability Project of the Institute for Policy Studies as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Solicitor General Lee* for the United States; by *Roger J. Marzulla* and *William H. Mellor III* for the Mountain States Legal Foundation; by *John C. Armor* and *H. Richard Mayberry* for the National Taxpayers Legal Fund, Inc.; and by *Thomas J. Madden* for Senator Orrin G. Hatch et al.

[1] Harlow held this position from the beginning of the Nixon administration on January 20, 1969, through November 4, 1969. On the latter date he was designated as Counselor to the President, a position accorded Cabinet status. He served in that capacity until December 9, 1970, when he returned to private life. Harlow later resumed the duties of Counselor for

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supporting evidence remained inferential. As evidence of Harlow's conspiratorial activity respondent relies heavily on a series of conversations in which Harlow discussed Fitzgerald's dismissal with Air Force Secretary Robert Seamans.[2] The other evidence most supportive of Fitzgerald's claims consists of a recorded conversation in which the President later voiced a tentative recollection that Harlow was "all for canning" Fitzgerald.[3]

Disputing Fitzgerald's contentions, Harlow argues that exhaustive discovery has adduced no direct evidence of his in-

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the period from July 1, 1973, through April 14, 1974. Respondent appears to allege that Harlow continued in a conspiracy against him throughout the various changes of official assignment.

[2] The record reveals that Secretary Seamans called Harlow in May 1969 to inquire about likely congressional reaction to a draft reorganization plan that would cause Fitzgerald's dismissal. According to Seamans' testimony, "[w]e [the Air Force] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." App. 153a, 164a–165a (deposition of Robert Seamans). Through an aide Harlow responded that "this was a very sensitive item on the Hill and that it would be [his] recommendation that [the Air Force] not proceed to make such a change at that time." *Id.*, at 152a. But the Air Force persisted. Seamans spoke to Harlow on at least one subsequent occasion during the spring of 1969. The record also establishes that Secretary Seamans called Harlow on November 4, 1969, shortly after the public announcement of Fitzgerald's impending dismissal, and again in December 1969. See *id.*, at 186a.

[3] See *id.*, at 284a (transcript of a recorded conversation between Richard Nixon and Ronald Ziegler, February 26, 1973). In a conversation with the President on January 31, 1973, John Ehrlichman also recalled that Harlow had discussed the Fitzgerald case with the President. See *id.*, at 218a–221a (transcript of recorded conversation between Richard Nixon and John Ehrlichman, January 31, 1973). In the same conversation the President himself asserted that he had spoken to Harlow about the Fitzgerald matter, see *id.*, at 218a, but the parties continue to dispute whether Mr. Nixon—at the most relevant moments in the discussion—was confusing Fitzgerald's case with that of another dismissed employee. The President explicitly stated at one point that he previously had been confused. See *id.*, at 220a.

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volvement in any wrongful activity.[4] He avers that Secretary Seamans advised him that considerations of efficiency required Fitzgerald's removal by a reduction in force, despite anticipated adverse congressional reaction. Harlow asserts he had no reason to believe that a conspiracy existed. He contends that he took all his actions in good faith.[5]

Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H. R. Haldeman,[6] Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to "blow the whistle" on some "shoddy purchasing practices" by exposing these practices to public view.[7] Fitzgerald characterizes this memorandum as evi-

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[4] See Defendants Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment in Civ. No. 74-178 (DC), p. 7 (Feb. 12, 1980).

[5] In support of his version of events Harlow relies particularly on the deposition testimony of Air Force Secretary Seamans, who stated that he regarded abolition of Fitzgerald's position as necessary "to improve the efficiency" of the Financial Management Office of the Air Force and that he never received any White House instruction regarding the Fitzgerald case. App. 159a–160a. Petitioner also disputes the probative value of Richard Nixon's recorded remark that Harlow had supported Fitzgerald's firing. Harlow emphasizes the tentativeness of the President's statement. To the President's query whether Harlow was "all for canning [Fitzgerald], wasn't he?", White House Press Secretary Ronald Ziegler in fact gave a negative reply: "No, I think Bryce may have been the other way." *Id.*, at 284a. The President did not respond to Ziegler's comment.

[6] The record establishes that Butterfield worked from an office immediately adjacent to the oval office. He had almost daily contact with the President until March 1973, when he left the White House to become Administrator of the Federal Aviation Administration.

[7] *Id.*, at 274a. Butterfield reported that this information had been referred to the Federal Bureau of Investigation. In the memorandum Butterfield reported that he had received the information "by word of several mouths, but allegedly from a senior AFL–CIO official originally . . . . Evidently, Fitzgerald attended a recent meeting of the National Democratic Coalition and, while there, revealed his intentions to a labor representative who, fortunately for us, was unsympathetic." *Ibid.*

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dence that Butterfield had commenced efforts to secure Fitzgerald's retaliatory dismissal. As evidence that Butterfield participated in the conspiracy to conceal his unlawful discharge and prevent his reemployment, Fitzgerald cites communications between Butterfield and Haldeman in December 1969 and January 1970. After the President had promised at a press conference to inquire into Fitzgerald's dismissal, Haldeman solicited Butterfield's recommendations. In a subsequent memorandum emphasizing the importance of "loyalty," Butterfield counseled against offering Fitzgerald another job in the administration at that time.[8]

For his part, Butterfield denies that he was involved in any decision concerning Fitzgerald's employment status until Haldeman sought his advice in December 1969—more than a month after Fitzgerald's termination had been scheduled and announced publicly by the Air Force. Butterfield states that he never communicated his views about Fitzgerald to any official of the Defense Department. He argues generally that nearly eight years of discovery have failed to turn up any evidence that he caused injury to Fitzgerald.[9]

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion the District Court upheld the legal sufficiency of Fitzgerald's *Bivens* (*Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)) claim under the First Amendment and his "inferred" statutory causes of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505.[10] The court

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[8] *Id.*, at 99a–100a, 180a–181a. This memorandum, quoted in *Nixon* v. *Fitzgerald*, *ante*, at 735–736, was not sent to the Defense Department.

[9] See Memorandum in Support of Summary Judgment, *supra*, at 26. The history of Fitzgerald's litigation is recounted in *Nixon* v. *Fitzgerald*, *ante*, p. 731. Butterfield was named as a defendant in the initial civil action filed by Fitzgerald in 1974. Harlow was named for the first time in respondent's second amended complaint of July 5, 1978.

[10] The first of these statutes, 5 U. S. C. § 7211 (1976 ed., Supp. IV), provides generally that "[t]he right of employees . . . to . . . furnish informa-

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found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity. App. to Pet. for Cert. 1a–3a.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. *Id.*, at 11a–12a. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari. 452 U. S. 959 (1981).[11]

II

As we reiterated today in *Nixon* v. *Fitzgerald*, *ante*, p. 731, our decisions consistently have held that Government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.

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tion to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. Neither expressly creates a private right to sue for damages. Petitioners argue that the District Court erred in finding that a private cause of action could be inferred under either statute, and that "special factors" present in the context of the federal employer-employee relationship preclude the recognition of respondent's *Bivens* action under the First Amendment. The legal sufficiency of respondent's asserted causes of action is not, however, a question that we view as properly presented for our decision in the present posture of this case. See n. 36, *infra*.

[11] As in *Nixon* v. *Fitzgerald*, *ante*, p. 731, our jurisdiction has been challenged on the basis that the District Court's order denying petitioners' claim of absolute immunity was not an appealable final order and that the Court of Appeals' dismissal of petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U. S. C. § 1254. As the discussion in *Nixon* establishes our jurisdiction in this case as well, we need not consider those challenges in this opinion.

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Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." The absolute immunity of legislators, in their legislative functions, see, *e. g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975), and of judges, in their judicial functions, see, *e. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz* v. *Economou*, 438 U. S. 478, 508–512 (1978), executive officers engaged in adjudicative functions, *id.*, at 513–517, and the President of the United States, see *Nixon* v. *Fitzgerald*, *ante*, p. 731.

For executive officials in general, however, our cases make plain that qualified immunity represents the norm. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity. *Id.*, at 247–248. In *Butz* v. *Economou*, *supra*, we extended the approach of *Scheuer* to high federal officials of the Executive Branch. Discussing in detail the considerations that also had underlain our decision in *Scheuer*, we explained that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, 438 U. S., at 504–505, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.*, at 506. Without discounting the adverse consequences of denying high officials an absolute immunity from private lawsuits alleging constitutional violations—consequences found sufficient in *Spalding* v. *Vilas*, 161 U. S. 483 (1896), and *Barr* v. *Matteo*, 360 U. S. 564

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(1959), to warrant extension to such officials of absolute immunity from suits at common law—we emphasized our expectation that insubstantial suits need not proceed to trial:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 438 U. S., at 507–508 (citations omitted).

Butz continued to acknowledge that the special functions of some officials might require absolute immunity. But the Court held that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.*, at 506. This we reaffirmed today in *Nixon* v. *Fitzgerald*, *ante*, at 747.

III

A

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim we do not write on an empty page. In *Butz* v. *Economou*, *supra*, the Secretary of Agriculture—a Cabinet official directly accountable to the President—asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the

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President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity. "[T]he greater power of [high] officials," we reasoned, "affords a greater potential for a regime of lawless conduct." 438 U. S., at 506. Damages actions against high officials were therefore "an important means of vindicating constitutional guarantees." *Ibid.* Moreover, we concluded that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U. S. C.] § 1983 and suits brought directly under the Constitution against federal officials." *Id.*, at 504.

Having decided in *Butz* that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

B

In disputing the controlling authority of *Butz*, petitioners rely on the principles developed in *Gravel* v. *United States*, 408 U. S. 606 (1972).[12] In *Gravel* we endorsed the view that "it is literally impossible . . . for Members of Congress to per-

[12] Petitioners also claim support from other cases that have followed *Gravel* in holding that congressional employees are derivatively entitled to the legislative immunity provided to United States Senators and Representatives under the Speech and Debate Clause. See *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975); *Doe* v. *McMillan*, 412 U. S. 306 (1973).

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form their legislative tasks without the help of aides and assistants" and that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . . ." *Id.*, at 616–617. Having done so, we held the Speech and Debate Clause derivatively applicable to the "legislative acts" of a Senator's aide that would have been privileged if performed by the Senator himself. *Id.*, at 621–622.

Petitioners contend that the rationale of *Gravel* mandates a similar "derivative" immunity for the chief aides of the President of the United States. Emphasizing that the President must delegate a large measure of authority to execute the duties of his office, they argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself.

Petitioners' argument is not without force. Ultimately, however, it sweeps too far. If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet—Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself[13]—be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz*.[14] Moreover, in general our cases have followed a "functional" approach to immunity law. We have recog-

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[13] See U. S. Const., Art. II, § 2 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .").

[14] THE CHIEF JUSTICE, *post*, at 828, argues that senior Presidential aides work "more intimately with the President on a daily basis than does a Cabinet officer," and that *Butz* therefore is not controlling. In recent years, however, such men as Henry Kissinger and James Schlesinger have served in both Presidential advisory and Cabinet positions. Kissinger held both posts simultaneously. In our view it is impossible to generalize about the role of "offices" in an individual President's administration without reference to the functions that particular officeholders are assigned by the President. *Butz* v. *Economou* cannot be distinguished on this basis.

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nized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel*, for example, we emphasized that Senators and their aides were absolutely immune only when performing "acts legislative in nature," and not when taking other acts even "in their official capacity." 408 U. S., at 625. See *Hutchinson* v. *Proxmire*, 443 U. S. 111, 125–133 (1979). Our cases involving judges[15] and prosecutors[16] have followed a similar line. The undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the "functional" approach that has characterized the immunity decisions of this Court, indeed including *Gravel* itself.[17]

C

Petitioners also assert an entitlement to immunity based on the "special functions" of White House aides. This form

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[15] See, *e. g.*, *Supreme Court of Virginia* v. *Consumers Union of United States*, 446 U. S. 719, 731–737 (1980); *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978).

[16] In *Imbler* v. *Pachtman*, 424 U. S. 409, 430–431 (1976), this Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the Courts of Appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities. See, *e. g.*, *Mancini* v. *Lester*, 630 F. 2d 990, 992 (CA3 1980); *Forsyth* v. *Kleindienst*, 599 F. 2d 1203, 1213–1214 (CA3 1979). This Court at least implicitly has drawn the same distinction in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions. See *Butz* v. *Economou*, 438 U. S., at 515–517.

[17] Our decision today in *Nixon* v. *Fitzgerald*, *ante*, p. 731, in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.

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of argument accords with the analytical approach of our cases. For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.[18] But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.[19]

Butz also identifies the location of the burden of proof. The burden of justifying absolute immunity rests on the official asserting the claim. 438 U. S., at 506. We have not of course had occasion to identify how a Presidential aide might carry this burden. But the general requisites are familiar in our cases. In order to establish entitlement to absolute im-

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[18] Cf. *United States* v. *Nixon*, 418 U. S. 683, 710–711 (1974) ("[C]ourts have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality"); *Katz* v. *United States*, 389 U. S. 347, 364 (1967) (WHITE, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States *or his chief legal officer, the Attorney General*, has considered the requirements of national security and authorized electronic surveillance as reasonable") (emphasis added).

[19] *Gravel* v. *United States*, 408 U. S. 606 (1972), points to a similar conclusion. We fairly may assume that some aides are assigned to act as Presidential "alter egos," *id.*, at 616–617, in the exercise of functions for which absolute immunity is "essential for the conduct of the public business," *Butz*, *supra*, at 507. Cf. *Gravel*, *supra*, at 620 (derivative immunity extends only to acts within the "central role" of the Speech and Debate Clause in permitting free legislative speech and debate). By analogy to *Gravel*, a derivative claim to Presidential immunity would be strongest in such "central" Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own.

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munity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability.[20] He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.[21]

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that "public policy requires [for any of the functions of his office] an exemption of [absolute] scope." *Butz*, 438 U. S., at 506. Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could we now conclude that the acts charged in this lawsuit—if taken at all—would lie within the protected area. We do not, however, foreclose the possibility that petitioners, on remand, could satisfy the standards properly applicable to their claims.

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alterna-

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[20] Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure. See *Nixon* v. *Fitzgerald*, *ante*, at 747–748.

[21] The need for such an inquiry is implicit in *Butz* v. *Economou*, *supra*, at 508–517; see *Imbler* v. *Pachtman*, *supra*, at 430–431. Cases involving immunity under the Speech and Debate Clause have inquired explicitly into whether particular acts and activities qualified for the protection of the Clause. See, *e. g.*, *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979); *Doe* v. *McMillan*, 412 U. S. 306 (1973); *Gravel* v. *United States*, *supra*.

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tive. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz* v. *Economou*, *supra*, at 506; see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 410 ("For people in Bivens' shoes, it is damages or nothing"). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to the society as a whole.[22] These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950).

In identifying qualified immunity as the best attainable accommodation of competing values, in *Butz*, *supra*, at 507–508, as in *Scheuer*, 416 U. S., at 245–248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U. S., at 507–508; see *Hanrahan* v. *Hampton*, 446 U. S. 754, 765 (1980) (POWELL, J., concurring in part and dissenting in part).[23] Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by

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[22] See generally Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 S. Ct. Rev. 281, 324–327.

[23] The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 405 (1979); *Tenney* v. *Brandhove*, 341 U. S. 367, 377–378 (1951). As the Court observed in *Tenney:* "In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." *Id.*, at 378.

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our prior cases—requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez* v. *Toledo*, 446 U. S. 635 (1980).[24] Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ." *Ibid.* (emphasis added).[25]

The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz*

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[24] Although *Gomez* presented the question in the context of an action under 42 U. S. C. § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense in actions under the Constitution and laws of the United States. See 446 U. S., at 640. *Gomez* did not decide which party bore the burden of proof on the issue of good faith. *Id.*, at 642 (REHNQUIST, J., concurring).

[25] In *Wood* the Court explicitly limited its holding to the circumstances in which a school board member, "in the specific context of school discipline," 420 U. S., at 322, would be stripped of claimed immunity in an action under § 1983. Subsequent cases, however, have quoted the *Wood* formulation as a general statement of the qualified immunity standard. See, *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555, 562–563, 566 (1978), quoted in *Baker* v. *McCollan*, 443 U. S. 137, 139 (1979).

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that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment.[26] And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.[27]

In the context of *Butz*'s attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a back-

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[26] Rule 56(c) states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. *E. g.*, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

[27] *E. g.*, *Landrum* v. *Moats*, 576 F. 2d 1320, 1329 (CA8 1978); *Duchesne* v. *Sugarman*, 566 F. 2d 817, 832–833 (CA2 1977); cf. *Hutchinson* v. *Proxmire*, 443 U. S., at 120, n. 9 (questioning whether the existence of "actual malice," as an issue of fact, may properly be decided on summary judgment in a suit alleging libel of a public figure).

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ground in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues.[28] Inquiries of this kind can be peculiarly disruptive of effective government.[29]

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of

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[28] In suits against a President's closest aides, discovery of this kind frequently could implicate separation-of-powers concerns. As the Court recognized in *United States* v. *Nixon*, 418 U. S., at 708:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

[29] As Judge Gesell observed in his concurring opinion in *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 307, 606 F. 2d 1192, 1214 (1979), aff'd in pertinent part by an equally divided Court, 452 U. S. 713 (1981):

"We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover *[sic]* is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient [to force a trial]. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

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trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Procunier* v. *Navarette*, 434 U. S. 555, 565 (1978); *Wood* v. *Strickland*, 420 U. S., at 322.[30]

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law,[31] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.[32] If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily

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[30] This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U. S. C. § 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz* v. *Economou*, 438 U. S., at 504.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope.

[31] This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

[32] As in *Procunier* v. *Navarette*, 434 U. S., at 565, we need not define here the circumstances under which "the state of the law" should be "evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."

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should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.[33] But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967).[34]

C

In this case petitioners have asked us to hold that the respondent's pretrial showings were insufficient to survive their motion for summary judgment.[35] We think it appropri-

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[33] Cf. *Procunier* v. *Navarette*, *supra*, at 565, quoting *Wood* v. *Strickland*, 420 U. S., at 322 ("Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith'").

[34] We emphasize that our decision applies only to suits for civil *damages* arising from actions within the scope of an official's duties and in "objective" good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

[35] In *Butz*, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U. S., at 507. See Schuck, *supra* n. 22, at 324–327. We reiterate this admonition. Insub-

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ate, however, to remand the case to the District Court for its reconsideration of this issue in light of this opinion.[36] The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary.

V

The judgment of the Court of Appeals is vacated, and the case is remanded for further action consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defend-

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stantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and "firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. 438 U. S., at 508.

[36] Petitioners also have urged us, prior to the remand, to rule on the legal sufficiency of respondent's "implied" causes of action under 5 U. S. C. § 7211 (1976 ed., Supp. IV) and 18 U. S. C. § 1505 and his *Bivens* claim under the First Amendment. We do not view petitioners' argument on the statutory question as insubstantial. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 377–378 (1982) (controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981) (same); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 638–639 (1981) (same). Nor is the *Bivens* question. Cf. *Bush* v. *Lucas*, 647 F. 2d 573, 576 (CA5 1981) (holding that the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy"). As in *Nixon* v. *Fitzgerald*, *ante*, p. 731, however, we took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine. We therefore think it appropriate to leave these questions for fuller consideration by the District Court and, if necessary, by the Court of Appeals.

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ant "knew or should have known" of the constitutionally violative effect of his actions. *Ante*, at 815, 819. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. *Ante*, at 819, n. 33. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board," to all "government officials performing discretionary functions." *Ante*, at 818. I write separately only to note that given this standard, it seems inescapable to me that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did "know" at the time of his actions. In this respect the issue before us is very similar to that addressed in *Herbert* v. *Lando*, 441 U. S. 153 (1979), in which the Court observed that "[t]o erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their goo[d f]aith . . . ." *Id.*, at 170. Of course, as the Court has already noted, *ante*, at 818–819, summary judgment will be readily available to public-official defendants whenever the state of the law was so ambiguous at the time of the alleged violation that it could not have been "known" then, and thus liability could not ensue. In my view, summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred. I see no reason why discovery of defendants' "knowledge" should not be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds such as these. Cf. *Herbert* v. *Lando*, *supra*, at 180, n. 4 (POWELL, J., concurring).

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL and JUSTICE BLACKMUN, concurring.

We join the Court's opinion but, having dissented in *Nixon*

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v. *Fitzgerald*, *ante*, p. 731, we disassociate ourselves from any implication in the Court's opinion in the present case that *Nixon* v. *Fitzgerald* was correctly decided.

JUSTICE REHNQUIST, concurring.

At such time as a majority of the Court is willing to reexamine our holding in *Butz* v. *Economou*, 438 U. S. 478 (1978), I shall join in that undertaking with alacrity. But until that time comes, I agree that the Court's opinion in this case properly disposes of the issues presented, and I therefore join it.

CHIEF JUSTICE BURGER, dissenting.

The Court today decides in *Nixon* v. *Fitzgerald*, *ante*, p. 731, what has been taken for granted for 190 years, that it is implicit in the Constitution that a President of the United States has absolute immunity from civil suits arising out of official acts as Chief Executive. I agree fully that absolute immunity for official acts of the President is, like executive privilege, "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).[1]

In this case the Court decides that senior aides of the President do not have derivative immunity from the President. I am at a loss, however, to reconcile this conclusion with our holding in *Gravel* v. *United States*, 408 U. S. 606 (1972). The Court reads *Butz* v. *Economou*, 438 U. S. 478 (1978), as resolving that question; I do not. *Butz* is clearly distinguishable.[2]

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[1] As I noted in *Nixon* v. *Fitzgerald*, Presidential immunity for official acts while in office has never been seriously questioned until very recently. See *ante*, at 758, n. 1 (BURGER, C. J., concurring).

[2] If indeed there is an irreconcilable conflict between *Gravel* and *Butz*,

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In *Gravel* we held that it is implicit in the Constitution that aides of Members of Congress have absolute immunity for acts performed for Members in relation to their legislative function. We viewed the aides' immunity as deriving from the Speech or Debate Clause, which provides that "for any Speech or Debate *in either House*, [Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6, cl. 1 (emphasis added). Read literally, the Clause would, of course, limit absolute immunity only to the Member and only to speech and debate within the Chamber. But we have read much more into this plain language. The Clause says nothing about "legislative acts" outside the Chambers, but we concluded that the Constitution grants absolute immunity for legislative acts not only "in either House" but in committees and conferences and in reports on legislative activities.

Nor does the Clause mention immunity for congressional aides. Yet, going far beyond any words found in the Constitution itself, we held that a Member's aides who implement policies and decisions of the Member are entitled to the same absolute immunity as a Member. It is hardly an overstatement to say that we thus avoided a "literalistic approach," *Gravel*, *supra*, at 617, and instead looked to the structure of the Constitution and the evolution of the function of the Legislative Branch. In short, we drew this immunity for legislative aides from a functional analysis of the legislative process in the context of the Constitution taken as a whole and in light of 20th-century realities. Neither Presidents nor Members of Congress can, as they once did, perform all their constitutional duties personally.[3]

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the Court has an obligation to try to harmonize its holdings—or at least tender a reasonable explanation. The Court has done neither.

[3] A Senator's allotment for staff varies significantly, but can range from as few as 17 to over 70 persons, in addition to committee staff aides who perform important legislative functions for Members. S. Doc. No. 97–19, pp. 27–106 (1981). House Members have roughly 18 to 26 assistants at any

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We very properly recognized in *Gravel* that the central purpose of a Member's absolute immunity would be "diminished and frustrated" if the legislative aides were not also protected by the same broad immunity. Speaking for the Court in *Gravel*, JUSTICE WHITE agreed with the Court of Appeals that

> "it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks *without the help of aides* and assistants; that the day-to-day work of such aides *is so critical to the Members' performance* that they must be treated as the latter's *alter egos;* and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . .—will inevitably be diminished and frustrated." 408 U. S., at 616–617 (emphasis added).

I joined in that analysis and continue to agree with it, for without absolute immunity for these "elbow aides," who are indeed "alter egos," a Member could not effectively discharge all of the assigned constitutional functions of a modern legislator.

The Court has made this reality a matter of our constitutional jurisprudence. How can we conceivably hold that a President of the United States, who represents a vastly larger constituency than does any Member of Congress, should not have "alter egos" with comparable immunity? To perform the constitutional duties assigned to the Executive would be "literally impossible, in view of the complexities of the modern [Executive] process, . . . without the help of

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one time, in addition to committee staff aides. H. R. Doc. No. 97–113, pp. 28–174 (1981).

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aides and assistants."[4] *Id.*, at 616. These words reflect the precise analysis of *Gravel*, and this analysis applies with at least as much force to a President. The primary layer of senior aides of a President—like a Senator's "alter egos"—are literally at a President's elbow, with offices a few feet or at most a few hundred feet from his own desk. The President, like a Member of Congress, may see those personal aides many times in one day. They are indeed the President's "arms" and "fingers" to aid in performing his constitutional duty to see "that the laws [are] faithfully executed." Like a Member of Congress, but on a vastly greater scale, the President cannot personally implement a fraction of his own policies and day-to-day decisions.[5]

For some inexplicable reason the Court declines to recognize the realities in the workings of the Office of a President, despite the Court's cogent recognition in *Gravel* concerning the realities of the workings of 20th-century Members of Congress. Absent equal protection for a President's aides, how will Presidents be free from the risks of "intimidation . . . by [Congress] and accountability before a possibly hostile

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[4] In the early years of the Republic, Members of Congress and Presidents performed their duties without staffs of aides and assistants. Washington and Jefferson spent much of their time on their plantations. Congress did not even appropriate funds for a Presidential clerk until 1857. Lincoln opened his own mail, Cleveland answered the phone at the White House, and Wilson regularly typed his own speeches. S. Wayne, The Legislative Presidency 30 (1978). Whatever may have been the situation beginning under Washington, Adams, and Jefferson, we know today that the Presidency functions with a staff that exercises a wide spectrum of authority and discretion and directly assists the President in carrying out constitutional duties.

[5] JUSTICE WHITE's dissent in *Nixon* v. *Fitzgerald* today expresses great concern that a President may "cause serious injury to any number of citizens even though he knows his conduct violates a statute . . . ." *Ante*, at 764. What the dissent wholly overlooks, however, is the plain fact that the absolute immunity does not protect a President for acts *outside* the constitutional function of a President.

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judiciary?" *Gravel*, 408 U. S., at 617. Under today's holding in this case the functioning of the Presidency will inevitably be "diminished and frustrated." *Ibid.*

Precisely the same public policy considerations on which the Court now relies in *Nixon* v. *Fitzgerald*, and that we relied on only recently in *Gravel*, are fully applicable to senior Presidential aides. The Court's opinion in *Nixon* v. *Fitzgerald* correctly points out that if a President were subject to suit, awareness of personal vulnerability to suit "frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve." *Ante*, at 753. This same negative incentive will permeate the inner workings of the Office of the President if the Chief Executive's "alter egos" are not protected derivatively from the immunity of the President. In addition, exposure to civil liability for official acts will result in constant judicial questioning, through judicial proceedings and pretrial discovery, into the inner workings of the Presidential Office beyond that necessary to maintain the traditional checks and balances of our constitutional structure.[6]

I challenge the Court and the dissenters in *Nixon* v. *Fitzgerald* who join in the instant holding to say that the effectiveness of Presidential aides will not "inevitably be diminished and frustrated," *Gravel*, *supra*, at 617, if they must weigh every act and decision in relation to the risks of future

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[6] The same remedies for checks on Presidential abuse also will check abuses by the comparatively small group of senior aides that act as "alter egos" of the President. The aides serve at the pleasure of the President and thus may be removed by the President. Congressional and public scrutiny maintain a constant and pervasive check on abuses, and such aides may be prosecuted criminally. See *Nixon*, *ante*, at 757. However, a criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability.

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lawsuits. The *Gravel* Court took note of the burdens on congressional aides: the stress of long hours, heavy responsibilities, constant exposure to harassment of the political arena. Is the Court suggesting the stresses are less for Presidential aides? By construing the Constitution to give only qualified immunity to senior Presidential aides we give those key "alter egos" only lawsuits, winnable lawsuits perhaps, but lawsuits nonetheless, with stress and effort that will disperse and drain their energies and their purses.[7]

In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service.

We—judges collectively—have held that the common law provides us with absolute immunity for ourselves with respect to judicial acts, however erroneous or ill-advised. See, *e. g.*, *Stump* v. *Sparkman*, 435 U. S. 349 (1978). Are the lowest ranking of 27,000 or more judges, thousands of prosecutors, and thousands of congressional aides—an aggregate

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[7] The Executive Branch may as a matter of grace supply some legal assistance. The Department of Justice has a longstanding policy of representing federal officers in civil suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary. See Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Justice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits, 95th Cong., 2d Sess. (Comm. Print 1978). The Congress frequently pays the expenses of defending its Members even as to acts wholly outside the legislative function.

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of not less than 75,000 in all—entitled to greater protection than two senior aides of a President?

Butz v. *Economou*, 438 U. S. 478 (1978), does not dictate that senior Presidential aides be given only qualified immunity. *Butz* held only that a Cabinet officer exercising discretion was not entitled to absolute immunity; we need not abandon that holding. A senior Presidential aide works more intimately with the President on a daily basis than does a Cabinet officer, directly implementing Presidential decisions literally from hour to hour.

In his dissent today in *Nixon* v. *Fitzgerald*, JUSTICE WHITE states that the "Court now applies the dissenting view in *Butz* to the Office of the President." *Ante*, at 764. However, this suggests that a President and his Cabinet officers, who serve only "during the pleasure of the President," are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his "elbow aides" from the role of Cabinet officers, who are department heads rather than "alter egos." It would be in no sense inconsistent to hold that a President's personal aides have greater immunity than Cabinet officers.

The Court's analysis in *Gravel* demonstrates that the question of derivative immunity does not and should not depend on a person's rank or position in the hierarchy, but on the *function* performed by the person and the relationship of that person to the superior. Cabinet officers clearly outrank United States Attorneys, yet qualified immunity is accorded the former and absolute immunity the latter; rank is important only to the extent that the rank determines the function to be performed. The function of senior Presidential aides, as the "alter egos" of the President, is an integral, inseparable part of the function of the President.[8] JUSTICE WHITE

[8] This Court had no trouble reconciling *Gravel* with *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). In *Kilbourn* the Sergeant-at-Arms of the House of Representatives was held not to share the absolute immunity enjoyed by the Members of Congress who ordered that officer to act.

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was clearly correct in *Gravel*, stating that Members of Congress could not "perform their legislative tasks without the help of aides and assistants; [and] that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . . ." 408 U. S., at 616–617.

By ignoring *Gravel* and engaging in a wooden application of *Butz*, the Court significantly undermines the functioning of the Office of the President. Under the Court's opinion in *Nixon* today it is clear that Presidential immunity derives from the Constitution as much as congressional immunity comes from that source. Can there rationally be one rule for congressional aides and another for Presidential aides simply because the initial absolute immunity of each derives from different aspects of the Constitution? I find it inexplicable why the Court makes no effort to demonstrate why the Chief Executive of the Nation should not be assured that senior staff aides will have the same protection as the aides of Members of the House and Senate.

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RENDELL-BAKER ET AL. *v.* KOHN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-2102. Argued April 19, 1982—Decided June 25, 1982

Respondent school is a privately operated school for maladjusted high school students. In recent years, nearly all of the students have been referred to the school by city school committees under a Massachusetts statute or by a state agency. When the students are referred to the school by the city committees, these cities pay for the students' education. The school also receives funds from a number of state and federal agencies. Public funds have recently accounted for at least 90% of the school's operating budget. To be eligible for tuition funding under the state statute, the school must comply with a variety of state regulations, but these regulations impose few specific personnel requirements. Similarly, the school's contracts with the State and the city committees generally do not cover personnel policies. Petitioners, a former vocational counselor and teachers at the school, brought separate actions in Federal District Court under 42 U. S. C. § 1983, claiming that they had been discharged by the school in violation of their First, Fifth, and Fourteenth Amendment rights. The court dismissed the counselor's action but denied a motion to dismiss the teachers' action, reaching conflicting conclusions as to whether the school had acted under color of state law so as to be subject to liability under § 1983. On appeal the cases were consolidated, and the Court of Appeals held that it was error to conclude that the school acted under color of state law, since, although regulated by the State, it was not dominated by the State, especially with respect to decisions involving discharge of personnel.

Held: Respondent school did not act under color of state law when it discharged petitioner employees, and hence petitioners have not stated a claim for relief under § 1983. Pp. 837-843.

(a) The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: Is the alleged infringement of federal rights fairly attributable to the State? Pp. 837-838.

(b) The school's receipt of public funds does not make the discharge decisions acts of the State. Cf. *Blum* v. *Yaretsky*, *post*, p. 991. The school is not fundamentally different from many private corporations whose business depends primarily on contracts with the government, and whose acts do not become acts of the government by reason of their

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significant or even total engagement in performing public contracts. The decision to discharge petitioners was not compelled or even influenced by any state regulation, and the fact that the school performs a public function in educating maladjusted high school students does not make its acts state action. Moreover, since the school's fiscal relationship with the State is not any different from that of many contractors performing services for the government, there is no "symbiotic relationship" between the school and the State. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, distinguished. Pp. 839–843.

641 F. 2d 14, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 843. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 844.

Zachary R. Karol argued the cause for petitioners. With him on the briefs were *S. Elaine Renfro*, *Alan Jay Rom*, and *John Reinstein*.

Matthew H. Feinberg argued the cause for respondents and filed a brief for respondents Kohn et al. *Francis X. Bellotti*, Attorney General of Massachusetts, *pro se*, *Betty E. Waxman* and *Leah S. Crothers*, Assistant Attorneys General, and *Thomas R. Kiley*, First Assistant Attorney General, filed a brief for respondents Bellotti et al.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees.

I

A

Respondent Kohn is the director of the New Perspectives School, a nonprofit institution located on privately owned

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**Carolyn Grace* filed a brief for the Massachusetts Association of 766 Approved Private Schools, Inc., as *amicus curiae* urging affirmance.

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property in Brookline, Massachusetts. The school was founded as a private institution and is operated by a board of directors, none of whom are public officials or are chosen by public officials. The school specializes in dealing with students who have experienced difficulty completing public high schools; many have drug, alcohol, or behavioral problems, or other special needs. In recent years, nearly all of the students at the school have been referred to it by the Brookline or Boston School Committees, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. The school issues high school diplomas certified by the Brookline School Committee.

When students are referred to the school by Brookline or Boston under Chapter 766 of the Massachusetts Acts of 1972, the School Committees in those cities pay for the students' education.[1] The school also receives funds from a number of other state and federal agencies. In recent years, public funds have accounted for at least 90%, and in one year 99%, of respondent school's operating budget. There were approximately 50 students at the school in those years and none paid tuition.[2]

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[1] Chapter 766, 1972 Mass. Acts, Mass. Gen. Laws Ann., ch. 71B, § 3 (West Supp. 1981), requires school committees to identify students with special needs and to develop suitable educational programs for such students. Massachusetts Gen. Laws Ann., ch. 71B, § 4 (West Supp. 1981), provides that school committees may "enter into an agreement with any public or private school, agency, or institution to provide the necessary special education" for these students. A student identified as having special needs and recommended for placement in private school may remain in public school, if his parents object to a placement in a particular private school, unless he is especially disruptive or dangerous. Parents who object to placement in a particular private school may also elect to place their child in a private school of their choice; in such cases, they must pay the tuition.

[2] *Amicus curiae* Massachusetts Association of 766 Approved Private Schools, Inc., of which the New Perspectives School is a member, informs the Court that many of its members have a student population which is more or less evenly divided between students referred and paid for by the State and students referred and paid for by their parents or guardians. Brief as *Amicus Curiae* 3.

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To be eligible for tuition funding under Chapter 766, the school must comply with a variety of regulations, many of which are common to all schools. The State has issued detailed regulations concerning matters ranging from record-keeping to student-teacher ratios. Concerning personnel policies, the Chapter 766 regulations require the school to maintain written job descriptions and written statements describing personnel standards and procedures, but they impose few specific requirements.

The school is also regulated by Boston and Brookline as a Aesult of its Chapter 766 funding. By its contract with the Boston School Committee, which refers to the school as a "contractor," the school must agree to carry out the individualized plan developed for each student referred to the school by the Committee. See n. 1, *supra*. The contract specifies that school employees are not city employees.[3]

The school also has a contract with the State Drug Rehabilitation Division. Like the contract with the Boston School Committee, that agreement refers to the school as a "contractor." It provides for reimbursement for services provided for students referred to the school by the Drug Rehabilitation Division, and includes requirements concerning the services to be provided. Except for general requirements, such as an equal employment opportunity requirement, the agreement does not cover personnel policies.

While five of the six petitioners were teachers at the school, petitioner Rendell-Baker was a vocational counselor hired under a grant from the federal Law Enforcement Assistance Administration, whose funds are distributed in Massachusetts through the State Committee on Criminal Justice. As a condition of the grant, the Committee on Criminal Justice must approve the school's initial hiring decisions. The purpose of this requirement is to insure that the school hires vocational counselors who meet the qualifications

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[3] The record does not contain details of the school's contract with the Brookline School Committee.

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described in the school's grant proposal to the Committee; the Committee does not interview applicants for counselor positions.

B

Rendell-Baker was discharged by the school in January 1977, and the five other petitioners were discharged in June 1978. Rendell-Baker's discharge resulted from a dispute over the role of a student-staff council in making hiring decisions. A dispute arose when some students presented a petition to the school's board of directors in December 1976, seeking greater responsibilities for the student-staff council. Director Kohn opposed the proposal, but Rendell-Baker supported it and so advised the board. On December 13, Kohn notified the State Committee on Criminal Justice, which funded Rendell-Baker's position, that she intended to dismiss Rendell-Baker and employ someone else. Kohn notified Rendell-Baker of her dismissal in January 1977.

Rendell-Baker then advised the board of directors that she had been discharged without due process because she exercised her First Amendment rights. She demanded reinstatement or a hearing. The school agreed to apply a new policy, calling for appointment of a grievance committee, to consider her claims. Rendell-Baker also complained to the State Committee on Criminal Justice, which asked the school to provide a written explanation for her discharge. After the school complied, the Committee responded that it was satisfied with the explanation, but notified the school that it would not pay any backpay or other damages award Rendell-Baker might obtain from it as a result of her discharge. The Committee told Rendell-Baker that it had no authority to order a hearing, although it would refuse to approve the hiring of another counselor if the school disregarded its agreement to apply its new grievance procedure in her case. At this point Rendell-Baker objected to the composition of the grievance committee, and its proceedings apparently never went forward. Rendell-Baker filed this suit in July 1977

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under 42 U. S. C. § 1983, alleging that she had been discharged in violation of her rights under the First, Fifth, and Fourteenth Amendments.

In the spring of 1978, students and staff voiced objections to Kohn's policies. The five petitioners other than Rendell-Baker, who were all teachers at the school, wrote a letter to the board of directors urging Kohn's dismissal. When the board affirmed its confidence in Kohn, students from the school picketed the home of the president of the board. The students were threatened with suspension; a local newspaper then ran a story about the controversy at the school. In response to the story, the five petitioners wrote a letter to the editor in which they stated that they thought the prohibition of picketing was unconstitutional. On the day the letter to the editor appeared, the five teachers told the president of the board that they were forming a union. Kohn discharged the teachers the next day. They brought suit against the school and its directors in December 1978. Like Rendell-Baker, they sought relief under § 1983, alleging that their rights under the First, Fifth, and Fourteenth Amendments had been violated.

C

On April 16, 1980, the District Court for the District of Massachusetts granted the defendant's motion for summary judgment in the suit brought by Rendell-Baker. A claim may be brought under § 1983 only if the defendant acted "under color" of state law.[4] The District Court took as its standard "'whether there is a sufficiently close nexus between the State and the challenged action of the regulated

[4] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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entity so that the action of the latter may be fairly treated as that of the State itself,'" quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974). Noting that, although the State regulated the school in many ways, it imposed few conditions on the school's personnel policies, the District Court concluded that the nexus between the school and the State was not sufficiently close so that the action of the school in discharging Rendell-Baker could be considered action of the Commonwealth of Massachusetts.

Nine days earlier, on April 7, 1980, a different judge of the District Court for the District of Massachusetts had reached a contrary conclusion on the same question in the case brought by the other five petitioners. His opinion stressed the school's dependency on public funding and its regulation by numerous public entities. It also noted that although education was not a uniquely public function, it is primarily a public function, and that Brookline did not maintain a school to serve maladjusted adolescents with drug, alcohol, or emotional problems. The District Court, following the guidelines of *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961), concluded that the school performed a "public function," as described in *Jackson*, *supra*, at 352. Accordingly, it held that the defendants acted under color of state law and denied the motion to dismiss. However, on June 13, 1980, noting that there was substantial ground for disagreement on that holding, the District Court certified its order as immediately appealable pursuant to 28 U. S. C. § 1292(b).

D

The Court of Appeals for the First Circuit consolidated the two actions. It noted that the school's funding, regulation, and function show that it has a close relationship with the State. However, it stressed that the school is managed by a private board and that the State has relatively little involvement in personnel matters. It concluded that the school, al-

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though regulated by the State, was not dominated by the State, especially with respect to decisions involving the discharge of personnel. The Court of Appeals then concluded that the District Court which certified the question in the action brought by the five teachers had erred in concluding that the defendants acted under color of state law.

The Court of Appeals separately considered Rendell-Baker's claim that she was discharged under color of state law since her position was funded directly by the Committee on Criminal Justice. The court rejected her claim, noting that the Committee had the power to insure that those hired had the qualifications described in the grant proposal, but that it did not have any other control over the school's personnel decisions. It therefore affirmed the District Court's dismissal of her action. 641 F. 2d 14 (1981).

We granted certiorari, 454 U. S. 891 (1981), and we affirm.

II

A

Petitioners do not claim that their discharges were discriminatory in violation of Title VII of the Civil Rights Act of 1964. Nor do they claim that their discharges were unfair labor practices in violation of the National Labor Relations Act. Rather, they allege that respondents violated 42 U. S. C. § 1983, *supra*, n. 4, by discharging them because of their exercise of their First Amendment right of free speech and without the process due them under the Fourteenth Amendment. Although Title VII and the National Labor Relations Act govern action by private parties making personnel decisions, it is fundamental that the First Amendment prohibits governmental infringement on the right of free speech. Similarly, the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities. *Civil*

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Rights Cases, 109 U. S. 3, 11 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948).[5] And § 1983, which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law.

In *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966), the Court stated:

> "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."

See also, *United States* v. *Classic*, 313 U. S. 299, 326 (1941). The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights "fairly attributable to the State?" *Lugar* v. *Edmondson Oil Co.*, *post*, at 937. The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action.[6] If the action of the respondent school is not state action, our inquiry ends.

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[5] The Fourteenth Amendment provides, in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[6] The Court has concluded that the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors. For example, in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 155–156 (1970), the issue was whether a restaurant violated § 1983 by refusing service to a white teacher who was in the company of six Negro students; the town sheriff arrested the white teacher for vagrancy as a result of her request to be served lunch in their company. The Court concluded that the restaurant acted under color of state law because it conspired with the sheriff, a state actor, in depriving the white teacher of federal rights.

Similarly, *Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978), and *Lugar*, *post*, p. 922, illustrate the relevance of whether action was taken in

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B

In *Blum* v. *Yaretsky*, *post*, p. 991, the Court analyzed the state action requirement of the Fourteenth Amendment. The Court considered whether certain nursing homes were state actors for the purpose of determining whether decisions regarding transfers of patients could be fairly attributed to

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concert with a state actor. The issue in *Flagg Brothers* was whether a warehouseman could be sued under § 1983 because it sought to execute a lien by selling goods in its possession pursuant to § 7–210 of the New York Uniform Commercial Code. While the sale was authorized by a state statute, and hence appeared to be threatened under color of state law, the Court did not reach that issue. Instead, it concluded that the warehouseman's decision to threaten to sell the goods was not "properly attributable to the State of New York," 436 U. S., at 156, since no state actor was involved. Since the respondent in *Flagg Brothers* claimed that the warehouseman violated her Fourteenth Amendment rights to due process and equal protection, and the Fourteenth Amendment is only offended by action of the state, we held that no claim for relief had been stated.

In *Lugar*, a lessee obtained an *ex parte* writ of attachment pursuant to a state statute, which was executed by a sheriff. The Court held that § 1983 applied because the involvement of the sheriff distinguished the case from *Flagg Brothers*. *Post*, at 941. The lessee thus acted under color of state law and the sheriff's involvement satisfied the state action requirement.

The limited role played by the Massachusetts Committee on Criminal Justice in the discharge of Rendell-Baker is not comparable to the role played by the public officials in *Adickes* and *Lugar*. The uncontradicted evidence presented by the school showed that the Committee had the power only initially to review the qualifications of a counselor selected by the school to insure that the counselor met the requirements described in the school's grant application. 641 F. 2d 14, 28 (1981). The Committee had no power to hire or discharge a counselor who had the qualifications specified in the school's grant application. Moreover, the Committee did not take any part in discharging Rendell-Baker; on the contrary, it attempted to use leverage to aid her. It requested an explanation for her discharge from the school and stated that it would not approve the appointment of a successor unless a grievance committee considered Rendell-Baker's case. As the Court of Appeals correctly concluded, there is no evidence that the Committee had any authority to take even those steps. *Ibid.*

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the State, and hence be subjected to Fourteenth Amendment due process requirements. The challenged transfers primarily involved decisions, made by physicians and nursing home administrators, to move patients from "skilled nursing facilities" to less expensive "health-related facilities." *Post*, at 1005. Like the New Perspectives School, the nursing homes were privately owned and operated. *Post*, at 1003. Relying on *Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972); and *Adickes* v. *S. H. Kress Co.*, 398 U. S. 144 (1970), the Court held that, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Post*, at 1004. In determining that the transfer decisions were not actions of the State, the Court considered each of the factors alleged by petitioners here to make the discharge decisions of the New Perspectives School fairly attributable to the State.

First, the nursing homes, like the school, depended on the State for funds; the State subsidized the operating and capital costs of the nursing homes, and paid the medical expenses of more than 90% of the patients. *Post*, at 1011. Here the Court of Appeals concluded that the fact that virtually all of the school's income was derived from government funding was the strongest factor to support a claim of state action. 641 F. 2d, at 24. But in *Blum* v. *Yaretsky*, we held that the similar dependence of the nursing homes did not make the acts of the physicians and nursing home administrators acts of the State, and we conclude that the school's receipt of public funds does not make the discharge decisions acts of the State.

The school, like the nursing homes, is not fundamentally different from many private corporations whose business de-

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pends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

The school is also analogous to the public defender found not to be a state actor in *Polk County* v. *Dodson*, 454 U. S. 312 (1981). There we concluded that, although the State paid the public defender, her relationship with her client was "identical to that existing between any other lawyer and client." *Id.*, at 318. Here the relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students.

A second factor considered in *Blum* v. *Yaretsky* was the extensive regulation of the nursing homes by the State. There the State was indirectly involved in the transfer decisions challenged in that case because a primary goal of the State in regulating nursing homes was to keep costs down by transferring patients from intensive treatment centers to less expensive facilities when possible. Both state and federal regulations encouraged the nursing homes to transfer patients to less expensive facilities when appropriate. *Post*, at 1007–1008, 1009–1010. The nursing homes were extensively regulated in many other ways as well. The Court relied on *Jackson*, where we held that state regulation, even if "extensive and detailed," 419 U. S., at 350, did not make a utility's actions state action.

Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as voca-

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tional counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action. See n. 6, *supra*.

The third factor asserted to show that the school is a state actor is that it performs a "public function." However, our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State." *Jackson, supra*, at 353; quoted in *Blum* v. *Yaretsky, post*, at 1011 (emphasis added). There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools. 641 F. 2d, at 26. That a private entity performs a function which serves the public does not make its acts state action.[7]

Fourth, petitioners argue that there is a "symbiotic relationship" between the school and the State similar to the relationship involved in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Such a claim is rejected in *Blum* v. *Yaretsky*, and we reject it here. In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the sup-

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[7] There is no evidence that the State has attempted to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties. Cf. *Evans* v. *Newton*, 382 U. S. 296 (1966) (private trustees appointed to manage previously public park for white persons only).

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port of the garage. 365 U. S., at 723. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here.

C

We hold that petitioners have not stated a claim for relief under 42 U. S. C. § 1983; accordingly, the judgment of the Court of Appeals for the First Circuit is

Affirmed.

JUSTICE WHITE, concurring in the judgments.*

The issue in *Blum* v. *Yaretsky*, No. 80–1952, is whether a private nursing home's decision to discharge or transfer a Medicaid patient satisfies the state-action requirement of the Fourteenth Amendment. To satisfy this requirement, respondents must show that the transfer or discharge is made on the basis of some rule of decision for which the State is responsible. *Lugar* v. *Edmondson Oil Co.*, *post*, at 937. It is not enough to show that the State takes certain actions in response to this private decision. The rule of decision implicated in the actions at issue here appears to be nothing more than a medical judgment. This is the clear import of the majority's conclusion that the "decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State," *post*, at 1008, with which I agree.

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*[This opinion applies also to No. 80–1952, *Blum, Commissioner of the New York State Department of Social Services, et al.* v. *Yaretsky et al.*, *post*, p. 991.]

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Similarly, the allegations of the petitioners in *Rendell-Baker* v. *Kohn*, No. 80–2102, fail to satisfy the state-action requirement. In this case, the question of state action focuses on an employment decision made by a private school that receives most of its funding from public sources and is subject to state regulation in certain respects. For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State. As the majority states, "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Ante*, at 841. The employment decision remains, therefore, a private decision not fairly attributable to the State.

Accordingly, I concur in the judgments.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioners in these consolidated cases, former teachers and a counselor at the New Perspectives School in Brookline, Mass., were discharged by the school's administrators when they criticized certain school policies. They commenced actions under 42 U. S. C. § 1983, claiming that they had been discharged in violation of the First, Fifth, and Fourteenth Amendments. The Court today holds that their suits must be dismissed because the school did not act "under color" of state law. According to the majority, the decision of the school to discharge petitioners cannot fairly be regarded as a decision of the Commonwealth of Massachusetts.

In my view, this holding simply cannot be justified. The State has delegated to the New Perspectives School its statutory duty to educate children with special needs. The school receives almost all of its funds from the State, and is heavily regulated. This nexus between the school and the State is so substantial that the school's action must be considered state action. I therefore dissent.

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I

The critical facts of this case deserve restatement. Chapter 766 of the Massachusetts Acts of 1972, Mass. Gen. Laws Ann., ch. 71B, §§ 1–14 (West 1981), provides that all students with special needs are entitled to a suitable publicly funded education under the supervision of the state and local governments. The school committee of every city, town, or school district in Massachusetts must identify all children who, because of physical or emotional disability, have special educational needs. It must prepare an individualized educational program tailored to meet those needs, and arrange for the implementation of that program. The school committee may offer the programs through existing public schools, or it may contract with private schools to implement the programs. If the school committee decides to place a child in a private school, it must bear all the expenses associated with the placement; parents need not pay the tuition.

If a school committee decides to place a child in a private school, it must closely monitor the child's educational progress. Every three months it must determine whether the child can be transferred to a less restrictive environment, such as a public school. 603 Code Mass. Regs. § 28, ¶¶ 502.4(i), 804.2 (1979). In general, special education programs must be provided in the least restrictive environment possible. ¶ 322.2. If the parents object to the placement of their child in private school, the child may remain in public school unless he is disruptive or dangerous. Parents may also place their child in a private school of their own choice. If they do so, however, they must pay the tuition.

As of 1978, all 50 students enrolled at the New Perspectives School were children with alcohol, drug, behavioral, or other special problems. They had been placed there pursuant to Chapter 766 by the town of Brookline, the city of Boston, or the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. None of the students pays

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tuition. When they graduate, they receive a diploma certified by the Town of Brookline School Committee.

The New Perspectives School is funded almost entirely by governmental agencies. In fiscal year 1975–1976, public funds accounted for 91% of the school's budget. In fiscal year 1976–1977, public funds accounted for 99% of the budget. The school has received money from the town of Brookline, the Massachusetts Department of Mental Health, the Massachusetts Department of Youth Services, the Massachusetts Division of Family and Children's Services, the Massachusetts Office for Children, and the federal Law Enforcement Assistance Administration. See 641 F. 2d 14, 17 (CA1 1981).

In order to remain eligible for placements and funding under Chapter 766, the New Perspectives School must comply with a variety of regulations. The Massachusetts Department of Education has promulgated "Guidelines for Approval of Day Educational Component in Private Schools under Chapter 766." These guidelines cover almost every aspect of a private school's operations, including financial recordkeeping, student discipline, medical examinations for students, parent involvement, health care, subjects of instruction, teacher-student ratio, student records, confidentiality of records, transportation, insurance, nutrition, food preparation, toileting procedures, physical facilities, and classroom equipment. The guidelines also address personnel policies. They set forth minimum standards for staff training, use of volunteers, teacher qualifications, and teacher evaluations. They further require that the school maintain written job descriptions and a written policy on criteria and procedures for hiring and dismissal, and procedures for handling staff complaints. And they require that the school provide vacations and other benefits.

The New Perspectives School is subject to additional regulation under contracts with each of the governmental units that refers students. A contract with the Massachusetts De-

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partment of Mental Health, Drug Rehabilitation Division, requires the school to provide counseling, educational, and vocational services for drug abusers. Under a contract with the city of Boston, the school must carry out the educational plan devised by the Boston School Committee for each Boston student placed with the school. The school must submit periodic reports to the city and is subject to inspection at any time during normal business hours. Finally, the school is bound by regulations contained in contracts with the Massachusetts Department of Youth Services and the Brookline School Committee. See 641 F. 2d, at 18.

II

The decisions of this Court clearly establish that where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributable to the State. "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it can be regarded as governmental action. *Evans* v. *Newton*, 382 U. S. 296, 299 (1966). See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 175 (1972). The question whether such a relationship exists "can be determined only in the framework of the peculiar facts or circumstances present." *Burton*, *supra*, at 726. Here, an examination of the facts and circumstances leads inexorably to the conclusion that the actions of the New Perspectives School should be attributed to the State; it is difficult to imagine a closer relationship between a government and a private enterprise.

The New Perspectives School receives virtually all of its funds from state sources. This financial dependence on the State is an important indicium of governmental involvement.

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The school's very survival depends on the State. If the State chooses, it may exercise complete control over the school's operations simply by threatening to withdraw financial support if the school takes action that it considers objectionable.

The school is heavily regulated and closely supervised by the State. This fact provides further support for the conclusion that its actions should be attributed to the State. The school's freedom of decisionmaking is substantially circumscribed by the Massachusetts Department of Education's guidelines and the various contracts with state agencies. For example, the school is required to develop and comply with written rules for hiring and dismissal of personnel. Almost every decision the school makes is substantially affected in some way by the State's regulations.[1]

The fact that the school is providing a substitute for public education is also an important indicium of state action. The provision of education is one of the most important tasks performed by government: it ranks at the very apex of the function of a State. *Ambach* v. *Norwick*, 441 U. S. 68, 77 (1979).[2] Of course, as the majority emphasizes, *ante*, at

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[1] The majority argues that the fact that the school receives almost all of its funds from the State is not enough, by itself, to justify a finding of state action. It also contends that the fact that the school is closely supervised and heavily regulated is not enough, by itself, to justify such a finding. *Ante*, at 840–842. I am in general agreement with both propositions. However, when these two factors are present in the same case, and when other indicia of state action are also present, a finding of state action may very well be justified. By analyzing the various indicia of state action separately, without considering their cumulative impact, the majority commits a fundamental error. See also *ante*, at 842–843.

[2] This Court has repeatedly recognized the unique role that education plays in American society. See *Plyler* v. *Doe*, *ante*, at 221 (public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); *Wisconsin* v. *Yoder*, 406 U. S. 205, 221 (1972) (education is necessary to "prepare citizens to participate effectively and intelligently in our open political system"); *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring)

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842, performance of a public function is by itself sufficient to justify treating a private entity as a state actor only where the function has been "traditionally the exclusive prerogative of the State." *Jackson, supra*, at 353. See *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Smith* v. *Allwright*, 321 U. S. 649 (1944). But the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action. Cf. *Evans* v. *Newton, supra*.

The school's provision of a substitute for public education deserves particular emphasis because of the role of Chapter 766. Under this statute, the State is *required* to provide a free education to all children, including those with special needs. Clearly, if the State had decided to provide the service itself, its conduct would be measured against constitutional standards. The State should not be permitted to avoid constitutional requirements simply by delegating its statutory duty to a private entity.[3] In my view, such a delegation does not convert the performance of the duty from public to private action when the duty is specific and the private institution's decisionmaking authority is significantly curtailed.

When an entity is not only heavily regulated and funded by the State, but also provides a service that the State is required to provide, there is a very close nexus with the State.

(public education is a "most vital civic institution for the preservation of a democratic system of government"); *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance").

[3] A State may not deliberately delegate a task to a private entity in order to avoid its constitutional obligations. *Terry* v. *Adams*, 345 U. S. 461 (1953). But a State's decision to delegate a duty to a private entity should be carefully examined even when it has acted, not in bad faith, but for reasons of convenience. The doctrinal basis for the state action requirement is that exercises of state authority pose a special threat to constitutional values. A private entity vested with state authority poses that threat just as clearly as a state agency.

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Under these circumstances, it is entirely appropriate to treat the entity as an arm of the State. Cf. *Smith* v. *Allwright, supra; Terry* v. *Adams*, 345 U. S. 461, 469 (1953) (opinion of Black, J.). Here, since the New Perspectives School exists solely to fulfill the State's obligations under Chapter 766, I think it fully reasonable to conclude that the school is a state actor.

Indeed, I would conclude that the actions challenged here were under color of state law, even if I believed that the sole basis for state action was the fact that the school was providing Chapter 766 services. Petitioners claim that they were discharged because they supported student demands for increased responsibilities in school affairs, that is, because they criticized the school's educational policies. If petitioners' allegations are true, then the school has adopted a specific view of the sort of education that should be provided under the statute, and refuses to tolerate departures from that view.[4] The State, by refusing to intervene, has effectively endorsed that view of its duties under Chapter 766. In short, because petitioners' criticism was directly addressed

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[4] This Court has previously emphasized the close relationship between teachers' free speech and the educational process. See *Givhan* v. *Western Line Consolidated School District*, 439 U. S. 410 (1979); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Shelton* v. *Tucker*, 364 U. S. 479 (1960).

The Commonwealth of Massachusetts has recently promulgated regulations recognizing that the role of teachers of special needs students is not limited to course instruction. These regulations provide:

"[T]he candidate will demonstrate that he or she:

1. responds to the needs of individual students so as to enhance their self-esteem and development
2. establishes constructive relationships with parents and others primarily concerned with the well-being of his or her students
3. works to develop a learning environment which is favorable to openness of inquiry and devoid of ridicule." 603 Code Mass. Regs. § 7, ¶ 7.04(40)(f) (1982).

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to the State's responsibilities under Chapter 766, a finding of state action is justified.[5]

The majority repeatedly compares the school to a private contractor that "depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government." *Ante*, at 840–841. The New Perspectives School can be readily distinguished, however. Although shipbuilders and dambuilders, like the school, may be dependent on government funds, they are not so closely supervised by the government. And unlike most private contractors, the school is performing a statutory duty of the State.

The majority also focuses on the fact that the actions at issue here are personnel decisions. It would apparently concede that actions directly affecting the students could be treated as under color of state law, since the school is fulfilling the State's obligations to those children under Chapter 766. It suggests, however, that the State has no interest in personnel decisions. As I have suggested, I do not share this narrow view of the school's obligations; the personnel decisions challenged here are related to the provision of Chapter 766 education. In any event, since the school is funded almost entirely by the State, is closely supervised by the State, and exists solely to perform the State's statutory duty to educate children with special needs—since the school is really just an arm of the State—its personnel decisions may appropriately be considered state action.

III

Even though there are myriad indicia of state action in this case, the majority refuses to find that the school acted under

[5] In my view, this connection between the teacher's role and the provision of Chapter 766 education would justify a finding that the State had acted under color of state law, even if the school did not depend solely on Chapter 766 placements. If the school had only one special needs student, and petitioners were discharged for criticizing the school's education of that child, a finding of state action might be justified.

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color of state law when it discharged petitioners. The decision in this case marks a return to empty formalism in state action doctrine. Because I believe that the state action requirement must be given a more sensitive and flexible interpretation than the majority offers, I dissent.

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Syllabus

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, ET AL. *v.* PICO, BY HIS NEXT FRIEND, PICO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-2043. Argued March 2, 1982—Decided June 25, 1982

Petitioner Board of Education, rejecting recommendations of a committee of parents and school staff that it had appointed, ordered that certain books, which the Board characterized as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," be removed from high school and junior high school libraries. Respondent students then brought this action for declaratory and injunctive relief under 42 U. S. C. § 1983 against the Board and petitioner Board members, alleging that the Board's actions had denied respondents their rights under the First Amendment. The District Court granted summary judgment in petitioners' favor. The Court of Appeals reversed and remanded for a trial on the merits of respondents' allegations.

Held: The judgment is affirmed.

638 F. 2d 404, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE STEVENS, concluded:

1. The First Amendment imposes limitations upon a local school board's exercise of its discretion to remove books from high school and junior high school libraries. Pp. 863–872.

(a) Local school boards have broad discretion in the management of school affairs, but such discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 506, and such rights may be directly and sharply implicated by the removal of books from the shelves of a school library. While students' First Amendment rights must be construed "in light of the special characteristics of the school environment," *ibid.*, the special characteristics of the school *library* make that environment especially appropriate for the recognition of such rights. Pp. 863–869.

(b) While petitioners might rightfully claim absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values in schools, petitioners' reliance upon that duty is misplaced

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where they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom into the school library and the regime of voluntary inquiry that there holds sway. P. 869.

(c) Petitioners possess significant discretion to determine the content of their school libraries, but that discretion may not be exercised in a narrowly partisan or political manner. Whether petitioners' removal of books from the libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. Local school boards may not remove books from school libraries simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642. If such an intention was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. Pp. 869–872.

2. The evidentiary materials before the District Court must be construed favorably to respondents, given the procedural posture of this case. When so construed, those evidentiary materials raise a genuine issue of material fact as to whether petitioners exceeded constitutional limitations in exercising their discretion to remove the books at issue from their school libraries. Respondents' allegations, and some of the evidentiary materials before the District Court, also fail to exclude the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivation. Pp. 872–875.

JUSTICE BLACKMUN concluded that a proper balance between the limited constitutional restriction imposed on school officials by the First Amendment and the broad state authority to regulate education, would be struck by holding that school officials may not remove books from school libraries for the *purpose* of restricting access to the political ideas or social perspectives discussed in the books, when that action is motivated simply by the officials' disapproval of the ideas involved. Pp. 879–882.

JUSTICE WHITE, while agreeing that there should be a trial to resolve the factual issues, concluded that there is no necessity at this point for discussing the extent to which the First Amendment limits the school board's discretion to remove books from the school libraries. Pp. 883–884.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL and STEVENS, JJ., joined and in all but Part II–A(1) of which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 875. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 883. BURGER, C. J., filed a

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dissenting opinion, in which POWELL, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 885. POWELL, J., filed a dissenting opinion, *post*, p. 893. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 904. O'CONNOR, J., filed a dissenting opinion, *post*, p. 921.

George W. Lipp, Jr., argued the cause for petitioners. With him on the briefs was *David S. J. Rubin*.

Alan H. Levine argued the cause for respondents. With him on the brief were *Steven R. Shapiro, Burt Neuborne, Alan Azzara, Bruce J. Ennis, Jr.*, and *Charles S. Sims*.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL and JUSTICE STEVENS joined, and in which JUSTICE BLACKMUN joined except for Part II–A–(1).

The principal question presented is whether the First Amendment[1] imposes limitations upon the exercise by a local

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*Briefs of *amici curiae* urging reversal were filed by *Bruce A. Taylor* for Charles H. Keating, Jr., et al.; and by *David Crump* for the Legal Foundation of America.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Marsha Berzon, Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Don H. Reuben* and *James A. Klenk* for the American Library Association et al.; by *Harold P. Weinberger, Justin J. Finger*, and *Jeffrey P. Sinensky* for the Anti-Defamation League of B'Nai B'Rith; by *R. Bruce Rich* for the Association of American Publishers, Inc., et al.; by *Irwin Karp* for the Authors League of America, Inc.; by *Robert M. Weinberg, Michael H. Gottesman*, and *David Rubin* for the National Education Association; by *James R. Sandner, Jeffrey S. Karp*, and *Elizabeth A. Truly* for New York State United Teachers; and by *Jerry Simon Chasen* and *Marcia B. Paul* for P. E. N. American Center.

Briefs of *amici curiae* were filed by *Nathan Z. Dershowitz* and *Edward Labaton* for the American Jewish Congress et al.; and by *Whitney North Seymour, Jr.*, and *Martha L. Wolfe* for the Long Island Library Association Coalition.

[1] The Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It applies to

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school board of its discretion to remove library books from high school and junior high school libraries.

I

Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim. When this suit was brought, Ahrens was the President of the Board, Martin was the Vice President, and the remaining petitioners were Board members. The Board is a state agency charged with responsibility for the operation and administration of the public schools within the Island Trees School District, including the Island Trees High School and Island Trees Memorial Junior High School. Respondents are Steven Pico, Jacqueline Gold, Glenn Yarris, Russell Rieger, and Paul Sochinski. When this suit was brought, Pico, Gold, Yarris, and Rieger were students at the High School, and Sochinski was a student at the Junior High School.

In September 1975, petitioners Ahrens, Martin, and Hughes attended a conference sponsored by Parents of New York United (PONYU), a politically conservative organization of parents concerned about education legislation in the State of New York. At the conference these petitioners obtained lists of books described by Ahrens as "objectionable," App. 22, and by Martin as "improper fare for school students," *id.*, at 101.[2] It was later determined that the High School library contained nine of the listed books, and that another listed book was in the Junior High School library.[3] In

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the States by virtue of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936).

[2] The District Court noted, however, that petitioners "concede that the books are not obscene." 474 F. Supp. 387, 392 (EDNY 1979).

[3] The nine books in the High School library were: Slaughter House Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers, edited

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February 1976, at a meeting with the Superintendent of Schools and the Principals of the High School and Junior High School, the Board gave an "unofficial direction" that the listed books be removed from the library shelves and delivered to the Board's offices, so that Board members could read them.[4] When this directive was carried out, it became publicized, and the Board issued a press release justifying its action. It characterized the removed books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," and concluded that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers." 474 F. Supp. 387, 390 (EDNY 1979).

A short time later, the Board appointed a "Book Review Committee," consisting of four Island Trees parents and four members of the Island Trees schools staff, to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level." In July, the Committee

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by Langston Hughes; Go Ask Alice, of anonymous authorship; Laughing Boy, by Oliver LaFarge; Black Boy, by Richard Wright; A Hero Ain't Nothin' But A Sandwich, by Alice Childress; and Soul On Ice, by Eldridge Cleaver. The book in the Junior High School library was A Reader for Writers, edited by Jerome Archer. Still another listed book, The Fixer, by Bernard Malamud, was found to be included in the curriculum of a 12th-grade literature course. 474 F. Supp., at 389, and nn. 2–4.

[4] The Superintendent of Schools objected to the Board's informal directive, noting:

"[W]e already have a policy . . . designed expressly to handle such problems. It calls for the Superintendent, upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations. I feel it is a good policy—and it is Board policy—and that it should be followed in this instance. Furthermore, I think it can be followed quietly and in such a way as to reduce, perhaps avoid, the public furor which has always attended such issues in the past." App. 44.

The Board responded to the Superintendent's objection by repeating its directive "that *all copies* of the library books in question be removed from the libraries to the Board's office." *Id.*, at 47 (emphasis in original).

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made its final report to the Board, recommending that five of the listed books be retained[5] and that two others be removed from the school libraries.[6] As for the remaining four books, the Committee could not agree on two,[7] took no position on one,[8] and recommended that the last book be made available to students only with parental approval.[9] The Board substantially rejected the Committee's report later that month, deciding that only one book should be returned to the High School library without restriction,[10] that another should be made available subject to parental approval,[11] but that the remaining nine books should "be removed from elementary and secondary libraries and [from] use in the curriculum." *Id.*, at 391.[12] The Board gave no reasons for rejecting the recommendations of the Committee that it had appointed.

Respondents reacted to the Board's decision by bringing the present action under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of New York. They alleged that petitioners had

> "ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, politi-

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[5] The Fixer, Laughing Boy, Black Boy, Go Ask Alice, and Best Short Stories by Negro Writers. 474 F. Supp., at 391, nn. 6–7.

[6] The Naked Ape and Down These Mean Streets. 474 F. Supp., at 391, n. 8.

[7] Soul On Ice and A Hero Ain't Nothin' But A Sandwich. 474 F. Supp., at 391, n. 9.

[8] A Reader for Writers. 474 F. Supp., at 391, n. 11. The reason given for this disposition was that all members of the Committee had not been able to read the book. *Id.*, at 391.

[9] Slaughter House Five. 474 F. Supp., at 391, n. 10.

[10] Laughing Boy. 474 F. Supp., at 391, n. 12.

[11] Black Boy. 474 F. Supp., at 391, n. 13.

[12] As a result, the nine removed books could not be assigned or suggested to students in connection with school work. *Id.*, at 391. However, teachers were not instructed to refrain from discussing the removed books or the ideas and positions expressed in them. App. 131.

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> cal and moral tastes and not because the books, taken as a whole, were lacking in educational value." App. 4.

Respondents claimed that the Board's actions denied them their rights under the First Amendment. They asked the court for a declaration that the Board's actions were unconstitutional, and for preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula. *Id.*, at 5–6.

The District Court granted summary judgment in favor of petitioners. 474 F. Supp. 387 (1979). In the court's view, "the parties substantially agree[d] about the motivation behind the board's actions," *id.*, at 391—namely, that

> "the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." *Id.*, at 392.

With this factual premise as its background, the court rejected respondents' contention that their First Amendment rights had been infringed by the Board's actions. Noting that statutes, history, and precedent had vested local school boards with a broad discretion to formulate educational policy,[13] the court concluded that it should not intervene in "'the daily operations of school systems'" unless "'basic constitutional values'" were "'sharply implicate[d],'"[14] and deter-

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[13] 474 F. Supp., at 396–397, citing *Presidents Council, District 25* v. *Community School Board #25*, 457 F. 2d 289 (CA2 1972); *James* v. *Board of Education*, 461 F. 2d 566, 573 (CA2 1972); *East Hartford Educational Assn.* v. *Board of Education*, 562 F. 2d 838, 856 (CA2 1977) (en banc).

[14] 474 F. Supp., at 395, quoting *Presidents Council, District 25* v. *Community School Board #25, supra*, at 291 (in turn quoting *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968)).

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mined that the conditions for such intervention did not exist in the present case. Acknowledging that the "removal [of the books] . . . clearly was content-based," the court nevertheless found no constitutional violation of the requisite magnitude:

> "The board has restricted access only to certain books which the board believed to be, in essence, vulgar. While removal of such books from a school library may . . . reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right." *Id.*, at 397.

A three-judge panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court, and remanded the action for a trial on respondents' allegations. 638 F. 2d 404 (1980). Each judge on the panel filed a separate opinion. Delivering the judgment of the court, Judge Sifton treated the case as involving "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters," and concluded that petitioners were obliged to demonstrate a reasonable basis for interfering with respondents' First Amendment rights. *Id.*, at 414–415. He then determined that, at least at the summary judgment stage, petitioners had not offered sufficient justification for their action,[15] and concluded that respondents "should have . . . been offered an opportunity to persuade a finder of fact that the ostensible justifications for [petitioners'] actions . . . were simply pretexts for the suppression of free speech." *Id.*, at 417.[16] Judge New-

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[15] After criticizing "the criteria for removal" employed by petitioners as "suffer[ing] from excessive generality and overbreadth," and the procedures used by petitioners as "erratic, arbitrary and free-wheeling," Judge Sifton observed that "precision of regulation and sensitivity to First Amendment concerns" were "hardly established" by such procedures. 638 F. 2d, at 416.

[16] Judge Sifton stated that it could be inferred from the record that petitioners' "political views and personal taste [were] being asserted not in the

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man concurred in the result. *Id.*, at 432–438. He viewed the case as turning on the contested factual issue of whether petitioners' removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas. *Id.*, at 436–437.[17] We granted certiorari, 454 U. S. 891 (1981).

II

We emphasize at the outset the limited nature of the substantive question presented by the case before us. Our precedents have long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom. For example, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), struck down a state law that forbade the teaching of modern foreign languages in public and private schools, and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), declared unconstitutional a state law that prohibited the teaching of the Darwinian theory of evolution in any state-supported school. But the current action does not require us to re-enter this difficult terrain, which *Meyer* and *Epperson* traversed without apparent misgiving. For as this case is presented to us, it does not involve textbooks, or indeed any books that Island

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interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community." *Id.*, at 417.

[17] Judge Mansfield dissented, *id.*, at 419–432, based upon a distinctly different reading of the record developed in the District Court. According to Judge Mansfield, "the undisputed evidence of the motivation for the Board's action was the perfectly permissible ground that the books were indecent, in bad taste, and unsuitable for educational purposes." *Id.*, at 430. He also asserted that in reaching its decision "the Board [had] acted carefully, conscientiously and responsibly after according due process to all parties concerned." *Id.*, at 422. Judge Mansfield concluded that "the First Amendment entitles students to reasonable freedom of expression but not to freedom from what some may consider to be excessively moralistic or conservative selection by school authorities of library books to be used as educational tools." *Id.*, at 432.

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Trees students would be required to read.[18] Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them.

The substantive question before us is still further constrained by the procedural posture of this case. Petitioners were granted summary judgment by the District Court. The Court of Appeals reversed that judgment, and remanded the action for a trial on the merits of respondents' claims. We can reverse the judgment of the Court of Appeals, and

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[18] Four of respondents' five causes of action complained of petitioners' "resolutions ordering the removal of certain books from the school libraries of the District and prohibiting the use of those books in the curriculum." App. 5. The District Court concluded "that respect for . . . the school board's substantial control over educational content . . . preclude[s] any finding of a first amendment violation arising out of removal of any of the books from use in the curriculum." 474 F. Supp., at 397. This holding is not at issue here. Respondents' fifth cause of action complained that petitioners' "resolutions prohibiting the use of certain books in the curriculum of schools in the District" had "imposed upon teachers in the District arbitrary and unreasonable restrictions upon their ability to function as teachers in violation of principles of academic freedom." App. 6. The District Court held that respondents had not proved this cause of action: "before such a claim may be sustained there must at least be a real, not an imagined controversy." 474 F. Supp., at 397. Respondents have not sought review of that holding in this Court.

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grant petitioners' request for reinstatement of the summary judgment in their favor, only if we determine that "there is no genuine issue as to any material fact," and that petitioners are "entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). In making our determination, any doubt as to the existence of a genuine issue of material fact must be resolved against petitioners as the moving party. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157–159 (1970). Furthermore, "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits, and depositions submitted below] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962).

In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose *any* limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations? If we answer either of these questions in the negative, then we must reverse the judgment of the Court of Appeals and reinstate the District Court's summary judgment for petitioners. If we answer both questions in the affirmative, then we must affirm the judgment below. We examine these questions in turn.

A

(1)

The Court has long recognized that local school boards have broad discretion in the management of school affairs. See, *e. g.*, *Meyer* v. *Nebraska*, *supra*, at 402; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925). *Epperson* v. *Arkan-*

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sas, supra, at 104, reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities," and that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 507 (1969), noted that we have "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." We have also acknowledged that public schools are vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U. S. 68, 76–77 (1979). We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." Brief for Petitioners 10.[19]

At the same time, however, we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. In *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), we held that under the First Amendment a student in a public school could not be compelled to salute the flag. We reasoned:

> "Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional

[19] Respondents also agree with these propositions. Tr. of Oral Arg. 28, 41.

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> freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*, at 637.

Later cases have consistently followed this rationale. Thus *Epperson* v. *Arkansas* invalidated a State's anti-evolution statute as violative of the Establishment Clause, and reaffirmed the duty of federal courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry." 393 U. S., at 104. And *Tinker* v. *Des Moines School Dist.*, *supra*, held that a local school board had infringed the free speech rights of high school and junior high school students by suspending them from school for wearing black armbands in class as a protest against the Government's policy in Vietnam; we stated there that the "comprehensive authority . . . of school officials" must be exercised "consistent with fundamental constitutional safeguards." 393 U. S., at 507. In sum, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.*, at 506, and therefore local school boards must discharge their "important, delicate, and highly discretionary functions" within the limits and constraints of the First Amendment.

The nature of students' First Amendment rights in the context of this case requires further examination. *West Virginia Board of Education* v. *Barnette*, *supra*, is instructive. There the Court held that students' liberty of conscience could not be infringed in the name of "national unity" or "patriotism." 319 U. S., at 640–641. We explained that

> "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*, at 642.

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Similarly, *Tinker* v. *Des Moines School Dist.*, *supra*, held that students' rights to freedom of expression of their political views could not be abridged by reliance upon an "undifferentiated fear or apprehension of disturbance" arising from such expression:

> "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this . . . often disputatious society." 393 U. S., at 508–509.

In short, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students." *Id.*, at 506.

Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. *Epperson* v. *Arkansas*, 393 U. S., at 104. But we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). And we have recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965). In keeping with this princi-

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ple, we have held that in a variety of contexts "the Constitution protects the right to receive information and ideas." *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); see *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–763 (1972) (citing cases). This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: "The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943) (citation omitted). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring).

More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).[20]

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[20] For a modern version of this observation, see A. Meiklejohn, Free Speech and Its Relation to Self-Government 26 (1948):

"Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good."

See also *Butler* v. *Michigan*, 352 U. S. 380, 383–384 (1957); *Procunier* v. *Martinez*, 416 U. S. 396, 408–409 (1974); *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 30 (1978) (STEVENS, J., dissenting) ("[T]he First Amendment pro-

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As we recognized in *Tinker*, students too are beneficiaries of this principle:

> "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.'" 393 U. S., at 511 (quoting *Burnside* v. *Byars*, 363 F. 2d 744, 749 (CA5 1966)).

In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." *Tinker* v. *Des Moines School Dist.*, 393 U. S., at 506. But the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students.

A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty." *Brown* v. *Louisiana*, 383 U. S. 131, 142 (1966) (opinion of Fortas, J.). *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), observed that "'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.'"[21] The school library is the principal locus

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tects not only the dissemination but also the receipt of information and ideas"); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862–863 (1974) (POWELL, J., dissenting) ("[P]ublic debate must not only be unfettered; it must be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression").

[21] 385 U. S., at 603, quoting *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (opinion of Warren, C. J.).

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of such freedom. As one District Court has well put it, in the school library

> "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom." *Right to Read Defense Committee* v. *School Committee*, 454 F. Supp. 703, 715 (Mass. 1978).

Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed *unfettered* discretion to "transmit community values" through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

(2)

In rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content. We thus must turn to the question of the extent to which the First Amendment places limitations upon the discretion of petitioners to remove books from their libraries. In this inquiry we

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enjoy the guidance of several precedents. *West Virginia Board of Education* v. *Barnette*, stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . . If there are any circumstances which permit an exception, they do not now occur to us." 319 U. S., at 642.

This doctrine has been reaffirmed in later cases involving education. For example, *Keyishian* v. *Board of Regents*, *supra*, at 603, noted that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom;" see also *Epperson* v. *Arkansas*, 393 U. S., at 104–105. And *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274 (1977), recognized First Amendment limitations upon the discretion of a local school board to refuse to rehire a nontenured teacher. The school board in *Mt. Healthy* had declined to renew respondent Doyle's employment contract, in part because he had exercised his First Amendment rights. Although Doyle did not have tenure, and thus "could have been discharged for no reason whatever," *Mt. Healthy* held that he could "nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.*, at 283–284. We held further that once Doyle had shown "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' . . . in the Board's decision not to rehire him," the school board was obliged to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287.

With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books

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written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision,[22] then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. Tr. of Oral Arg. 36. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." *Id.*, at 53. In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding

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[22] By "decisive factor" we mean a "substantial factor" in the absence of which the opposite decision would have been reached. See *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977).

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today affects only the discretion to *remove* books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S., at 642. Such purposes stand inescapably condemned by our precedents.

B

We now turn to the remaining question presented by this case: Do the evidentiary materials that were before the District Court, when construed most favorably to respondents, raise a genuine issue of material fact whether petitioners exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries? We conclude that the materials do raise such a question, which forecloses summary judgment in favor of petitioners.

Before the District Court, respondents claimed that petitioners' decision to remove the books "was based on [their] personal values, morals and tastes." App. 139. Respondents also claimed that petitioners objected to the books in part because excerpts from them were "anti-American." *Id.*, at 140. The accuracy of these claims was partially conceded by petitioners,[23] and petitioners' own affidavits lent further support to respondents' claims.[24] In addition, the

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[23] Petitioners acknowledged that their "evaluation of the suitability of the books was based on [their] personal values, morals, tastes and concepts of educational suitability." App. 142. But they did not accept, and thus apparently denied, respondents' assertion that some excerpts were objected to as "anti-American." *Ibid.*

[24] For example, petitioner Ahrens stated:

"I am basically a conservative in my general philosophy and feel that the community I represent as a school board member shares that philosophy. . . . I feel that it is my duty to apply my conservative principles to the decision making process in which I am involved as a board member and

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record developed in the District Court shows that when petitioners offered their first public explanation for the removal of the books, they relied in part on the assertion that the removed books were "anti-American," and "offensive to . . . Americans in general." 474 F. Supp., at 390.[25] Furthermore, while the Book Review Committee appointed by petitioners was instructed to make its recommendations based upon criteria that appear on their face to be permissible—the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level," App. 67—the Committee's recommendations that five of the books be retained and that only two be removed were essentially rejected by petitioners, without any statement of reasons for doing so. Finally, while petitioners originally defended their removal decision with the explanation that "these books contain obscenities, blasphemies, brutality, and perversion beyond description," 474 F. Supp., at 390, one of the books, A Reader for Writers, was removed even though it contained no such language. 638 F. 2d, at 428, n. 6 (Mansfield, J., dissenting).

I have done so with regard to . . . curriculum formation and content and other educational matters." *Id.*, at 21.

"We are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires." *Id.*, at 27.

Petitioners Fasulo, Hughes, Melchers, Michaels, and Nessim made a similar statement, that they had "represented the basic values of the community in [their] actions." *Id.*, at 120.

[25] When asked to give an example of "anti-Americanism" in the removed books, petitioners Ahrens and Martin both adverted to A Hero Ain't Nothin' But A Sandwich, which notes at one point that George Washington was a slaveholder. See A. Childress, A Hero Ain't Nothin' But A Sandwich 43 (1973); Deposition of Petitioner Ahrens 89; Deposition of Petitioner Martin 20–22. Petitioner Martin stated: "I believe it is anti-American to present one of the nation's heroes, the first President, . . . in such a negative and obviously one-sided life. That is one example of what I would consider anti-American." Deposition of Petitioner Martin 22.

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Standing alone, this evidence respecting the substantive motivations behind petitioners' removal decision would not be decisive. This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. Petitioners' removal procedures were vigorously challenged below by respondents, and the evidence on this issue sheds further light on the issue of petitioners' motivations.[26] Respondents alleged that in making their removal decision petitioners ignored "the advice of literary experts," the views of "librarians and teachers within the Island Trees School system," the advice of the Superintendent of Schools, and the guidance of publications that rate books for junior and senior high school students. App. 128–129. Respondents also claimed that petitioners' decision was based solely on the fact that the books were named on the PONYU list received by petitioners Ahrens, Martin, and Hughes, and that petitioners "did not undertake an independent review of other books in the [school] libraries." *Id.*, at 129–130. Evidence before the District Court lends support to these claims. The record shows that immediately after petitioners first ordered the books removed from the library shelves, the Superintendent of Schools reminded them that "we already have a policy . . . designed ex-

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[26] We have recognized in numerous precedents that when seeking to distinguish activities unprotected by the First Amendment from other, protected activities, the State must employ "sensitive tools" in order to achieve a precision of regulation that avoids the chilling of protected activities. See, *e. g.*, *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603–604 (1967); *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971). In the case before us, the presence of such sensitive tools in petitioners' decisionmaking process would naturally indicate a concern on their part for the First Amendment rights of respondents; the absence of such tools might suggest a lack of such concern. See 638 F. 2d, at 416–417 (opinion of Sifton, J.).

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pressly to handle such problems," and recommended that the removal decision be approached through this established channel. See n. 4, *supra*. But the Board disregarded the Superintendent's advice, and instead resorted to the extraordinary procedure of appointing a Book Review Committee—the advice of which was later rejected without explanation. In sum, respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

Construing these claims, affidavit statements, and other evidentiary materials in a manner favorable to respondents, we cannot conclude that petitioners were "entitled to a judgment as a matter of law." The evidence plainly does not foreclose the possibility that petitioners' decision to remove the books rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on petitioners' part to impose upon the students of the Island Trees High School and Junior High School a political orthodoxy to which petitioners and their constituents adhered. Of course, some of the evidence before the District Court might lead a finder of fact to accept petitioners' claim that their removal decision was based upon constitutionally valid concerns. But that evidence at most creates a genuine issue of material fact on the critical question of the credibility of petitioners' justifications for their decision: On that issue, it simply cannot be said that there is no genuine issue as to any material fact.

The mandate shall issue forthwith.

Affirmed.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

While I agree with much in today's plurality opinion, and while I accept the standard laid down by the plurality to

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guide proceedings on remand, I write separately because I have a somewhat different perspective on the nature of the First Amendment right involved.

I

To my mind, this case presents a particularly complex problem because it involves two competing principles of constitutional stature. On the one hand, as the dissenting opinions demonstrate, and as we all can agree, the Court has acknowledged the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979). See, also, *ante*, at 863–864 (plurality opinion). Because of the essential socializing function of schools, local education officials may attempt "to promote civic virtues," *Ambach* v. *Norwick*, 441 U. S., at 80, and to "awake[n] the child to cultural values." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U. S., at 77.

On the other hand, as the plurality demonstrates, it is beyond dispute that schools and school boards must operate within the confines of the First Amendment. In a variety of academic settings the Court therefore has acknowledged the force of the principle that schools, like other enterprises operated by the State, may not be run in such a manner as to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). While none of these cases define the limits of a school board's au-

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thority to choose a curriculum and academic materials, they are based on the general proposition that "state-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 511 (1969).

The Court in *Tinker* thus rejected the view that "a State might so conduct its schools as to 'foster a homogeneous people.'" *Id.*, at 511, quoting *Meyer* v. *Nebraska*, 262 U. S. 390, 402 (1923). Similarly, *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967)—a case that involved the State's attempt to remove "subversives" from academic positions at its universities, but that addressed itself more broadly to public education in general—held that "[t]he classroom is peculiarly the 'marketplace of ideas'"; the First Amendment therefore "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.*, at 603. And *Barnette* is most clearly applicable here: its holding was based squarely on the view that "[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." The Court therefore made it clear that imposition of "ideological discipline" was not a proper undertaking for school authorities. 319 U. S., at 637.

In combination with more generally applicable First Amendment rules, most particularly the central proscription of content-based regulations of speech, see *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the cases outlined above yield a general principle: the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons. Because the school board must perform all its functions "within the limits of the Bill of Rights," *Barnette*, 319 U. S., at 637, this principle necessarily applies in at least a limited way to public education. Surely this is true in an ex-

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treme case: as the plurality notes, it is difficult to see how a school board, consistent with the First Amendment, could refuse for political reasons to buy books written by Democrats or by Negroes, or books that are "anti-American" in the broadest sense of that term. Indeed, JUSTICE REHNQUIST appears "cheerfully [to] concede" this point. *Post*, at 907 (dissenting opinion).

In my view, then, the principle involved here is both narrower and more basic than the "right to receive information" identified by the plurality. I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a "right to receive." See *post*, at 887 (BURGER, C. J., dissenting); *post*, at 915–918 (REHNQUIST, J., dissenting). And I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library, see *ante*, at 868–869; if schools may be used to inculcate ideas, surely libraries may play a role in that process.[1] Instead, I suggest that certain forms of state dis-

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[1] As a practical matter, however, it is difficult to see the First Amendment right that I believe is at work here playing a role in a school's choice of curriculum. The school's finite resources—as well as the limited number of hours in the day—require that education officials make sensitive choices between subjects to be offered and competing areas of academic emphasis; subjects generally are excluded simply because school officials have chosen to devote their resources to one rather than to another subject. As is explained below, a choice of this nature does not run afoul of the First Amendment. In any event, the Court has recognized that students' First Amendment rights in most cases must give way if they interfere "with the schools' work or [with] the rights of other students to be secure and to be let alone," *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 508 (1969), and such interference will rise to intolerable levels if public participation in the management of the curriculum becomes commonplace. In contrast, library books on a shelf intrude not at all on the daily operation of a school.

I also have some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book. But as Judge Newman observed, there is a profound practical and evidentiary distinction between

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crimination *between* ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.[2]

Certainly, the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values. But that environment also makes it particularly important that *some* limits be imposed. The school is designed to, and inevitably will, inculcate ways of thought and outlooks; if educators intentionally may eliminate all diversity of thought, the school will "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U. S., at 637. As I see it, then, the question in this case is how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."

II

In my view, we strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by

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the two actions: "removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity." 638 F. 2d 404, 436 (CA2 1980) (Newman, J., concurring in result).

[2] In effect, my view presents the obverse of the plurality's analysis: while the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it.

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the officials' disapproval of the ideas involved. It does not seem radical to suggest that state action calculated to suppress novel ideas or concepts is fundamentally antithetical to the values of the First Amendment. At a minimum, allowing a school board to engage in such conduct hardly teaches children to respect the diversity of ideas that is fundamental to the American system. In this context, then, the school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *Tinker* v. *Des Moines School Dist.*, 393 U. S., at 509, and that the board had something in mind in addition to the suppression of partisan or political views it did not share.

As I view it, this is a narrow principle. School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present. These decisions obviously will not implicate First Amendment values. And even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 757 (1978) (POWELL, J., concurring), or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are "manifestly inimical to the public welfare." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925). And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.

As is evident from this discussion, I do not share JUSTICE REHNQUIST's view that the notion of "suppression of ideas" is not a useful analytical concept. See *post*, at 918–920 (dissenting opinion). Indeed, JUSTICE REHNQUIST's discussion it-

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self demonstrates that "access to ideas" has been given meaningful application in a variety of contexts. See *post*, at 910–920, 914 ("[e]ducation consists of the selective presentation and explanation of ideas"). And I believe that tying the First Amendment right to the *purposeful* suppression of ideas makes the concept more manageable than JUSTICE REHNQUIST acknowledges. Most people would recognize that refusing to allow discussion of current events in Latin class is a policy designed to "inculcate" Latin, not to suppress ideas. Similarly, removing a learned treatise criticizing American foreign policy from an elementary school library because the students would not understand it is an action unrelated to the *purpose* of suppressing ideas. In my view, however, removing the same treatise because it is "anti-American" raises a far more difficult issue.

It is not a sufficient answer to this problem that a State operates a school in its role as "educator," rather than its role as "sovereign," see *post*, at 908–910 (REHNQUIST, J., dissenting), for the First Amendment has application to all the State's activities. While the State may act as "property owner" when it prevents certain types of expressive activity from taking place on public lands, for example, see *post*, at 908–909, few would suggest that the State may base such restrictions on the content of the speaker's message, or may take its action for the purpose of suppressing access to the ideas involved. See *Police Department of Chicago* v. *Mosley*, 408 U. S., at 96. And while it is not clear to me from JUSTICE REHNQUIST's discussion whether a State operates its public libraries in its "role as sovereign," surely difficult constitutional problems would arise if a State chose to exclude "anti-American" books from its public libraries—even if those books remained available at local bookstores.

Concededly, a tension exists between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials. But that tension demonstrates only that the problem

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here is a difficult one, not that the problem should be resolved by choosing one principle over another. As the Court has recognized, school officials must have the authority to make educationally appropriate choices in designing a curriculum: "the State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" *Barnette*, 319 U. S., at 631, quoting *Minersville School District* v. *Gobitis*, 310 U. S. 586, 604 (1940) (Stone, J., dissenting). Thus school officials may seek to instill certain values "by persuasion and example," 319 U. S., at 640, or by choice of emphasis. That sort of positive educational action, however, is the converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful. Arguing that the majority in the community rejects the ideas involved, see *post*, at 889, 891–892 (BURGER, C. J., dissenting), does not refute this principle: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . ." *Barnette*, 319 U. S., at 638.

As THE CHIEF JUSTICE notes, the principle involved here may be difficult to apply in an individual case. See *post*, at 889 (dissenting opinion). But on a record as sparse as the one before us, the plurality can hardly be faulted for failing to explore every possible ramification of its decision. And while the absence of a record "underscore[s] the views of those of us who originally felt that the cas[e] should not be taken," *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 559 (1957) (opinion of Harlan, J.), the case is here, and must be decided.

Because I believe that the plurality has derived a standard similar to the one compelled by my analysis, I join all but Part II–A(1) of the plurality opinion.

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JUSTICE WHITE, concurring in the judgment.

The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar." 474 F. Supp. 387, 397 (EDNY 1979). Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

The Court seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. When findings of fact and conclusions of law are made by the District Court, that may end the case. If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal. In any event, if there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals' judgment, and if certiorari is sought and granted, there will be time enough to address the First Amendment issues that may then be presented.

I thus prefer the course taken by the Court in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), a suit involving overtime compensation under the Fair Labor Standards Act. Summary judgment had been granted by the District Court and affirmed by the Court of Appeals. This Court reversed, holding that summary judgment was improvidently granted, and remanded for trial so that a proper record could be made. The Court expressly abjured issuing its advice on the legal

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issues involved. Writing for the Court, Justice Jackson stated:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.
>
> "Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions." *Id.*, at 257.

We took a similar course in a unanimous *per curiam* opinion in *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967). There we overturned a summary judgment since it was necessary to resolve a factual dispute about collaboration between one of the respondents and a state legislative committee. We remanded, saying: "In the absence of the factual refinement which can occur only as a result of trial, we need not and, indeed, could not express judgment as to the legal consequences of such collaboration, if it occurred." *Id.*, at 84.

The *Silas Mason* case turned on issues of statutory construction. It is even more important that we take a similar course in cases like *Dombrowski*, which involved Speech or Debate Clause immunity, and in this one, which poses difficult First Amendment issues in a largely uncharted field. We should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here. I therefore concur in the judgment of affirmance.

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CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, a plurality of the Court, in a lavish expansion going beyond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library is subject to federal-court review.[1] Were this to become the law, this Court would come perilously close to becoming a "super censor" of school board library decisions. Stripped to its essentials, the issue comes down to two important propositions: *first*, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and *second*, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library. In an attempt to place this case within the protection of the First Amendment, the plurality suggests a new "right" that, when shorn of the plurality's rhetoric, allows this Court to impose

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[1] At the outset, the plurality notes that certain school board members found the books in question "objectionable" and "improper" for junior and senior high school students. What the plurality apparently finds objectionable is that the inquiry as to the challenged books was initially stimulated by what is characterized as "a politically conservative organization of parents concerned about education," which had concluded that the books in question were "improper fare for school students." *Ante*, at 856. As noted by the District Court, however, and in the plurality opinion, *ante*, at 859, both parties substantially agreed about the motivation of the school board in removing the books:

"[T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." 474 F. Supp. 387, 392 (1979).

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its own views about what books must be made available to students.[2]

I

A

I agree with the fundamental proposition that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 865. For example, the Court has held that a school board cannot compel a student to participate in a flag salute ceremony, *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624 (1943), or *prohibit* a student from expressing certain views, so long as that expression does not disrupt the educational process. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969). Here, however, no restraints of any kind are placed on the students. They are free to read the books in question, which are available at public libraries and bookstores; they are free to discuss them in the classroom or elsewhere. Despite this absence of any direct external control on the students' ability to express themselves, the plurality suggests that there is a new First Amendment "entitlement" to have access to particular books in a school library.

The plurality cites *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), which struck down a state law that restricted the

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[2] In oral argument counsel advised the Court that of the original plaintiffs, only "[o]ne of them is still in school . . . until this June, and will assumedly graduate in June. *There is a potential question of mootness.*" Tr. of Oral Arg. 4–5 (emphasis added). The sole surviving plaintiff has therefore either recently been graduated from high school or is within days or even hours of graduation. Yet the plurality expresses views on a very important constitutional issue. Fortunately, there is no binding holding of the Court on the critical constitutional issue presented.

We do well to remember the admonition of Justice Frankfurter that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett*, 328 U. S. 303, 320 (1946) (concurring opinion). In the same vein, Justice Stone warned that "the only check upon our own exercise of power is our own sense of self-restraint." *United States* v. *Butler*, 297 U. S. 1, 79 (1936) (dissenting opinion).

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teaching of modern foreign languages in public and private schools, and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), which declared unconstitutional under the Establishment Clause a law banning the teaching of Darwinian evolution, to establish the validity of federal-court interference with the functioning of schools. The plurality finds it unnecessary "to re-enter this difficult terrain," *ante*, at 861, yet in the next breath relies on these very cases and others to establish the previously unheard of "right" of access to particular books in the public school library.[3] The apparent underlying basis of the plurality's view seems to be that students have an enforceable "right" to receive the information and ideas that are contained in junior and senior high school library books. *Ante*, at 866. This "right" purportedly follows "ineluctably" from the sender's First Amendment right to freedom of speech and as a "necessary predicate" to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. *Ante*, at 866–867. No such right, however, has previously been recognized.

It is true that where there is a willing distributor of materials, the government may not impose unreasonable obstacles to dissemination by the third party. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). And where the speaker desires to express certain ideas, the government may not impose unreasonable restraints. *Tinker* v. *Des Moines School Dist.*, *supra*. It does not follow, however, that a school board must affirmatively aid the speaker in its communication with the recipient. In short the plurality suggests today that if a writer has something to say, the government through its schools must be the courier. None of the cases cited by the plurality establish this broad-based proposition.

First, the plurality argues that the right to receive ideas is derived in part from the sender's First Amendment rights to

[3] Of course, it is perfectly clear that, unwise as it would be, the board could wholly dispense with the school library, so far as the First Amendment is concerned.

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send them. Yet we have previously held that a sender's rights are not absolute. *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970).[4] Never before today has the Court indicated that the government has an *obligation* to aid a speaker or author in reaching an audience.

Second, the plurality concludes that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Ante*, at 867 (emphasis in original). However, the "right to receive information and ideas," *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969), cited *ante*, at 867, does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government. The plurality cites James Madison to emphasize the importance of having an informed citizenry. *Ibid.* We all agree with Madison, of course, that knowledge is necessary for effective government. Madison's view, however, does not establish a *right* to have particular books retained on the school library shelves if the school board decides that they are inappropriate or irrelevant to the school's mission. Indeed, if the need to have an informed citizenry creates a "right," why is the government not also required to provide ready access to a variety of information? This same need would support a constitutional "right" of the people to have public libraries as part of a new constitutional "right" to continuing adult education.

The plurality also cites *Tinker*, *supra*, to establish that the recipient's right to free speech encompasses a right to have particular books retained in the school library shelf. *Ante*, at 868. But the cited passage of *Tinker* notes only that school officials may not *prohibit* a student from expressing his or her view on a subject unless that expression interferes with

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[4] In *Rowan* a unanimous Court upheld the right of a homeowner to direct the local post office to stop delivery of unwanted materials that the householder viewed as "erotically arousing or sexually provocative."

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the legitimate operations of the school. The government does not "contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965), cited *ante*, at 866, by choosing not to retain certain books on the school library shelf; it simply chooses not to be the conduit for that particular information. In short, even assuming the desirability of the policy expressed by the plurality, there is not a hint in the First Amendment, or in any holding of this Court, of a "right" to have the government provide continuing access to certain books.

B

Whatever role the government might play as a conduit of information, schools in particular ought not be made a slavish courier of the material of third parties. The plurality pays homage to the ancient verity that in the administration of the public schools "'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Ante*, at 864. If, as we have held, schools may legitimately be used as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system," *Ambach* v. *Norwick*, 441 U. S. 68, 77 (1979), school authorities must have broad discretion to fulfill that obligation. Presumably all activity within a primary or secondary school involves the conveyance of information and at least an implied approval of the worth of that information. How are "fundamental values" to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum. In order to fulfill its function, an elected school board *must* express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today.

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The plurality concludes that under the Constitution school boards cannot choose to retain or dispense with books if their discretion is exercised in a "narrowly partisan or political manner." *Ante*, at 870. The plurality concedes that permissible factors are whether the books are "pervasively vulgar," *ante*, at 871, or educationally unsuitable. *Ibid.* "Educational suitability," however, is a standardless phrase. This conclusion will undoubtedly be drawn in many—if not most—instances because of the decisionmaker's content-based judgment that the ideas contained in the book or the idea expressed from the author's method of communication are inappropriate for teenage pupils.

The plurality also tells us that a book may be removed from a school library if it is "pervasively vulgar." But why must the vulgarity be "pervasive" to be offensive? Vulgarity might be concentrated in a single poem or a single chapter or a single page, yet still be inappropriate. Or a school board might reasonably conclude that even "random" vulgarity is inappropriate for teenage school students. A school board might also reasonably conclude that the school board's retention of such books gives those volumes an implicit endorsement. Cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

Further, there is no guidance whatsoever as to what constitutes "political" factors. This Court has previously recognized that public education involves an area of broad public policy and "'go[es] to the heart of representative government.'" *Ambach* v. *Norwick*, *supra*, at 74. As such, virtually all educational decisions necessarily involve "political" determinations.

What the plurality views as valid reasons for removing a book at their core involve partisan judgments. Ultimately the federal courts will be the judge of whether the motivation for book removal was "valid" or "reasonable." Undoubtedly the validity of many book removals will ultimately turn on a judge's evaluation of the books. Discretion must be used,

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and the appropriate body to exercise that discretion is the local elected school board, not judges.[5]

We can all agree that as a matter of *educational policy* students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy. The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the *parents* have a large voice in running the school.[6] Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. Finally, even if

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[5] Indeed, this case is illustrative of how essentially all decisions concerning the retention of school library books will become the responsibility of federal courts. As noted in n. 1, *supra*, the parties agreed that the school board in this case acted not on religious principles but "on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." Despite this agreement as to motivation, the case is to be remanded for a determination of whether removal was in violation of the standard adopted by the plurality. The school board's error appears to be that it made its own determination rather than relying on experts. *Ante*, at 874–875.

[6] *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). There are approximately 15,000 school districts in the country. U. S. Bureau of Census, Statistical Abstract of the United States 297 (102d ed. 1981) (Table 495: Number of Local Governments, by Taxing Power and Type, and Public School Systems—States: 1972 and 1977). See also Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Texas L. Rev. 477, 506–507, n. 130 (1981).

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parents and students cannot convince the school board that book removal is inappropriate, they have alternative sources to the same end. Books may be acquired from bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools.[7]

II

No amount of "limiting" language could rein in the sweeping "right" the plurality would create. The plurality distinguishes library books from textbooks because library books "by their nature are optional rather than required reading." *Ante*, at 862. It is not clear, however, why this distinction requires *greater* scrutiny before "optional" reading materials may be removed. It would appear that required reading and textbooks have a greater likelihood of imposing a "'pall of orthodoxy'" over the educational process than do optional reading. *Ante*, at 870. In essence, the plurality's view transforms the availability of this "optional" reading into a "right" to have this "optional" reading maintained at the demand of teenagers.

The plurality also limits the new right by finding it applicable only to the *removal* of books once acquired. Yet if the First Amendment commands that certain books cannot be *removed*, does it not equally require that the same books be *acquired*? Why does the coincidence of timing become the basis of a constitutional holding? According to the plurality, the evil to be avoided is the "official suppression of ideas." *Ante*, at 871. It does not follow that the decision to *remove* a book is less "official suppression" than the decision not to acquire a book desired by someone.[8] Similarly, a decision to

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[7] Other provisions of the Constitution, such as the Establishment Clause, *Epperson* v. *Arkansas*, *supra*, and the Equal Protection Clause, also limit the discretion of the school board.

[8] The formless nature of the "right" found by the plurality in this case is exemplified by this purported distinction. Presumably a school board could, for any reason, choose not to purchase a book for its library. Once

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eliminate certain material from the curriculum, history for example, would carry an equal—probably greater—prospect of "official suppression." Would the decision be subject to our review?

III

Through use of bits and pieces of prior opinions unrelated to the issue of this case, the plurality demeans our function of constitutional adjudication. Today the plurality suggests that the *Constitution* distinguishes between school libraries and school classrooms, between *removing* unwanted books and *acquiring* books. Even more extreme, the plurality concludes that the Constitution *requires* school boards to justify to its teenage pupils the decision to remove a particular book from a school library. I categorically reject this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.

JUSTICE POWELL, dissenting.

The plurality opinion today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. After today's decision any junior high school student, by instituting a suit against a school board or teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools.

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it purchases that book, however, it is "locked in" to retaining it on the school shelf until it can justify a reason for its removal. This anomalous result of "book tenure" was pointed out by the District Court in this case. 474 F. Supp., at 395–396. See also *Presidents Council* v. *Community School Board*, 457 F. 2d 289, 293 (CA2 1972). Under the plurality view, if a school board wants to be assured that it maintains control over the education of its students, every page of every book sought to be acquired must be read before a purchase decision is made.

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I

School boards are uniquely local and democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country during their most formative and impressionable years. Apart from health, no subject is closer to the hearts of parents than their children's education during those years. For these reasons, the governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTA's), and even less formal arrangements that vary with schools, parents are informed and often may influence decisions of the board. Frequently, parents know the teachers and visit classes. It is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board.

I therefore view today's decision with genuine dismay. Whatever the final outcome of this suit and suits like it, the resolution of educational policy decisions through litigation, and the exposure of school board members to liability for such decisions, can be expected to corrode the school board's authority and effectiveness. As is evident from the generality of the plurality's "standard" for judicial review, the decision as to the educational worth of a book is a highly subjective one. Judges rarely are as competent as school authorities to make this decision; nor are judges responsive to the parents and people of the school district.[1]

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[1] The plurality speaks of the need for "sensitive" decisionmaking, pursuant to "regular" procedures. See *ante*, at 874, n. 26, and 875. One wonders what indeed does this mean. In this case, for example, the Board did not act precipitously. It simply did not agree with the recommendations of a committee it had appointed. Would the plurality require—as a constitutional matter—that the board delegate unreviewable authority to such a committee?

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The new constitutional right, announced by the plurality, is described as a "right to receive ideas" in a school. *Ante*, at 867. As the dissenting opinions of THE CHIEF JUSTICE and JUSTICE REHNQUIST so powerfully demonstrate, however, this new found right finds no support in the First Amendment precedents of this Court. And even apart from the inappropriateness of judicial oversight of educational policy, the new constitutional right is framed in terms that approach a meaningless generalization. It affords little guidance to courts, if they—as the plurality now authorizes them—are to oversee the inculcation of ideas. The plurality does announce the following standard: A school board's "discretion may not be exercised in a narrowly partisan or political manner." *Ante*, at 870. But this is a standardless standard that affords no more than subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular decision was made in a "narrowly partisan or political manner." Even the "chancellor's foot" standard in ancient equity jurisdiction was never this fuzzy.

As JUSTICE REHNQUIST tellingly observes, how does one limit—on a principled basis—today's new constitutional right? If a 14-year-old child may challenge a school board's decision to remove a book from the library, upon what theory is a court to prevent a like challenge to a school board's decision not to purchase that identical book? And at the even more "sensitive" level of "receiving ideas," does today's decision entitle student oversight of which courses may be added or removed from the curriculum, or even of what a particular teacher elects to teach or not teach in the classroom? Is not the "right to receive ideas" as much—or indeed even more—implicated in these educational questions?[2]

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[2] The plurality suggests that the books in a school library derive special protection under the Constitution because the school library is a place in which students exercise unlimited choice. See *ante*, at 868–869. This sug-

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II

The plurality's reasoning is marked by contradiction. It purports to acknowledge the traditional role of school boards and parents in deciding what should be taught in the schools. It states the truism that the schools are "vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" *Ante*, at 864. Yet when a school board, as in this case, takes its responsibilities seriously and seeks to decide what the fundamental values are that should be imparted, the plurality finds a constitutional violation.

Just this Term the Court held, in an opinion I joined, that the children of illegal aliens must be permitted to attend the public schools. See *Plyler* v. *Doe*, *ante*, p. 202. Quoting from earlier opinions, the Court noted that the "'public schoo[l is] a most vital civic institution for the preservation of democratic system of government'" and that the public schools are "the primary vehicle for transmitting 'the values on which our society rests.'" *Ante*, at 221. By denying to illegal aliens the opportunity "to absorb the values and skills upon which our social order rests" the law under review placed a lifelong disability upon these illegal alien children. *Ibid.*

Today the plurality drains much of the content from these apt phrases. A school board's attempt to instill in its students the ideas and values on which a democratic system depends is viewed as an impermissible suppression of other ideas and values on which other systems of government and other societies thrive. Books may not be removed because

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gestion is without support in law or fact. It is contradicted by this very case. The school board in this case does not view the school library as a place in which students pick from an unlimited range of books—some of which may be inappropriate for young people. Rather, the school library is analogous to an assigned reading list within which students may exercise a degree of choice.

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they are indecent; extol violence, intolerance, and racism; or degrade the dignity of the individual. Human history, not the least that of the 20th century, records the power and political life of these very ideas. But they are not our ideas or values. Although I would leave this educational decision to the duly constituted board, I certainly would not *require* a school board to promote ideas and values repugnant to a democratic society or to teach such values to *children*.

In different contexts and in different times, the destruction of written materials has been the symbol of despotism and intolerance. But the removal of nine vulgar or racist books from a high school library by a concerned local school board does not raise this specter. For me, today's decision symbolizes a debilitating encroachment upon the institutions of a free people.

Attached as an Appendix hereto is Judge Mansfield's summary of excerpts from the books at issue in this case.

APPENDIX TO OPINION OF POWELL, J., DISSENTING

"The excerpts which led the Board to look into the educational suitability of the books in question are set out (with minor corrections after comparison with the text of the books themselves) below. The pagination and the underlinings are retained from the original report used by the board. In newer editions of some of the books, the quotes appear at different pages.

"1) *SOUL ON ICE* by Eldridge Cleaver
PAGE QUOTE

157–158 '. . . There are white men who will pay you to fuck their wives. They approach you and say, "How would you like to fuck a white woman?" "What is this?" you ask. "On the up-and-up," he assures you. "It's all right. She's my wife. She needs black rod, is all. She has to have it. It's like a medicine or drug to her. She has to have it. I'll pay you. It's all on the level, no trick involved. Interested?"

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You go with him and he drives you to their home. The three of you go into the bedroom. There is a certain type who will leave you and his wife alone and tell you to pile her real good. After it is all over, he will pay you and drive you to wherever you want to go. Then there are some who like to peep at you through a keyhole and watch you have his woman, or peep at you through a window, or lie under the bed and listen to the creaking of the bed as you work out. There is another type who likes to masturbate while he stands beside the bed and watches you pile her. There is the type who likes to eat his woman up after you get through piling her. And there is the type who only wants you to pile her for a little while, just long enough to thaw her out and kick her motor over and arouse her to heat, then he wants you to jump off real quick and he will jump onto her and together they can make it from there by themselves.'

"2) *A HERO AIN'T NOTHING BUT A SANDWICH*
by Alice Childress
PAGE QUOTE

10 'Hell, no! *Fuck the society.*'
64–65 'The hell with the junkie, the wino, the capitalist, the welfare checks, the world . . . yeah, and *fuck* you too!'
75–76 'They can have back the spread and curtains, I'm too old for them *fuckin* bunnies anyway.'

"3) *THE FIXER* by Bernard Malamud
PAGE QUOTE

52 'What do you think goes on in the wagon at night: Are the drivers on their knees *fucking their mothers*?'
90 '*Fuck yourself*, said the blinker, etc.'
92 'Who else would do anything like that but a *mother-fucking* Zhid?'
146 'No more noise out of you or I'll shoot your *Jew cock off.*'
189 'Also there's a lot of *fucking in the Old Testament*, so how is that religious?'
192 'You better go *fuck yourself*, Bok, said Kogin, I'm onto your Jew tricks.'

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215 'Ding-dong giddyap. A *Jew's cock's* in the devil's hock.'
216 'You *cocksucker* Zhid, I ought make you lick it up off the floor.'

"4) *GO ASK ALICE* by Anonymous
PAGE QUOTE

31 'I wonder if sex without acid could be so exciting, so wonderful, so indescribable. I always thought it just took a minute, or that it would be like dogs mating.'
47 'Chris and I walked into Richie and Ted's apartment to find the bastards stoned and making love to each other . . . low class queer.'
81 'shitty, goddamned, pissing, ass, goddamned beJesus, screwing life's, ass, shit. Doris was ten and had *humped* with who knows how many men in between . . . her current stepfather started having sex with her but good . . . *sonofabitch balling her*'
83 'but now when I face a girl its like facing a boy. I get all excited and turned on. *I want to screw with the girl. . . .*'
84 'I'd rather screw with a guy . . . sometimes I want one of the girls to kiss me. I want her to touch me, to have her sleep under me.'
84 'Another day, another *blow job* . . . If I don't give *Big Ass a blow* he'll cut off my supply . . . and LittleJacon is yelling, "Mama, *Daddy can't come now. He's humping Carla.*"
85 'Shit, goddamn, goddamn prick, son-of-a-bitch, ass, pissed, bastard, goddamn, bullshit
94 'I hope you have a *nice orgasm with your dog tonight.*'
110 'You *fucking* Miss Polly pure
117 'Then he said that all I needed was a good *fuck.*'
146 'It might be great because I'm practically a virgin in the sense that I've never had sex except when I've been stoned. . . .'

"5) *SLAUGHTERHOUSE FIVE* by Kurt Vonnegut, Jr.
PAGE QUOTE

29 'Get out of the road, you dumb *motherfucker.*' The last word was still a novelty in the speech of white people in 1944.

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It was fresh and astonishing to Billy, who had never *fucked* anybody . . .'

32 'You stake a guy out on an anthill in the desert-see? He's facing upward, and you put *honey* all over his *balls and pecker*, and you cut off his eyelids so he has to stare at the sun till he dies.'

34 'He had a prophylactic kit containing two tough condoms 'For the prevention of disease only!' . . . He had a dirty picture of a *woman* attempting *sexual intercourse with a shetland pony.*'

94 & 95 'But the Gospels actually taught this: Before you kill somebody, make absolutely sure he isn't well connected . . . The flaw in the Christ stories, said the visitor from outer space, was that Christ who didn't look like much, was actually the son of the Most Powerful Being in the Universe. Readers understood that, so, when they came to the crucifixion, they naturally thought . . . Oh boy-they sure picked the wrong guy to lynch this time! And that thought had a brother: There are right people to lynch. People not well connected . . . . The visitor from outer space made a gift to Earth of a new Gospel. In it, Jesus really WAS a nobody, and a pain in the neck to a lot of people with better connections then he had . . . . So the people amused themselves one day by nailing him to a cross and planting the cross in the ground. There couldn't possibly be any repercussions, the lynchers thought . . . since the new Gospel hammered home again and again what a nobody Jesus was. And then just before the nobody died . . . . The voice of God came crashing down. He told the people that he was adopting the bum as his son . . . God said this: *From this moment on, He will punish horribly anybody who torments a bum who has no connections.*'

99 'They told him that there could be no Earthling babies without male homosexuals. There could be babies without female homosexuals.'

120 'Why don't you go *fuck* yourself? Don't think I haven't

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tried . . . he was going to have revenge, and that revenge was sweet . . . It's the sweetest thing there is, said Lazzaro. People *fuck* with me, he said, and *Jesus Christ* are they ever fucking sorry.'

122 'And he'll pull out a gun and *shoot his pecker off.* The stranger'll let him think a couple of seconds about who Paul Lazzaro is and what life's gonna be like without a *pecker.* Then he'll shoot him once in the guts and walk away. . . . He died on account of this silly *cocksucker* here. So I promised him I'd have this silly *cocksucker* shot after the war.'

134 'In my prison cell I sit . . . With my *britches full of shit,* And my *balls are bouncing* gently on the floor. And I see the bloody snag when she bit me in the bag . . . Oh, I'll never fuck *a Polack* any more.'

173 'And the peckers of the young men would still be *semi-erect,* and their *muscles* would be *bulging like cannonballs.*'

175 'They didn't have *hard-ons* . . . Everybody else did.'

177 'The magazine, which was published for *lonesome men to jerk off to.*'

178 'and one critic said. . . . 'To describe *blow-jobs* artistically."

"6) *THE BEST SHORT STORIES BY NEGRO WRITERS* Ed. *by Langston Hughes*

PAGE QUOTE

176 'like bat's shit and camel piss,'

228 'that no-count bitch of a daughter of yours is up there up North making a whore of herself.'

237 'they made her get out and stand in front of the headlights of the car and pull down her pants and raise her dress—they said that was the only way they could be sure. And you can imagine what they said and what they did—.'

303 'You need some pussy. Come on, let's go up to the whore house on the hill.'

'Oh, these bastards, these bastards, this God damned Army and the bastards in it. The sons of bitches!'

436 'he produced a brown rag doll, looked at her again, then

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grabbed the doll by its legs and tore it part way up the middle. Then he jammed his finger into the rip between the doll's legs. The other men laughed. . . .'

444 'The pimps, hustlers, lesbians, and others trying to misuse me.'

462 'But she had straight firm legs and her breasts were small and upright. No doubt if she'd had children her breasts would be hanging like little empty purses.'

464 'She first became aware of the warm tense nipples on her breasts. Her hands went up gently to clam them.' 'In profile, his penis hung like a stout tassle. She could even tell that he was circumcised.'

406 'Cadillac Bill was busy following Luheaster around, rubbing her stomach and saying, "Magic Stomach, Magic Stomach, bring me a little baby cadillac."' 'One of the girls went upstairs with Red Top and stayed for about forty five minutes.'

"7) *BLACK BOY* by Richard Wright

PAGE QUOTE

70–71 'We black children—seven or eight or nine years of age—used to run to the Jew's store and shout:

. . . Bloody Christ Killers
Never trust a Jew
Bloody Christ Killers
What won't a Jew do . . .
Red, white and blue
Your pa was a Jew
Your ma a dirty dago
What the hell is you?'

265 'Crush that nigger's nuts, nigger!' 'Hit that nigger!' 'Aw, fight, you goddam niggers!' 'Sock 'im, in his f-k-g-piece!' 'Make 'im bleed!'

"8) *LAUGHING BOY* by Oliver LaFarge

PAGE QUOTE

38 'I'll tell you, she is all bad; for two bits she will do the worst thing.'

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258–9 'I was frightened when he wanted me to lie with him, but he made me feel all right. He knew all about how to make women forget themselves, that man.'

"9) *THE NAKED APE* by Desmond Morris

PAGE QUOTE

73–74 'Also, the frontal approach provides the maximum possibility for stimulation of the female's clitoris during the pelvic thrusting of the male. It is true that it will be passively, stimulated by the pulling effect of the male's thrusts, regardless of his body position in relation to the female, but in a face-to-face mating there will in addition be the direct rhythmic pressure of the male's pubic region on to the clitoral area, and this will considerably heighten the stimulation . . .' 'So it seems plausible to consider that face-to-face copulation is basic to our species. There are, of course, a number of variations that do not eliminate the frontal element: male above, female above, side by side, squatting, standing, and so on, but the most efficient and commonly used one is with both partners horizontal, the male above the female. . . .'

80 ' . . . This broadening of the penis results in the female's external genitals being subjected to much more pulling and pushing during the performance of pelvic thrusts. With each inward thrust of the penis, the clitoral region is pulled downwards and then with each withdrawal, it moves up again. Add to this the rhythmic pressure being exerted on the clitoris region by the pubic region of the frontally copulating male, and you have a repeated massaging of the clitoris that—were she a male—would virtually be masturbatory.'

94–99 ' . . . If either males or females cannot for some reason obtain sexual access to their opposite numbers, they will find sexual outlets in other ways. They may use other members of their own sex, or they may even use members of other species, or they may masturbate. . . .'

"10) *READER FOR WRITERS* . . ."

638 F. 2d 404, 419–422, n. 1 (CA2 1980) (Mansfield, J., dissenting).

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JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Addressing only those aspects of the constitutional question which must be decided to determine whether or not the District Court was correct in granting summary judgment, I conclude that it was. I agree fully with the views expressed by THE CHIEF JUSTICE, and concur in his opinion. I disagree with JUSTICE BRENNAN's opinion because it is largely hypothetical in character, failing to take account of the facts as admitted by the parties pursuant to local rules of the District Court for the Eastern District of New York, and because it is analytically unsound and internally inconsistent.[1]

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[1] I also disagree with JUSTICE WHITE's conclusion that he need not decide the constitutional issue presented by this case. That view seems to me inconsistent with the "rule of four"—"that any case warranting consideration in the opinion of [four Justices] of the Court will be taken and disposed of" on the merits, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 560 (1957) (opinion of Harlan, J.)—which we customarily follow in exercising our certiorari jurisdiction. His concurrence, although not couched in such language, is in effect a single vote to dismiss the writ of certiorari as improvidently granted. Justice Harlan debated this issue with Justice Frankfurter in *Ferguson* v. *Moore-McCormack Lines, supra*, and his view ultimately attracted the support of six out of the seven remaining Members of the Court. He stated:

"In my opinion due adherence to [the 'rule of four'] requires that once certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted. In [this case] I am unable to say that such considerations exist, even though I do think that the arguments on the merits underscored the views of those of us who originally felt that the cas[e] should not be taken because [it] involved only issues of fact, and presented nothing of sufficient general importance to warrant this substantial expenditure of the Court's time." *Id.*, at 559.

The case upon which JUSTICE WHITE relies, *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), was disposed of in an opinion which commanded the votes of seven of the nine Members of the Court. There could therefore be no question of an infringement of the "rule of four." Certainly any intimation from that case that this Court should not review questions of law in cases where the District Court has granted summary judgment is

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I

A

JUSTICE BRENNAN's opinion deals far more sparsely with the procedural posture of this case than it does with the constitutional issues which it conceives to arise under the First Amendment. It first launches into a confusing, discursive exegesis on these constitutional issues as applied to junior high school and high school libraries, *ante*, at 863–872, and only thereafter does it discuss the state of the record before the Court. *Ante*, at 872–875. Because the record facts should always establish the limits of the Court's constitutional analysis, and are particularly relevant in cases where the trial court has granted summary judgment, I think that JUSTICE BRENNAN's approach violates our "long . . . considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945) (citations omitted).

When JUSTICE BRENNAN finally does address the state of the record, he refers to snippets and excerpts of the relevant facts to explain why a grant of summary judgment was improper. But he totally ignores the effect of Rule 9(g) of the local rules of the District Court, under which the parties set forth their version of the disputed facts in this case.[2] Since

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belied by subsequent decisions too numerous to catalogue. See, *e. g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); *Mills* v. *Alabama*, 384 U. S. 214 (1966).

[2] Rule 9(g) of the local rules of the United States District Court for the Eastern District of New York provides:

"Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

"The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

[Footnote 2 is continued on p. 906]

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summary judgment was entered against respondents, they are entitled to have their version of the facts, as embodied in their Rule 9(g) statement, accepted for purposes of our review. Since the parties themselves are presumably the best judges of the extent of the factual dispute between them, however, respondents certainly are not entitled to any more favorable version of the facts than that contained in their own Rule 9(g) statement. JUSTICE BRENNAN's combing through the record of affidavits, school bulletins, and the like for bits and snatches of dispute is therefore entirely beside the point at this stage of the case.

Considering only the respondents' description of the factual aspects of petitioners' motivation, JUSTICE BRENNAN's apparent concern that the Board's action may have been a sinister political plot "to suppress ideas" may be laid to rest. The members of the Board, in deciding to remove these books, were undoubtedly influenced by their own "personal values, morals, and tastes,"[3] just as any member of a school board is apt to be so influenced in making decisions as to whether a book is educationally suitable. Respondents essentially conceded that some excerpts of the removed books "contained profanities, some were sexually explicit, some were ungrammatical, some were anti-American, and some were offensive to racial, religious or ethnic groups."[4]

Respondents also agreed that, "[a]lthough the books them-

"All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

[3] Paragraph 4 of respondents' Rule 9(g) statement asserts that petitioners' "evaluation of the suitability of the books was based on [their] personal values, morals, and tastes." App. 139.

[4] Paragraph 8 of respondents' Rule 9(g) statement reads:

"Defendants Ahrens and Martin objected to those excerpts because some contained profanities, some were sexually explicit, some were ungrammatical, some were anti-American, and some were offensive to racial, religious or ethnic groups." App. 140.

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selves were excluded from use in the schools in any way, [petitioners] have not precluded discussion about the themes of the books or the books themselves." App. 140. JUSTICE BRENNAN's concern with the "suppression of ideas" thus seems entirely unwarranted on this state of the record, and his creation of constitutional rules to cover such eventualities is entirely gratuitous. Though for reasons stated in Part II of this opinion I entirely disagree with JUSTICE BRENNAN's treatment of the constitutional issue, I also disagree with his opinion for the entirely separate reason that it is not remotely tailored to the facts presented by this case.

In the course of his discussion, JUSTICE BRENNAN states:

> "Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students . . . . The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*." *Ante*, at 870–871 (emphasis in original).

I can cheerfully concede all of this, but as in so many other cases the extreme examples are seldom the ones that arise in the real world of constitutional litigation. In *this case* the facts taken most favorably to respondents suggest that nothing of this sort happened. The nine books removed undoubtedly did contain "ideas," but in the light of the excerpts from them found in the dissenting opinion of Judge Mansfield in the Court of Appeals, it is apparent that eight of them contained demonstrable amounts of vulgarity and profanity, see 638 F. 2d 404, 419–422, n. 1 (CA2 1980), and the ninth con-

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tained nothing that could be considered partisan or political, see *id.*, at 428, n. 6. As already demonstrated, respondents admitted as much. Petitioners did not, for the reasons stated hereafter, run afoul of the First and Fourteenth Amendments by removing these particular books from the library in the manner in which they did. I would save for another day—feeling quite confident that that day will not arrive—the extreme examples posed in JUSTICE BRENNAN's opinion.

B

Considerable light is shed on the correct resolution of the constitutional question in this case by examining the role played by petitioners. Had petitioners been the members of a town council, I suppose all would agree that, absent a good deal more than is present in this record, they could not have prohibited the sale of these books by private booksellers within the municipality. But we have also recognized that the government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice:

> "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968).

By the same token, expressive conduct which may not be prohibited by the State as sovereign may be proscribed by the State as property owner: "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedi-

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cated." *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966) (upholding state prohibition of expressive conduct on certain state property).

With these differentiated roles of government in mind, it is helpful to assess the role of government as educator, as compared with the role of government as sovereign. When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people. Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of a school board will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called "experts."[5] In this connection I find myself entirely in agreement with the observation of the Court of Appeals for the Seventh Circuit in *Zykan* v. *Warsaw Community School Corp.*, 631 F. 2d 1300, 1305 (1980), that it is "permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." In the very course of administering the many-faceted operations of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others. The decision to teach a particular subject may preclude the possibility of teaching another subject. A decision to replace a teacher because of ineffectiveness may by implication be seen as a disparagement of the subject matter taught. In each of these instances, however, the book or the exposure to the

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[5] There are intimations in JUSTICE BRENNAN's opinion that if petitioners had only consulted literary experts, librarians, and teachers their decision might better withstand First Amendment attack. *Ante*, at 874, and n. 26. These observations seem to me wholly fatuous; surely ideas are no more accessible or no less suppressed if the school board merely ratifies the opinion of some other group rather than following its own opinion.

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subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library. In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.

II

JUSTICE BRENNAN would hold that the First Amendment gives high school and junior high school students a "right to receive ideas" in the school. *Ante*, at 867. This right is a curious entitlement. It exists only in the library of the school, and only if the idea previously has been acquired by the school in book form. It provides no protection against a school board's decision not to acquire a particular book, even though that decision denies access to ideas as fully as removal of the book from the library, and it prohibits removal of previously acquired books only if the remover "dislike[s] the ideas contained in those books," even though removal for any other reason also denies the students access to the books. *Ante*, at 871–872.

But it is not the limitations which JUSTICE BRENNAN places on the right with which I disagree; they simply demonstrate his discomfort with the new doctrine which he fashions out of whole cloth. It is the very existence of a right to receive information, in the junior high school and high school setting, which I find wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education.

A

The right described by JUSTICE BRENNAN has never been recognized in the decisions of this Court and is not supported by their rationale. JUSTICE BRENNAN correctly observes that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

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Tinker v. *Des Moines School District*, 393 U. S. 503, 506 (1969). But, as this language from *Tinker* suggests, our past decisions in this area have concerned freedom of speech and expression, not the right of access to particular ideas. We have held that students may not be prevented from symbolically expressing their political views by the wearing of black arm bands, *Tinker* v. *Des Moines School District*, *supra*, and that they may not be forced to participate in the symbolic expression of saluting the flag, *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). But these decisions scarcely control the case before us. Neither the District Court nor the Court of Appeals found that petitioners' removal of books from the school libraries infringed respondents' right to speak or otherwise express themselves.

Despite JUSTICE BRENNAN's suggestion to the contrary, this Court has never held that the First Amendment grants junior high school and high school students a right of access to certain information in school. It is true that the Court has recognized a limited version of that right in other settings, and JUSTICE BRENNAN quotes language from five such decisions and one of his own concurring opinions in order to demonstrate the viability of the right-to-receive doctrine. *Ante*, at 866–867. But not one of these cases concerned or even purported to discuss elementary or secondary educational institions.[6] JUSTICE BRENNAN brushes over this significant

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[6] The right of corporations to make expenditures or contributions in order to influence ballot issues was the question presented in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978), and the language which JUSTICE BRENNAN quotes from that decision, *ante*, at 866, was explicitly limited to "the Court's decisions involving corporations in the business of communications or entertainment." 435 U. S., at 783. In *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972), the Court upheld the power of Congress and the Executive Branch to prevent the entry into this country of a Marxist theoretician who had been invited to lecture at an American university, despite the First Amendment rights of citizens who wished to hear him. *Stanley* v. *Georgia*, 394 U. S. 557 (1969), held that the First Amendment prohibits States from making the private possession of ob-

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omission in First Amendment law by citing *Tinker* v. *Des Moines School District* for the proposition that "students too are beneficiaries of this [right-to-receive] principle." *Ante*, at 868. But *Tinker* held no such thing. One may read *Tinker* in vain to find any recognition of a First Amendment right to receive information. *Tinker*, as already mentioned, was based entirely on the students' right to *express* their political views.

Nor does the right-to-receive doctrine recognized in our past decisions apply to schools by analogy. JUSTICE BRENNAN correctly characterizes the right of access to ideas as "an inherent corollary of the rights of free speech and press" which "follows ineluctably from the *sender's* First Amendment right to send them." *Ante*, at 867 (emphasis in original). But he then fails to recognize the predicate right to speak from which the students' right to receive must follow. It would be ludicrous, of course, to contend that all authors have a constitutional right to have their books placed in junior high school and high school libraries. And yet without such a right our prior precedents would not recognize the reciprocal right to receive information. JUSTICE BRENNAN disregards this inconsistency with our prior cases and fails to explain the constitutional or logical underpinnings of a right to hear ideas in a place where no speaker has the right to express them.

JUSTICE BRENNAN also correctly notes that the reciprocal nature of the right to receive information derives from the fact that it "is a necessary predicate to the *recipient's* mean-

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scene material a crime, and *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), held that the right of privacy prohibits States from forbidding the use of contraceptives. Finally, *Martin* v. *Struthers*, 319 U. S. 141 (1943), held that the First Amendment protects the door-to-door distribution of religious literature.

JUSTICE BRENNAN's concurring opinion appears in a case which considered the constitutionality of certain postal statutes. *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965).

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ingful exercise of his own rights of speech, press, and political freedom." *Ibid.* (emphasis in original). But the denial of access to ideas inhibits one's own acquisition of knowledge only when that denial is relatively complete. If the denied ideas are readily available from the same source in other accessible locations, the benefits to be gained from exposure to those ideas have not been foreclosed by the State. This fact is inherent in the right-to-receive cases relied on by JUSTICE BRENNAN, every one of which concerned the complete denial of access to the ideas sought.[7] Our past decisions are thus unlike this case where the removed books are readily available to students and nonstudents alike at the corner bookstore or the public library.

B

There are even greater reasons for rejecting JUSTICE BRENNAN's analysis, however, than the significant fact that we have never adopted it in the past. "The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized by our decisions." *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979). Pub-

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[7] In *First National Bank of Boston* v. *Bellotti*, *supra*, public access to corporate viewpoints on ballot issues not directly affecting the corporations was foreclosed by the Massachusetts law prohibiting corporate expenditures to express such viewpoints. In *Kleindienst* v. *Mandel*, *supra*, the Court noted that the potential recipients of Mandel's ideas were completely deprived of the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning." 408 U. S., at 765. The Georgia law in *Stanley* v. *Georgia*, *supra*, criminalized all private possession of obscene material, and the statute in *Griswold* v. *Connecticut*, *supra*, criminalized all use of contraceptive devices or actions encouraging the use of such devices. The ordinance at issue in *Martin* v. *Struthers*, *supra*, forbade all door-to-door distribution of religious literature, while the statute challenged in *Lamont* v. *Postmaster General*, *supra*, required persons receiving Communist propaganda in the mails affirmatively to state their desire to receive such mailings.

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lic schools fulfill the vital role of teaching students the basic skills necessary to function in our society, and of "inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.*, at 77. The idea that such students have a right of access, *in the school*, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

JUSTICE BRENNAN rejects this idea, claiming that it "overlooks the unique role of the school library." *Ante*, at 869. But the unique role referred to appears to be one of JUSTICE BRENNAN's own creation. No previous decision of this Court attaches unique First Amendment significance to the libraries of elementary and secondary schools. And in his paean of praise to such libraries as the "environment especially appropriate for the recognition of the First Amendment rights of students," *ante*, at 868, JUSTICE BRENNAN turns to language about *public* libraries from the three-Justice plurality in *Brown* v. *Louisiana*, 383 U. S. 131 (1966), and to language about universities and colleges from *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). *Ante*, at 868. Not only is his

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authority thus transparently thin, but also, and more importantly, his reasoning misapprehends the function of libraries in our public school system.

As already mentioned, elementary and secondary schools are inculcative in nature. The libraries of such schools serve as supplements to this inculcative role. Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas. Thus, JUSTICE BRENNAN cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas.

After all else is said, however, the most obvious reason that petitioners' removal of the books did not violate respondents' right to receive information is the ready availability of the books elsewhere. Students are not denied books by their removal from a school library. The books may be borrowed from a public library, read at a university library, purchased at a bookstore, or loaned by a friend. The government as educator does not seek to reach beyond the confines of the school. Indeed, following the removal from the school library of the books at issue in this case, the local public library put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.

C

JUSTICE BRENNAN's own discomfort with the idea that students have a right to receive information from their elementary or secondary schools is demonstrated by the artificial limitations which he places upon the right—limitations which are supported neither by logic nor authority and which are inconsistent with the right itself. The attempt to confine the right to the library is one such limitation, the fallacies of which have already been demonstrated.

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As a second limitation, JUSTICE BRENNAN distinguishes the act of removing a previously acquired book from the act of refusing to acquire the book in the first place: "[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. [O]ur holding today affects only the discretion to *remove* books." *Ante*, at 871–872 (emphasis in original). If JUSTICE BRENNAN truly has found a "right to receive ideas," *ante*, at 866–867, however, this distinction between acquisition and removal makes little sense. The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf. As a result of either action the book cannot be found in the "principal locus" of freedom discovered by JUSTICE BRENNAN. *Ante*, at 868.

The justification for this limiting distinction is said by JUSTICE BRENNAN to be his concern in this case with "the suppression of ideas." *Ante*, at 871. Whatever may be the analytical usefulness of this appealing sounding phrase, see Part II–D, *infra*, the suppression of ideas surely is not the identical twin of the denial of access to information. Not every official act which denies access to an idea can be characterized as a suppression of the idea. Thus unless the "right to receive information" and the prohibition against "suppression of ideas" are each a kind of Mother-Hubbard catch phrase for whatever First Amendment doctrines one wishes to cover, they would not appear to be interchangeable.

JUSTICE BRENNAN's reliance on the "suppression of ideas" to justify his distinction between acquisition and removal of books has additional logical pitfalls. Presumably the distinction is based upon the greater visibility and the greater sense of conscious decision thought to be involved in the removal of a book, as opposed to that involved in the refusal to acquire a book. But if "suppression of ideas" is to be the talisman, one would think that a school board's public announcement of its refusal to acquire certain books would have every bit as much

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impact on public attention as would an equally publicized decision to remove the books. And yet only the latter action would violate the First Amendment under JUSTICE BRENNAN's analysis.

The final limitation placed by JUSTICE BRENNAN upon his newly discovered right is a motive requirement: the First Amendment is violated only "[i]f petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed." *Ante*, at 871 (emphasis in original). But bad motives and good motives alike deny access to the books removed. If JUSTICE BRENNAN truly recognizes a constitutional right to receive information, it is difficult to see why the reason for the denial makes any difference. Of course JUSTICE BRENNAN's view is that intent matters because the First Amendment does not tolerate an officially prescribed orthodoxy. *Ante*, at 870–872. But this reasoning mixes First Amendment apples and oranges. The right to receive information differs from the right to be free from an officially prescribed orthodoxy. Not every educational denial of access to information casts a pall of orthodoxy over the classroom.

It is difficult to tell from JUSTICE BRENNAN's opinion just what motives he would consider constitutionally impermissible. I had thought that the First Amendment proscribes content-based restrictions on the marketplace of ideas. See *Widmar* v. *Vincent*, 454 U. S. 263, 269–270 (1981). JUSTICE BRENNAN concludes, however, that a removal decision based solely upon the "educational suitability" of a book or upon its perceived vulgarity is "'perfectly permissible.'" *Ante*, at 871 (quoting Tr. of Oral Arg. 53). But such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views.

Moreover, JUSTICE BRENNAN's motive test is difficult to square with his distinction between acquisition and removal. If a school board's removal of books might be motivated by a desire to promote favored political or religious views, there is

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no reason that its acquisition policy might not also be so motivated. And yet the "pall of orthodoxy" cast by a carefully executed book-acquisition program apparently would not violate the First Amendment under JUSTICE BRENNAN's view.

D

Intertwined as a basis for JUSTICE BRENNAN's opinion, along with the "right to receive information," is the statement that "[o]ur Constitution does not permit the official suppression of *ideas*." *Ante*, at 871 (emphasis in original). There would be few champions, I suppose, of the idea that our Constitution *does* permit the official suppression of ideas; my difficulty is not with the admittedly appealing catchiness of the phrase, but with my doubt that it is really a useful analytical tool in solving difficult First Amendment problems. Since the phrase appears in the opinion "out of the blue," without any reference to previous First Amendment decisions of this Court, it would appear that the Court for years has managed to decide First Amendment cases without it.

I would think that prior cases decided under established First Amendment doctrine afford adequate guides in this area without resorting to a phrase which seeks to express "a complicated process of constitutional adjudication by a deceptive formula." *Kovacs* v. *Cooper*, 336 U. S. 77, 96 (1949) (Frankfurter, J., concurring). A school board which publicly adopts a policy forbidding the criticism of United States foreign policy by any student, any teacher, or any book on the library shelves is indulging in one kind of "suppression of ideas." A school board which adopts a policy that there shall be no discussion of current events in a class for high school sophomores devoted to second-year Latin "suppresses ideas" in quite a different context. A teacher who had a lesson plan consisting of 14 weeks of study of United States history from 1607 to the present time, but who because of a week's illness is forced to forgo the most recent 20 years of American history, may "suppress ideas" in still another way.

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I think a far more satisfactory basis for addressing these kinds of questions is found in the Court's language in *Tinker* v. *Des Moines School District*, where we noted:

> "[A] particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U. S., at 510–511.

In the case before us the petitioners may in one sense be said to have "suppressed" the "ideas" of vulgarity and profanity, but that is hardly an apt description of what was done. They ordered the removal of books containing vulgarity and profanity, but they did not attempt to preclude discussion about the themes of the books or the books themselves. App. 140. Such a decision, on respondents' version of the facts in this case, is sufficiently related to "educational suitability" to pass muster under the First Amendment.

E

The inconsistencies and illogic of the limitations placed by JUSTICE BRENNAN upon his notion of the right to receive ideas in school are not here emphasized in order to suggest that they should be eliminated. They are emphasized because they illustrate that the right itself is misplaced in the elementary and secondary school setting. Likewise, the criticism of JUSTICE BRENNAN's newly found prohibition against the "suppression of ideas" is by no means intended to suggest that the Constitution permits the suppression of ideas; it is rather to suggest that such a vague and imprecise phrase, while perhaps wholly consistent with the First Amendment, is simply too diaphanous to assist careful decision of cases such as these.

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I think the Court will far better serve the cause of First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning. Cf. *Tilton* v. *Richardson*, 403 U. S. 672, 685–686 (1971) (opinion of BURGER, C. J.). With respect to the education of children in elementary and secondary schools, the school board may properly determine in many cases that a particular book, a particular course, or even a particular area of knowledge is not educationally suitable for inclusion within the body of knowledge which the school seeks to impart. Without more, this is not a condemnation of the book or the course; it is only a determination akin to that referred to by the Court in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388 (1926): "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

III

Accepting as true respondents' assertion that petitioners acted on the basis of their own "personal values, morals and tastes," App. 139, I find the actions taken in this case hard to distinguish from the myriad choices made by school boards in the routine supervision of elementary and secondary schools. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). In this case respondents' rights of free speech and expression were not infringed, and by respondents' own admission no ideas were "suppressed." I would leave to another day the harder cases.

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JUSTICE O'CONNOR, dissenting.

If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it. As JUSTICE REHNQUIST persuasively argues, the plurality's analysis overlooks the fact that in this case the government is acting in its special role as educator.

I do not personally agree with the Board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability, and it has done so in this case. I therefore join THE CHIEF JUSTICE's dissent.

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LUGAR *v.* EDMONDSON OIL CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1730. Argued December 8, 1981—Decided June 25, 1982

This case concerns the relationship between the requirement of "state action" to establish a violation of the Fourteenth Amendment, and the requirement of action "under color of state law" to establish a right to recover under 42 U. S. C. § 1983, which provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State. Respondents filed suit in Virginia state court on a debt owed by petitioner, and sought prejudgment attachment of certain of petitioner's property. Pursuant to Virginia law, respondents alleged, in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors; acting upon that petition, a Clerk of the state court issued a writ of attachment, which was executed by the County Sheriff; and a hearing on the propriety of the attachment was conducted 34 days after the levy, resulting in the trial judge's dismissing the attachment for respondents' failure to establish the alleged statutory grounds for attachment. Petitioner then brought this action in Federal District Court under § 1983, alleging that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment, and that the complaint therefore did not state a valid claim under § 1983. The Court of Appeals affirmed, but on the basis that the complaint failed to allege conduct under color of state law for purposes of § 1983 because there was neither usurpation or corruption of official power by a private litigant nor a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer was compromised to a significant degree.

Held:

1. Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337. And if the challenged conduct of the creditor constitutes state action as delimited by this Court's prior decisions, then that conduct is also action under color of state law and will support a suit under § 1983. Pp. 926-935.

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2. Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Pp. 936–939.

3. Insofar as petitioner alleged only misuse or abuse by respondents of Virginia law, he did not state a cause of action under § 1983, but challenged only private action. Such challenged conduct could not be ascribed to any governmental decision, nor did respondents have the authority of state officials to put the weight of the State behind their private decision. However, insofar as petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause, he did present a valid cause of action under § 1983. The statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. Respondents were, therefore, acting under color of state law in participating in the deprivation of petitioner's property. Pp. 939–942.

639 F. 2d 1058, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 943. POWELL, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 944.

Robert L. Morrison, Jr., argued the cause and filed a brief for petitioner.

James W. Haskins argued the cause for respondents. With him on the brief was *H. Victor Millner, Jr.*

JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

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United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action."

Title 42 U. S. C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . ."[1] This case concerns the relationship between the § 1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action.

I

In 1977, petitioner, a lessee-operator of a truckstop in Virginia, was indebted to his supplier, Edmondson Oil Co., Inc. Edmondson sued on the debt in Virginia state court. Ancillary to that action and pursuant to state law, Edmondson sought prejudgment attachment of certain of petitioner's property. Va. Code § 8.01–533 (1977).[2] The prejudgment attachment procedure required only that Edmondson allege, in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's

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[1] Title 42 U. S. C. § 1983, at the time in question, provided in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] At the time of the attachment in question, this section was codified as Va. Code § 8–519 (1973).

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property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition.[3]

Petitioner subsequently brought this action under 42 U. S. C. § 1983 against Edmondson and its president. His complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The lower courts construed the complaint as alleging a due process violation both from a misuse of the Virginia procedure and from the statutory procedure itself.[4] He sought compensatory and punitive damages for specified financial loss allegedly caused by the improvident attachment.

Relying on *Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978), the District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment and that the complaint therefore did not state a claim upon which relief could be granted under § 1983. Petitioner appealed; the Court of Appeals for the Fourth Circuit, sitting en banc, affirmed, with three dissenters.[5] 639 F. 2d 1058 (1981).

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[3] The principal action then proceeded to the entry of judgment on the debt in favor of Edmondson and some of petitioner's property was sold in execution of the judgment.

[4] In his answer to respondents' motion to dismiss on abstention grounds petitioner stated that "[n]o question of the constitutional validity of the State statutes is made." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court responded to this as follows: "[D]espite plaintiff's protests to the contrary . . . the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F. 2d 1058, 1060, n. 1 (CA4 1981).

[5] The case was originally argued before a three-judge panel. The Court of Appeals, however, acting *sua sponte*, set the matter for a rehearing en banc.

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The Court of Appeals rejected the District Court's reliance on *Flagg Brothers* in finding that the requisite state action was missing in this case. The participation of state officers in executing the levy sufficiently distinguished this case from *Flagg Brothers*. The Court of Appeals stated the issue as follows:

> "[W]hether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of § 1983." 639 F. 2d, at 1061–1062 (footnote omitted).

The court distinguished between the acts directly chargeable to respondents and the larger context within which those acts occurred, including the direct levy by state officials on petitioner's property. While the latter no doubt amounted to state action, the former was not so clearly action under color of state law. The court held that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree. Because the court thought none of these elements was present here, the complaint failed to allege conduct under color of state law.

Because this construction of the under-color-of-state-law requirement appears to be inconsistent with prior decisions of this Court, we granted certiorari. 452 U. S. 937 (1981).

II

Although the Court of Appeals correctly perceived the importance of *Flagg Brothers* to a proper resolution of this case,

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it misread that case.[6] It also failed to give sufficient weight to that line of cases, beginning with *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), in which the Court considered constitutional due process requirements in the context of garnishment actions and prejudgment attachments. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). Each of these cases involved a finding of state action as an implicit predicate of the application of due process standards. *Flagg Brothers* distinguished them on the ground that in each there was overt, official involvement in the property deprivation; there was no such overt action by a state officer in *Flagg Brothers*. 436 U. S., at 157. Although this case falls on the *Sniadach*, and not the *Flagg Brothers*, side of this distinction, the Court of Appeals thought the garnishment and attachment cases to be irrelevant because none but *Fuentes* arose under 42 U. S. C. § 1983 and because *Fuentes* was distinguishable.[7]

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[6] JUSTICE POWELL suggests that our opinion is not "consistent with the mode of inquiry prescribed by our cases." *Post*, at 946. We believe the situation to be just the opposite. We rely precisely upon the ground that the majority itself put forth in *Flagg Brothers* to distinguish that case from the earlier prejudgment attachment cases: "This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies." 436 U. S., at 157. JUSTICE POWELL at no point mentions this aspect of the *Flagg Brothers* decision. The method of inquiry we adopt is that suggested by *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), and seemingly approved in *Flagg Brothers:* Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a § 1983 claim against a private party.

[7] The Court of Appeals held *Fuentes* v. *Shevin* not to be relevant because the defendants in that case included the State Attorney General, as well as the private creditor. In the court's view, the presence of a state official made the "private party defendant . . . merely a nominal party to the action for injunctive relief." 639 F. 2d, at 1068, n. 22. Judge Butzner, in dissent, found *Fuentes* to be directly controlling.

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It determined that it could ignore all of them because the issue in this case was not whether there was state action, but rather whether respondents acted under color of state law.

As we see it, however, the two concepts cannot be so easily disentangled. Whether they are identical or not, the state-action and the under-color-of-state-law requirement are obviously related.[8] Indeed, until recently this Court did not distinguish between the two requirements at all.

A

In *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966), we explicitly stated that the requirements were identical: "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."[9] In support of this proposition the Court cited *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Terry* v. *Adams*, 345 U. S. 461 (1953).[10] In both of these

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[8] The Court of Appeals itself recognized this when it stated that in two of three basic patterns of § 1983 litigation—that in which the defendant is a public official and that in which he is a private party—there is no distinction between state action and action under color of state law. Only when there is joint action by private parties and state officials, the court stated, could a distinction arise between these two requirements.

[9] We also stated that if an indictment "allege[s] conduct on the part of the 'private' defendants which constitutes 'state action,' [it alleges] action 'under color' of law within [18 U. S. C.] § 242." 383 U. S., at 794, n. 7. In *Monroe* v. *Pape*, 365 U. S. 167, 185 (1961), the Court held that "under color of law" has the same meaning in 18 U. S. C. § 242 as it does in § 1983.

[10] Besides these two Supreme Court cases, the Court cited a number of lower court cases in support of the proposition that the constitutional concept of state action satisfies the statutory requirement of action under color of state law. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963); *Smith* v. *Holiday Inns*, 336 F. 2d 630 (CA6 1964); *Hampton* v. *City of Jacksonville*, 304 F. 2d 320 (CA5 1962); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (CA5 1960); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (CA4 1945). Each of these cases involved litigation between private parties in which the plaintiffs alleged unconstitutional discrimination. In each case, the only inquiry was whether the private-party defendant met the state-action requirement of the Fourteenth Amend-

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cases black voters in Texas challenged their exclusion from party primaries as a violation of the Fifteenth Amendment and sought relief under 8 U. S. C. § 43 (1946 ed.).[11] In each case, the Court understood the problem before it to be whether the discriminatory policy of a private political association could be characterized as "state action within the meaning of the Fifteenth Amendment." *Smith, supra,* at 664.[12] Having found state action under the Constitution, there was no further inquiry into whether the action of the political associations also met the statutory requirement of action "under color of state law."

Similarly, it is clear that in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. The Court's conclusion in *United States* v. *Classic*, 313 U. S. 299, 326 (1941), that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law," was founded on the rule announced in *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880), that the actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment.[13]

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ment. Once that requirement was met, the courts granted the relief sought.

[11] Title 8 U. S. C. § 43 (1946 ed.) was reclassified as 42 U. S. C. § 1983 in 1952.

[12] There was no opinion for the Court in *Terry* v. *Adams*. All three opinions in support of the reversal of the lower court decision pose the question as to whether the action of the private political association in question, the Jaybird Democratic Association, constituted state action for purposes of the Fifteenth Amendment. None suggests that a Fifteenth Amendment violation by the private association might not support a cause of action because of a failure to prove action under color of state law.

[13] *United States* v. *Classic* did not involve § 1983 directly; rather, it interpreted 18 U. S. C. § 242 (then 18 U. S. C. § 52 (1940 ed.)), which is the criminal counterpart of 42 U. S. C. § 1983. See n. 9, *supra*, on the relationship between 18 U. S. C. § 242 and 42 U. S. C. § 1983.

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The decision of the Court of Appeals rests on a misreading of *Flagg Brothers*. In that case the Court distinguished two elements of a § 1983 action:

> "[Plaintiffs] are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States. They must secondly show that Flagg Brothers deprived them of this right acting 'under color of any statute' of the State of New York. It is clear that these two elements denote two separate areas of inquiry. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 150 (1970)." 436 U. S., at 155–156.

Plaintiffs' case foundered on the first requirement. Because a due process violation was alleged and because the Due Process Clause protects individuals only from governmental and not from private action, plaintiffs had to demonstrate that the sale of their goods was accomplished by state action. The Court concluded that the sale, although authorized by state law, did not amount to state action under the Fourteenth Amendment, and therefore set aside the Court of Appeals' contrary judgment.

There was no reason in *Flagg Brothers* to address the question whether there was action under color of state law. The Court expressly eschewed deciding whether that requirement was satisfied by private action authorized by state law. *Id.*, at 156. Although the state-action and under-color-of-state-law requirements are "separate areas of inquiry," *Flagg Brothers* did not hold nor suggest that state action, if present, might not satisfy the § 1983 requirement of conduct under color of state law. Nevertheless, the Court of Appeals relied on *Flagg Brothers* to conclude in this case that state action under the Fourteenth Amendment is not necessarily action under color of state law for purposes of § 1983. We do not agree.

The two-part approach to a § 1983 cause of action, referred to in *Flagg Brothers*, was derived from *Adickes* v.

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S. H. Kress & Co., 398 U. S. 144, 150 (1970). *Adickes* was a § 1983 action brought against a private party, based on a claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Although stating that the § 1983 plaintiff must show both that he has been deprived "of a right secured by the 'Constitution and laws' of the United States" and that the defendant acted "under color of any statute . . . of any State," *ibid.*, we held that the private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights" and action "'under color' of law for purposes of the statute." *Id.*, at 152.[14] In

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[14] The *Adickes* opinion contained the following statement, 398 U. S., at 162, n. 23: "Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." This statement obviously was meant neither to establish the definition of action under color of state law, nor to establish a distinction between this statutory requirement and the constitutional standard of state action. The statement was made in response to an argument that the discrimination by the private party was pursuant to the state trespass statute and that this would satisfy the requirements of § 1983. The Court rejected this because there had been no factual showing that the defendants had acted with knowledge of, or pursuant to, this statute. It was in this context, that this statement was made.

JUSTICE BRENNAN, writing separately, did suggest in *Adickes* that "when a private party acts alone, more must be shown . . . to establish that he acts 'under color of' a state statute or other authority than is needed to show that his action constitutes state action." *Id.*, at 210 (footnote omitted). Even in his view, however, when a private party acts in conjunction with a state official, whatever satisfies the state-action requirement of the Fourteenth Amendment satisfies the under-color-of-state-law requirement of the statute. JUSTICE BRENNAN's position rested, at least in part, on a much less strict standard of what would constitute "state action" in the area of racial discrimination than that adopted by the majority. In any case, the position he articulated there has never been adopted by the Court.

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support of our conclusion that a private party held to have violated the Fourteenth Amendment "can be liable under § 1983," *ibid.*, we cited that part of *United States* v. *Price*, 383 U. S., at 794, n. 7, in which we had concluded that state action and action under color of state law are the same (quoted *supra*, at 928). *Adickes* provides no support for the Court of Appeals' novel construction of § 1983.[15]

B

The decision of the Court of Appeals is difficult to reconcile with the Court's garnishment and prejudgment attachment cases and with the congressional purpose in enacting § 1983.

Beginning with *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers

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[15] JUSTICE POWELL's discussion of *Adickes* confuses the two counts of the complaint in that case. There was a conspiracy count which alleged that respondent—a private party—and a police officer had conspired "(1) 'to deprive [petitioner] of her right to enjoy equal treatment and service in a place of public accommodation'; and (2) to cause her arrest 'on the false charge of vagrancy.'" *Id.*, at 149–150. It was with respect to this count, which did not allege any unconstitutional statute or custom, that the Court held that joint action of the private party and the police officer was sufficient to support a § 1983 suit against that party. The other count of her complaint was a substantive count in which she alleged that the private act of discrimination was pursuant to a "custom of the community to segregate the races in public eating places." Here the Court did not rely on any "joint action" theory, but held that "petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom." *Id.*, at 171, 173. JUSTICE POWELL is wrong when he summarizes *Adickes* as holding that "a private party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity." *Post*, at 954–955. This is to confuse the conspiracy and the substantive counts at issue in *Adickes*. Unless one argues that the state vagrancy law was unconstitutional—an argument no one made in *Adickes*—the joint action count of *Adickes* did not involve a state law, whether "plainly unconstitutional" or not.

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of the State act jointly with a creditor in securing the property in dispute. *Sniadach* and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), involved state-created garnishment procedures; *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974), involved execution of a vendor's lien to secure disputed property. In each of these cases state agents aided the creditor in securing the disputed property; but in each case the federal issue arose in litigation between creditor and debtor in the state courts and no state official was named as a party. Nevertheless, in each case the Court entertained and adjudicated the defendant-debtor's claim that the procedure under which the private creditor secured the disputed property violated federal constitutional standards of due process. Necessary to that conclusion is the holding that private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment.

Fuentes v. *Shevin*, 407 U. S. 67 (1972), was a § 1983 action brought against both a private creditor and the State Attorney General. The plaintiff sought declaratory and injunctive relief, on due process grounds, from continued enforcement of state statutes authorizing prejudgment replevin. The plaintiff prevailed; if the Court of Appeals were correct in this case, there would have been no § 1983 cause of action against the private parties. Yet they remained parties, and judgment ran against them in this Court.[16]

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[16] We thus find incomprehensible JUSTICE POWELL's statement that we cite no cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action. *Post*, at 950. Likewise, his discussion of these cases, *post*, at 952–953, steadfastly ignores the predicate for the holding in each case that the debtor could challenge the constitutional adequacy of the private creditor's seizure of his property. That predicate was necessarily the principle that a private party's invocation of a seemingly valid prejudgment remedy statute, coupled with the aid of a state official, satisfies the state-action requirement of the Fourteenth Amendment and warrants relief against the private party.

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If a defendant debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state-court plaintiff should not provide a cause of action under § 1983. If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations.

To read the "under color of any statute" language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, from which § 1983 is derived. The Act was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'" *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 545 (1972). The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual. Perhaps the most direct statement of this was that of Senator Edmunds, the manager of the bill in the Senate: "[Section 1 is] so very simple and really reenact[s] the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871). Representative Bingham similarly stated that the bill's purpose was "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution." *Id.*, App. 81.[17]

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[17] In fact, throughout the congressional debate over the 1871 Act, the bill was officially described as a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." See also, *e. g.*, remarks of Senator Trumbull in describing the purpose of the House in passing the Act: "[A]s the bill passed the House of

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In sum, the line drawn by the Court of Appeals is inconsistent with our prior cases and would substantially undercut the congressional purpose in providing the § 1983 cause of action. If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983.[18]

Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States," Cong. Globe, 42d Cong., 1st Sess., 579 (1871); and remarks of Representative Shellabarger on the relationship between § 1 of the bill and the Fourteenth Amendment, *id.*, App. 68.

[18] Our conclusion in this case is not inconsistent with the statement in *Flagg Brothers* that "these two elements [state action and action under color of state law] denote two separate areas of inquiry." 436 U. S., at 155–156. First, although we hold that conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action. If action under color of state law means nothing more than that the individual act "with the knowledge of and pursuant to that statute," *Adickes* v. *S. H. Kress & Co.*, 398 U. S., at 162, n. 23, then clearly under *Flagg Brothers* that would not, in itself, satisfy the state-action requirement of the Fourteenth Amendment. Second, although we hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the Fourteenth Amendment, § 1983 is applicable to other constitutional provisions and statutory provisions that contain no state-action requirement. Where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

Nor is our decision today inconsistent with *Polk County* v. *Dodson*, 454 U. S. 312 (1981). In *Polk County*, we held that a public defender's actions, when performing a lawyer's traditional functions as counsel in a state criminal proceeding, would not support a § 1983 suit. Although we analyzed the public defender's conduct in light of the requirement of action "under color of state law," we specifically stated that it was not necessary in that case to consider whether that requirement was identical to the

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III

As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Brothers*, 436 U. S., at 156. As the Court said in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 349 (1974):

> "In 1883, this Court in the *Civil Rights Cases*, 109 U. S. 3, affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of

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"state action" requirement of the Fourteenth Amendment: "Although this Court has sometimes treated the questions as if they were identical, see *United States* v. *Price*, 383 U. S. 787, 794, and n. 7 (1966), we need not consider their relationship in order to decide this case." *Id.*, at 322, n. 12. We concluded there that a public defender, although a state employee, in the day-to-day defense of his client, acts under canons of professional ethics in a role adversarial to the State. Accordingly, although state employment is generally sufficient to render the defendant a state actor under our analysis, *infra*, at 937, it was "peculiarly difficult" to detect any action of the State in the circumstances of that case. 454 U. S., at 320. In *Polk County*, we also rejected respondent's claims against governmental agencies because he "failed to allege any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments." *Id.*, at 326. Because respondent failed to challenge any rule of conduct or decision for which the State was responsible, his allegations would not support a claim of state action under the analysis proposed below. *Infra*, at 937. Thus, our decision today does not suggest a different outcome in *Polk County*.

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their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In *Sniadach*, *Fuentes*, *W. T. Grant*, and *North Georgia*, for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Although related, these two principles are not the same. They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions. See *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961). The two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i. e.*, against a private party. The difference between the two inquiries is well illustrated by comparing *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), with *Flagg Brothers*, *supra*.

In *Moose Lodge*, the Court held that the discriminatory practices of the appellant did not violate the Equal Protection Clause because those practices did not constitute "state action." The Court focused primarily on the question of

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whether the admittedly discriminatory policy could in any way be ascribed to a governmental decision.[19] The inquiry, therefore, looked to those policies adopted by the State that were applied to appellant. The Court concluded as follows:

> "We therefore hold, that with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to . . . make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U. S., at 177.

In other words, the decision to discriminate could not be ascribed to any governmental decision; those governmental decisions that did affect Moose Lodge were unconnected with its discriminatory policies.[20]

Flagg Brothers focused on the other component of the state-action principle. In that case, the warehouseman proceeded under New York Uniform Commercial Code, § 7–210, and the debtor challenged the constitutionality of that provision on the grounds that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Undoubtedly the State was responsible for the statute. The response of the Court, however, focused not on the terms of the statute but on the character of the defendant to the § 1983

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[19] There are elements of the other state-action inquiry in the opinion as well. This is found primarily in the effort to distinguish the relationship of Moose Lodge and the State from that between the State and the restaurant considered in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). See 407 U. S., at 175.

[20] The "one exception" further illustrates this point. The Court enjoined enforcement of a state rule requiring Moose Lodge to comply with its own constitution and bylaws insofar as they contained racially discriminatory provisions. State enforcement of this rule, either judicially or administratively, would, under the circumstances, amount to a governmental decision to adopt a racially discriminatory policy.

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suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor." The Court suggested that that "something more" which would convert the private party into a state actor might vary with the circumstances of the case. This was simply a recognition that the Court has articulated a number of different factors or tests in different contexts: *e. g.*, the "public function" test, see *Terry* v. *Adams*, 345 U. S. 461 (1953); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); the "state compulsion" test, see *Adickes* v. *S. H. Kress & Co.*, 398 U. S., at 170; the "nexus" test, see *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Brothers*, 436 U. S., at 157.[21] Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here. See *Burton*, *supra*, at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").

IV

Turning to this case, the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors."

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[21] Contrary to the suggestion of JUSTICE POWELL's dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law." *Post*, at 951. The holding today, as the above analysis makes clear, is limited to the particular context of prejudgment attachment.

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Both the District Court and the Court of Appeals noted the ambiguous scope of petitioner's contentions: "There has been considerable confusion throughout the litigation on the question whether Lugar's ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him." 639 F. 2d, at 1060, n. 1. Both courts held that resolution of this ambiguity was not necessary to their disposition of the case: both resolved it, in any case, in favor of the view that petitioner was attacking the constitutionality of the statute as well as its misapplication. In our view, resolution of this issue is essential to the proper disposition of the case.

Petitioner presented three counts in his complaint. Count three was a pendent claim based on state tort law; counts one and two claimed violations of the Due Process Clause. Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, opressive *[sic]*, [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i. e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe* v. *Pape*, 365 U. S. 167 (1961). That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

Count one is a different matter. That count describes the procedures followed by respondents in obtaining the prejudgment attachment as well as the fact that the state court subsequently ordered the attachment dismissed because respondents had not met their burden under state law. Pe-

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titioner then summarily states that this sequence of events deprived him of his property without due process. Although it is not clear whether petitioner is referring to the state-created procedure or the misuse of that procedure by respondents, we agree with the lower courts that the better reading of the complaint is that petitioner challenges the state statute as procedurally defective under the Fourteenth Amendment.[22]

While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.

As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes* v. *S. H. Kress & Co.*, *supra*, at 152, in the context of an equal protection deprivation:

> "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" quoting *United States* v. *Price*, 383 U. S., at 794.

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[22] This confusion in the nature of petitioner's allegations continued in oral argument in this Court. Although at various times counsel for petitioner seemed to deny that petitioner challenged the constitutionality of the statute, see, *e. g.*, Tr. of Oral Arg. 11, he also stated that

"[t]he claim is that the action as taken, even if it were just line by line in accordance with Virginia law—whether or not they did it right, the claim is that it was in violation of Lugar's constitutional rights." *Id.*, at 19.

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The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.

In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute.[23]

The judgment is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[23] JUSTICE POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconsitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture. What we said in *Adickes*, 398 U. S., at 174, n. 44, when confronted with this question is just as applicable today: "We intimate no views concerning the relief that might be appropriate if a violation is shown. The parties have not briefed these remedial issues, and if a violation is proved they are best explored in the first instance below in light of the new record that will be developed on remand. Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand. Cf. *Pierson* v. *Ray*, 386 U. S. 547 (1967)" (citations omitted).

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CHIEF JUSTICE BURGER, dissenting.

Whether we are dealing with suits under § 1983 or suits brought pursuant to the Fourteenth Amendment, in my view the inquiry is the same: is the claimed infringement of a federal right fairly attributable to the State. *Rendell-Baker* v. *Kohn*, *ante*, at 838. Applying this standard, it cannot be said that the actions of the named respondents are fairly attributable to the State.* Respondents did no more than invoke a presumptively valid state prejudgment attachment procedure available to all. Relying on a dubious "but for" analysis, the Court erroneously concludes that the subsequent procedural steps taken by the State in attaching a putative debtor's property in some way transforms respondents' acts into actions of the State. This case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State. *Dennis* v. *Sparks*, 449 U. S. 24 (1980). Similarly, one who practices a trade or profession, drives an automobile, or builds a house under a state license is not engaging in acts fairly attributable to the state. In both *Dennis* and the instant case petitioner's remedy lies in private suits for damages such as malicious prosecution. The Court's opinion expands the reach of the statute beyond anything intended by Congress. It may well be a consequence of too casually falling into a semantical trap because of the figurative use of the term "color of state law."

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*The pleadings in this case amply demonstrate that the challenged conduct was directed solely at respondents' acts. The unlawful actions alleged were that respondents made "conclusory allegations," App. 5, respondents lacked a "factual basis" for attachment, *id.*, at 10, and respondents lacked "good cause to believe facts which would support" attachment. *Id.*, at 19. There is no allegation of collusion or conspiracy with state actors.

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JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent—a small wholesale oil dealer in Southside, Va.—brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt.[1] The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors.[2] No court had questioned the validity of the statute, and it remains presumptively valid. The Clerk of the state court duly issued a writ of attachment, and the County Sheriff then executed it. There is no allegation that respondent conspired with the state officials to deny petitioner the fair protection of state or federal law.

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[1] The state action, filed in the name of the Edmondson Oil Co., alleged that Lugar owed $41,983 for products and merchandise previously delivered. App. 22. In the present suit Lugar has named as defendants both the Edmondson Oil Co. and its president, Ronald Barbour. As the respondent Barbour is the sole stockholder of Edmondson Oil Co., *id.*, at 2, and appears to have directed all its actions in this litigation, see *id.*, at 26, I refer throughout to Barbour as if he were the sole respondent.

[2] See Va. Code § 8.01–533 *et seq.* (1977). At the time of the attachment in this case, the applicable provisions were Va. Code § 8–519 *et seq.* (1973). The Virginia attachment provisions have remained essentially in their present form despite numerous recodifications since 1819. See Va. Code § 8–519 *et seq.* (1950); Va. Code § 6378 *et seq.* (1919); Va. Code § 2959 *et seq.* (1887); Va. Code, ch. 151 (1849); Va. Code, ch. 123 (1819).

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Respondent ultimately prevailed in his lawsuit. The petitioner Lugar was ordered by a court to pay his debt. A state court did find, however, that Lugar's assets should not have been attached prior to a judgment on the underlying action.

Following this decision Lugar instituted legal action in the United States District Court for the Western District of Virginia. Suing under a federal statute, 42 U. S. C. § 1983, Lugar alleged that the respondent—by filing a petition in state court—had acted "under color of law" *and* had caused the deprivation of constitutional rights under the Fourteenth Amendment—an Amendment that does not create rights enforceable against private citizens, such as one would have assumed respondent to be, but only against the States. *Rendell-Baker* v. *Kohn*, *ante*, at 837; *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 156 (1978); *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); *Civil Rights Cases*, 109 U. S. 3, 11 (1883).[3] Both the District Court and the Court of Appeals agreed that petitioner had no cause of action under § 1983. They sensibly found that respondent could not be held responsible for any deprivation of constitutional rights and that the suit did not belong in federal court.

This Court today reverses the judgment of those lower courts. It holds that respondent, a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties, thereby engaged in "state action." This decision is as unprecedented as it is implausible. It is plainly unjust to the respondent, and the Court makes no

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[3] Title 42 U. S. C. § 1983, at the time in question, provided:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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argument to the contrary. Respondent, who was represented by counsel, could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a "state actor" liable in damages for allegedly unconstitutional action by the Commonwealth of Virginia. Nor is the Court's analysis consistent with the mode of inquiry prescribed by our cases. On the contrary, the Court undermines fundamental distinctions between the common-sense categories of state and private conduct and between the legal concepts of "state action" and private action "under color of law."

I

The plain language of 42 U. S. C. § 1983 establishes that a plaintiff must satisfy two jurisdictional requisites to state an actionable claim. First, he must allege the violation of a right "secured by the Constitution and laws" of the United States. Because "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Bros., Inc.* v. *Brooks*, 436 U. S., at 156, this requirement compels an inquiry into the presence of state action. Second, a § 1983 plaintiff must show that the alleged deprivation was caused by a person acting "under color" of law. In *Flagg Bros.*, this Court affirmed that "these two elements denote two separate areas of inquiry." *Id.*, at 155–156. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970).

This case demonstrates why separate inquiries are required. Here it is not disputed that the Virginia Sheriff and Clerk of Court, the state officials who sequestered petitioner's property in the manner provided by Virginia law, engaged in state action. Yet the petitioner, while alleging constitutional injury from this action by state officials, did not sue the State or its agents. In these circumstances the Court of Appeals correctly stated that the relevant inquiry was the second identified in *Flagg Bros.*: whether the respondent, a private citizen whose only action was to invoke a presumptively valid state attachment process, had acted under color of state law in "causing" the State to deprive peti-

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tioner of alleged constitutional rights.[4] Consistently with past decisions of this Court, the Court of Appeals concluded that respondent's private conduct had not occurred under color of law.

Rejecting the reasoning of the Court of Appeals, the Court opinion inexplicably conflates the two inquiries mandated by *Flagg Bros.* Ignoring that this case involves two sets of actions—one by respondent, who merely filed a suit and accompanying sequestration petition; another by the state officials, who issued the writ and executed the lien—it wrongly frames the question before the Court, not as whether the private respondent acted under color of law in filing the petition, but as "whether . . . respondents, who are private parties, may be appropriately characterized as 'state actors.'" *Ante*, at 939. It then concludes that they may, on the theory that a private party who invokes "the aid of state officials to take advantage of state-created attachment procedures" is a "joint participant" with the State and therefore a "state actor." "The rule," the Court asserts, is as follows:

> "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in a joint activity with the State or its agents." *Ante*, at 941, quoting *Adickes* v. *S. H. Kress & Co.*, *supra*, at 152, in turn quoting *United States* v. *Price*, 383 U. S. 787, 794 (1966).

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[4] Judge Phillips' excellent opinion for the en banc Court of Appeals correctly defined the question presented as "whether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within the contemplation of § 1983." 639 F. 2d 1058, 1061–1062 (CA4 1981) (footnote omitted).

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There are at least two fallacies in the Court's conclusion. First, as is apparent from the quotation, our cases have *not* established that private "joint participants" with state officials themselves necessarily become state actors. Where private citizens interact with state officials in the pursuit of merely private ends, the appropriate inquiry generally is whether the private parties have acted "under color of law." Second, even when the inquiry is whether an action occurred under color of law, our cases make clear that the "joint participation" standard is not satisfied when a private citizen does no more than invoke a presumptively valid judicial process in pursuit only of legitimate private ends.

II

As this Court recognized in *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961), the historic purpose of § 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement by the Fourteenth Amendment.[5] The Court accordingly is correct that an important inquiry in a § 1983 suit against a private party is whether there is an allegation of wrongful "conduct that can be attributed to the State." *Ante*, at 941. This is the first question referred to in *Flagg Bros.* But there still remains the second *Flagg Bros.* question: whether this state action fairly can be attributed to the respondent, whose

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[5] State officials acting in their official capacities, even if in abuse of their lawful authority, generally are held to act "under color" of law. *E. g.*, *Monroe* v. *Pape*, 365 U. S., at 171–172; *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880). This is because such officials are "clothed with the authority" of state law, which gives them power to perpetrate the very wrongs that Congress intended § 1983 to prevent. *United States* v. *Classic*, 313 U. S. 299, 326 (1941); *Ex parte Virginia*, *supra*, at 346–347. Cf. *Polk County* v. *Dodson*, 454 U. S. 312 (1981) (a public defender, representing an indigent client in a criminal proceeding, performs a function for which the authority of his state office is not needed, and therefore does not act under color of state law when engaged in a defense attorney's traditionally private roles).

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only action was to invoke a presumptively valid attachment statute. This question, unasked by the Court, reveals the fallacy of its conclusion that respondent may be held accountable for the attachment of property because he was a "state actor."[6] From the occurrence of state action taken by the Sheriff who sequestered petitioner's property, it does not follow that respondent became a "state actor," simply because the Sheriff was. This Court, until today, has never endorsed this non sequitur.

It of course is true that respondent's private action was *followed* by state action, and that the private and the state actions were not unconnected. But "[t]hat the State responds to [private] actions by [taking action of its own] does not render it *responsible* for those [private] actions." *Blum* v. *Yaretsky*, *post*, at 1005. See *Flagg Bros.*, 436 U. S., at 164–165; *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered "state action" within the meaning of our cases. See, *e. g.*, *Blum* v. *Yaretsky*, *post*, at 1004–1005; *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172–173 (1972). As in *Jackson* v. *Metropolitan Edison Co.*, *supra*, "[r]espondent's exercise of the choice allowed by state law where

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[6] The Court, *ante*, at 928, quotes *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966), as establishing that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." In *Price*, however, the *same* conduct by the same actors constituted both "state action" and the action "under color" of law. See 383 U. S., at 794, n. 7 (if an indictment alleges "conduct on the part of the 'private' defendants which constitutes 'state action,' [it also alleges] action 'under color of law' . . ."). The situation in this case is quite different. The present case involves "state action" by the Sheriff—action that also was "under color of law" under *Price*. But the real question here is whether the conduct of the private respondent constituted *either* state action or action under color of law. The *Price* quotation plainly does not resolve this question. And the cases cited in *Price*, on which the Court also relies, are similarly inapposite.

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the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." 419 U. S., at 357 (footnote omitted).

This Court of course has held that private parties are amenable to suit under § 1983 when "jointly engaged" with state officials in the violation of constitutional rights. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).[7] Yet the Court, in advancing its "joint participation" theory, does not cite a single case in which a private decision to invoke a presumptively valid state legal process has been held to constitute state action. Even the quotation on which the Court principally relies for its statement of the applicable "rule," *ante*, at 941, does not refer to state action. Rather, it states explicitly that "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."

As illustrated by this quotation, our cases have recognized a distinction between "state action" and private action under "color of law." This distinction is sound in principle. It also is consistent with and supportive of the distinction between "private" conduct and government action that is subject to the procedural limitations of the Due Process Clause of the Fourteenth Amendment. As the Court itself notes: "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Ante*, at 936.

A "color of law" inquiry acknowledges that private individuals, engaged in unlawful joint behavior with state officials, may be *personally* responsible for wrongs that they cause to occur. But it does not confuse private actors with the

[7] In *Adickes* the term "jointly engaged" appears to have been used specifically to connote engagement in a "conspiracy." See 398 U. S., at 152–153.

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State—the fallacy of the analysis adopted today by the Court. In this case involving the private action of the respondent in petitioning the state courts of Virginia, the appropriate inquiry as to respondent's liability is not whether he was a state actor, but whether he acted under color of law. It is to this question that I therefore turn.

III

Contrary to the position of the Court, our cases do not establish that a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law. In *Dennis* v. *Sparks*, 449 U. S. 24 (1980), we held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In so holding, however, we explicitly stated that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.*, at 28. This conclusion is reinforced by our more recent decision in *Polk County* v. *Dodson*, 454 U. S. 312 (1981). As we held to be true with respect to the defense of a criminal defendant, invocation of state legal process is "essentially a private function . . . for which state office and authority are not needed." *Id.*, at 319. These recent decisions make clear that independent, private decisions made in the context of litigation cannot be said to occur under color of law.[8] The Court nevertheless advances two principal grounds for its holding to the contrary.

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[8] The Court avers that its holding "is limited to the particular context of prejudgment attachment." *Ante*, at 939, n. 21. However welcome, this limitation lacks a principled basis. It is unclear why a private party engages in state action when filing papers seeking an attachment of property, but not when seeking other relief (*e. g.*, an injunction), or when summoning police to investigate a suspected crime.

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A

The Court argues that petitioner's action under § 1983 is supported by cases in which this Court has applied due process standards to state garnishment and prejudgment attachment procedures. The Court relies specifically on *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974); and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975). According to the Court, these cases establish that a private party acts "under color" of law when seeking the attachment of property under an unconstitutional state statute.[9] In fact, a careful reading demonstrates that they provide no authority for this proposition.

Of the cases cited by the Court, *Sniadach*, *Mitchell*, and *Di-Chem* all involved attacks on the validity of state attachment or garnishment statutes. None of the cases alleged that the private creditor was a joint actor with the State, and none involved a claim for damages against the creditor. Each case involved a state suit, not federal action under § 1983. It therefore was unnecessary in any of these cases for this Court to consider whether the creditor, by virtue of instituting the attachment or garnishment, became a state actor or acted under color of state law. There is not one word in any of these cases that so characterizes the private creditor.[10] In *Fuentes* v. *Shevin*, the Court did consider a

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[9] At one stage in the litigation the respondent averred that his lawsuit raised "[n]o question of the constitutional validity of the State statutes." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court nevertheless concluded that "the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F. 2d, at 1060, and n. 1.

[10] The Court finds support for its contrary view only by reading these cases as implicitly embracing the same fallacy as the Court does today. In *Sniadach*, *Mitchell*, and *Di-Chem*—as in this case—there was no question that state action had occurred. There, as here, some official of the State—an undisputed state actor—had undertaken either to attach property or

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§ 1983 action against a private creditor as well as the State Attorney General.[11] Again, however, the only question before this Court was the validity of a state statute. No claim was made that the creditor was a joint actor with the State or had acted under color of law. No damages were sought from the creditor. Again, there was no occasion for this Court to consider the status under § 1983 of the private party, and there is not a word in the opinion that discusses this. As with *Sniadach*, *Mitchell*, and *Di-Chem*, *Fuentes* thus fails to establish that a private party's mere invocation of state attachment or garnishment procedures represents action under color of law—even in a case in which those procedures are subsequently held to be unconstitutional.

B

In addition to relying on cases involving the constitutionality of state attachment and garnishment statutes, the Court advances a "joint participation" theory based on *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). In *Adickes* the plaintiff sued a private restaurant under § 1983, alleging a *conspiracy* between the restaurant and local police to deprive her of the right to equal treatment in a place of public accommodation. *Id.*, at 152, 153. Reversing the decision below, this Court upheld the cause of action. It found that the private defendant, in "conspiring" with local police to obtain official enforcement of a state custom of racial segregation, engaged in a "'joint activity with the State or its agents'"

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garnish wages. For the Court, the occurrence of state action by these state officials *ipso facto* establishes that the private plaintiffs also must have been viewed as state actors. Given the presence of state action by the state officials, however, there was no need to inquire whether the private parties also were state actors. It is plain from the opinions that the Court did not do so. Nor, in cases arising in state court, was there any need to consider whether the private defendants had acted under color of law within the meaning of § 1983.

[11] *Fuentes* was consolidated with a case involving similar facts, *Epps* v. *Cortese*, 326 F. Supp. 127 (ED Pa. 1971).

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and therefore acted under color of law within the meaning of § 1983. *Id.*, at 152 (quoting *United States* v. *Price*, 383 U. S., at 794).

Contrary to the suggestion of the Court, however, Justice Harlan's Court opinion in *Adickes* did not purport to define the term "under color of law." Attending closely to the facts presented, the Court observed that *"[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . .* we think it essential that he act with the knowledge of and pursuant to that statute." 398 U. S., at 162, n. 23 (emphasis added). As indicated by this choice of language, the Court clearly seems to have contemplated some limiting principle. A citizen summoning the police to enforce the law ordinarily would not be considered to have engaged in a "conspiracy." Nor, presumably, would such a citizen be characterized as acting under color of law and thereby risking amenability to suit for constitutional violations that subsequently might occur. Surely there is nothing in *Adickes* to indicate that the Court would have found action under color of law in cases of this kind.

Although *Adickes* is distinguishable from these hypotheticals, the current case is not. The conduct in *Adickes* occurred in 1964, 10 years after *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and after the decade of publicized litigation that followed in its wake. In view of the intense national focus on issues of racial discrimination, it is virtually inconceivable that a private citizen then could have acted in the innocent belief that the state law and customs involved in *Adickes* still were presumptively valid. As Justice Harlan wrote, "[f]ew principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage segregation." 398 U. S., at 150–152. Construed as resting on this basis, *Adickes* establishes that a private

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party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity. In such a context, the private party *could* be characterized as hiding behind the authority of law and as engaging in "joint participation" with the State in the deprivation of constitutional rights.[12] Here, however, petitioner has alleged no conspiracy. Nor has he even alleged that respondent was invoking the aid of a law he should have known to be constitutionally invalid.[13] Finally, there is no allegation that respondent's decision to invoke legal process was in any way

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[12] Arguing that the patent unconstitutionality of racial discrimination was irrelevant to the "conspiracy" count in *Adickes*, the Court charges that this discussion confuses the conspiracy and the substantive causes of action. *Ante*, at 932, n. 15. The Court's view is difficult to understand. In *Adickes* the private defendant allegedly conspired with the police to "deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation," 398 U. S., at 150, n. 5, and apparently to cause her discriminatory and legally baseless arrest under a vagrancy statute. Because the vagrancy statute was not challenged as invalid on its face, the Court concludes that the "joint action" or "conspiracy" count "did not involve a state law, whether 'plainly unconstitutional' or not." *Ante*, at 932, n. 15. This conclusion is simply wrong. In the first place, the alleged "conspiracy" included an agreement to enforce a state law requiring racial segregation in restaurants. This law plainly was unconstitutional. Further, even the vagrancy statute certainly would have been unconstitutional as applied to enforce racial segregation. Presumably it was for these reasons that the Court agreed that the private defendant had "conspir[ed]" with the local police. 398 U. S., at 152. *Adickes* is entirely a different case from the one at bar.

[13] At least one scholarly commentator has stated a cautious conclusion that the Virginia attachment provisions would satisfy the standards established by this Court's recent due process decisions. See Brabham, Sniadach Through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U. Rich. L. Rev. 157, 195–199 (1977). The correctness of this conclusion is not of course an issue in the present posture of the case, nor is it directly relevant to the case's proper resolution.

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compelled by the law or custom of the State in which he lived. In this context *Adickes* simply is inapposite.

Today's decision therefore is as unprecedented as it is unjust.[14]

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[14] The Court suggests that respondent may be entitled to claim good-faith immunity from this suit for civil damages. *Ante*, at 942, n. 23. This is a positive suggestion with which I agree. A holding of immunity will mitigate the ultimate cost of this litigation. It would not, however, convert the Court's holding into a just one. This case already has been in litigation for nearly five years. It will now be remanded for further proceedings. Respondent, solely because he undertook to assert rights authorized by a presumptively valid state statute, will have been subjected to the expense, distractions, and hazards of a protracted litigation.

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CLEMENTS, GOVERNOR OF TEXAS, ET AL. v. FASHING ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1290. Argued January 12, 1982—Decided June 25, 1982

Article III, § 19, of the Texas Constitution provides that "[n]o judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature." As interpreted by the Texas Supreme Court, § 19 requires an officeholder to complete his current term of office—if it overlaps the legislature's term—before he may be eligible to serve in the state legislature. Article XVI, § 65, provides that if holders of certain state and county offices whose unexpired term exceeds one year become candidates for any other state or federal office, this shall constitute an automatic resignation of the office then held. Appellees—who challenged these provisions in Federal District Court as violating the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution—included officeholders subject to § 65, each of whom alleged that he would have announced his candidacy for higher judicial office except that such announcement would constitute an automatic resignation from his current position, and one of whom (Baca), a Justice of the Peace, also alleged that he could not become a candidate for the state legislature because of § 19. The other appellees were voters who alleged that they would vote for the officeholder-appellees were they to become candidates. The District Court held that the challenged provisions denied appellees equal protection, and the Court of Appeals affirmed.

Held: The judgment is reversed.

631 F. 2d 731, reversed.

JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I, II, and V, concluding that:

1. The uncontested allegations in the complaint are sufficient to create an actual case or controversy between the officeholder-appellees and those Texas officials charged with enforcing §§ 19 and 65. Pp. 961–962.

2. Sections 19 and 65 do not violate the First Amendment. The State's interests are sufficient to warrant the *de minimis* interference with appellees' First Amendment interests in candidacy. In addition,

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appellees' First Amendment challenge as *elected* state officeholders contesting restrictions on partisan political activity must fail since §§ 19 and 65 represent a far more limited restriction on political activity than has been upheld with regard to *civil servants*. Cf. *CSC* v. *Letter Carriers*, 413 U. S. 548; *Broadrick* v. *Oklahoma*, 413 U. S. 601; *United Public Workers* v. *Mitchell*, 330 U. S. 75. Pp. 971–973.

JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR, concluded in Parts III and IV that neither of the challenged provisions of the Texas Constitution violates the Equal Protection Clause. Pp. 962–971.

(a) Candidacy is not a "fundamental right" that itself requires departure from traditional equal protection principles under which state-law classifications need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. In determining whether the provisions challenged here deserve "scrutiny" more vigorous than that which the traditional principles would require, the nature of the interests affected and the extent of the burden the challenged provisions place on the candidacy of current officeholders must be examined. Pp. 962–966.

(b) As applied to Baca, a Justice of the Peace whose term of office is four years whereas a state legislator's term is two years, § 19 simply requires that Baca must wait, at most, two years—one election cycle—before he may run as a candidate for the legislature. In establishing this maximum "waiting period," § 19 places a *de minimis* burden on the political aspirations of a current officeholder. This sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive an equal protection challenge. Section 19 clearly rests on a rational predicate, since it furthers Texas' interests in maintaining the integrity of its Justices of the Peace by ensuring that they will neither abuse their position nor neglect their duties because of aspirations for higher office. Moreover, Texas has a legitimate interest in discouraging its Justices of the Peace from vacating their current terms of office, thereby avoiding the difficulties that accompany interim elections and appointments. Nor is § 19 invalid in that it burdens only those officeholders who desire to run for the legislature. It would be a perversion of the Equal Protection Clause to conclude that Texas must restrict a Justice of the Peace's candidacy for *all* offices before it can restrict his candidacy for *any* office. Pp. 966–970.

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(c) The burdens imposed on candidacy by the automatic-resignation provision of § 65 are even less substantial than those imposed by § 19. Both provisions serve essentially the same state interests. Nor is § 65 invalid on the ground that it applies only to certain elected officials and not to others. Its history shows that the resignation provision was a creature of state electoral reforms, and a regulation is not devoid of a rational predicate simply because it happens to be incomplete. The Equal Protection Clause does not prohibit Texas from restricting one elected officeholder's candidacy for another elected office unless and until it places similar restrictions on other officeholders. Pp. 970–971.

REHNQUIST, J., announced the Court's judgment and delivered the opinion of the Court with respect to Parts I, II, and V, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts III and IV, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 973. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, and in Part I of which WHITE, J., joined, *post*, p. 976.

James P. Allison, Assistant Attorney General of Texas, argued the cause for appellants. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, and *Richard E. Gray III*, Executive Assistant Attorney General.

Raymond C. Caballero argued the cause for appellees. With him on the brief was *John L. Fashing, pro se.**

JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I, II, and V, and delivered an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR joined.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

**Gary A. Ahrens* filed a brief for the County Court at Law Judges Association of the State of Texas as *amicus curiae* urging affirmance.

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I

Article III, § 19, of the Texas Constitution provides:

> "No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee* v. *Daniels*, 377 S.W. 2d 618, 619 (Tex. 1964). Resignation is ineffective to avoid § 19 if the officeholder's current term of office overlaps the term of the legislature to which he seeks election. *Ibid.* In other words, § 19 requires an officeholder to complete his current term of office before he may be eligible to serve in the legislature.

Article XVI, § 65, is commonly referred to as a "resign-to-run" or "automatic resignation" provision. Section 65 covers a wide range of state and county offices.[1] It provides in relevant part:

> "[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held."

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[1] Section 65 covers District Clerks, County Clerks, County Judges, County Treasurers, Criminal District Attorneys, County Surveyors, Inspectors of Hides and Animals, County Commissioners, Justices of the Peace, Sheriffs, Assessors and Collectors of Taxes, District Attorneys, County Attorneys, Public Weighers, and Constables. Section 65 altered the terms of these offices. See *infra*, at 970.

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Four of the appellees are officeholders subject to the automatic resignation provision of § 65. Fashing is a County Judge, Baca and McGhee are Justices of the Peace, and Ybarra is a Constable. Each officeholder-appellee alleged in the complaint that he is qualified under Texas law to be a candidate for higher judicial office, and that the reason he has not and will not announce his candidacy is that such an announcement will constitute an automatic resignation from his current position. Appellee Baca alleged in addition that he could not become a candidate for the legislature because of § 19. The remaining appellees are 20 voters who allege that they would vote for the officeholder-appellees were they to become candidates.

The District Court for the Western District of Texas held that § 19 and § 65 denied appellees equal protection. *Fashing* v. *Moore*, 489 F. Supp. 471 (1980). The District Court concluded that § 19 created "classifications that are invidiously discriminatory." *Id.*, at 475. The District Court explained that § 19 draws distinctions between those officials whose terms end concurrently with the beginning of the legislative term and those whose terms overlap the legislative term. The court also found § 19 deficient because "[n]o reciprocal prohibition . . . is placed upon a legislator seeking to run for mayor or judge." *Ibid.* As to § 65, the District Court determined that the classifications embodied in § 65 "fail[ed] to serve any proper governmental interest" because some state and local officials were covered by § 65 while others were not. The Court of Appeals for the Fifth Circuit affirmed without opinion. *Fashing* v. *Moore*, 631 F. 2d 731 (1980). We noted probable jurisdiction, 452 U. S. 904 (1981), and now reverse.

II

Before we may reach the merits of the constitutional issues in this case, we must address appellants' contention that the allegations in the complaint are insufficient to create a "case or controversy" between the officeholder-appellees and those Texas officials charged with enforcing § 19 and § 65. Appel-

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lants contend that the dispute in this case is merely hypothetical and therefore not a justiciable controversy within the meaning of Art. III of the United States Constitution. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 90–91 (1947).

We find the uncontested allegations in the complaint sufficient to create an actual case or controversy. The officeholder-appellees have alleged that they have not and will not announce their candidacy for higher judicial office because such action will constitute an automatic resignation of their current offices pursuant to § 65. Unlike the situation in *Mitchell*, appellees have alleged in a precise manner that, but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision. Given that § 65 provides for *automatic* resignation upon an announcement of candidacy, it cannot be said that § 65 presents only a speculative or hypothetical obstacle to appellees' candidacy for higher judicial office. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143, and n. 29 (1974); *Turner* v. *Fouche*, 396 U. S. 346, 361–362, n. 23 (1970).

Baca's uncontested allegations are sufficient to create a case or controversy with regard to § 19. That provision entirely disables an officeholder from becoming a candidate for the legislature until he completes his present term of office. The gist of Baca's challenge to § 19 is that it renders him ineligible to become a candidate for the legislature because his term as Justice of the Peace overlaps the legislative term. Baca's dispute with appellants over the constitutionality of § 19, therefore, cannot be said to be abstract or hypothetical, since he has sufficiently alleged that § 19 has prevented him from becoming a candidate for the legislature.

III

The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect

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similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them. See, *e. g.*, *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 808–809 (1969); *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961). We have departed from traditional equal protection principles only when the challenged statute places burdens upon "suspect classes" of persons or on a constitutional right that is deemed to be "fundamental." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17 (1973).

Thus, we must first determine whether the provisions challenged in this case deserve "scrutiny" more vigorous than that which the traditional principles would require.

Far from recognizing candidacy as a "fundamental right," we have held that the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." *Bullock* v. *Carter*, 405 U. S. 134, 143 (1972). "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Ibid.* In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. *Ibid.*; *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968).

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Our ballot access cases, however, do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the "availability of political opportunity." *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974). This Court has departed from traditional equal protection analysis in recent years in two essentially separate, although similar, lines of ballot access cases.

One line of ballot access cases involves classifications based on wealth.[2] In invalidating candidate filing-fee provisions, for example, we have departed from traditional equal protection analysis because such a "system falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock* v. *Carter*, *supra*, at 144. "Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status." *Lubin* v. *Panish*, *supra*, at 717–718. Economic status is not a measure of a prospective candidate's qualifications to hold elective office, and a filing fee alone is an inadequate test of whether a candidacy is serious or spurious. Clearly, the challenged provisions in the instant case involve neither filing fees nor restrictions that invidiously burden those of lower economic status. This line of cases, therefore, does not support a departure from the traditional equal protection principles.

The second line of ballot access cases involves classification schemes that impose burdens on new or small political parties or independent candidates. See, *e. g.*, *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173 (1979); *Storer* v. *Brown*, *supra*; *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); *Williams* v. *Rhodes*, *supra*. These cases involve requirements

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[2] *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Lubin* v. *Panish*, 415 U. S. 709 (1974).

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that an independent candidate or minor party demonstrate a certain level of support among the electorate before the minor party or candidate may obtain a place on the ballot. In these cases, the Court has emphasized that the States have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections. To this end, the Court has upheld reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections. See *Storer* v. *Brown*, *supra; American Party of Texas* v. *White*, *supra; Jenness* v. *Fortson*, *supra*. The Court has recognized, however, that such requirements may burden First Amendment interests in ensuring freedom of association, as these requirements classify on the basis of a candidate's association with particular political parties. Consequently, the State may not act to maintain the "status quo" by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates. See *Williams* v. *Rhodes*, *supra*, at 25.

The provisions of the Texas Constitution challenged in this case do not contain any classification that imposes special burdens on minority political parties or independent candidates. The burdens placed on those candidates subject to § 19 and § 65 in no way depend upon political affiliation or political viewpoint.

It does not automatically follow, of course, that we must apply traditional equal protection principles in examining § 19 and § 65 merely because these restrictions on candidacy do not fall into the two patterns just described. But this fact does counsel against discarding traditional principles without first examining the nature of the interests that are affected and the extent of the burden these provisions place on candidacy. See *Bullock* v. *Carter*, *supra*, at 143; *Storer* v. *Brown*, *supra*, at 730. Not all ballot access restrictions

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require "heightened" equal protection scrutiny. The Court, for example, applied traditional equal protection principles to uphold a classification scheme that denied absentee ballots to inmates in jail awaiting trial. *McDonald* v. *Board of Election Comm'rs*, 394 U. S., at 807–811. Thus, it is necessary to examine the provisions in question in terms of the extent of the burdens that they place on the candidacy of current holders of public office.

IV

A

Section 19 applies only to candidacy for the Texas Legislature. Of the appellees, only Baca, a Justice of the Peace, alleged that he would run for the Texas Legislature. Of the plaintiffs in this case, only appellee Baca's candidacy for another public office has in any fashion been restricted by § 19. The issue in this case, therefore, is whether § 19 may be applied to a Justice of the Peace in a manner consistent with the Equal Protection Clause.[3]

Section 19 merely prohibits officeholders from cutting short their current term of office in order to serve in the legislature. In Texas, the term of office for a Justice of the Peace is four years, while legislative elections are held every

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[3] A litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights. *Ulster County Court* v. *Allen*, 442 U. S. 140, 154–155 (1979). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973). Therefore, Baca may not argue that § 19 may not be applied to restrict a Justice of the Peace's candidacy for the legislature because the State's interests in restricting candidacy by a different class of officeholders are insufficient to survive constitutional scrutiny. See *Storer* v. *Brown*, 415 U. S. 724, 737 (1974). Cf. *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 442 (1982).

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two years. See Tex. Const., Art. V, § 18; Art. III, §§ 3, 4. Therefore, § 19 simply requires Baca to complete his 4-year term as Justice of the Peace before he may be eligible for the legislature. At most, therefore, Baca must wait two years—one election cycle—before he may run as a candidate for the legislature.[4]

In making an equal protection challenge, it is the claimant's burden to "demonstrate in the first instance a discrimination against [him] of some substance." *American Party of Texas* v. *White*, 415 U. S., at 781. Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

In establishing a maximum "waiting period" of two years for candidacy by a Justice of the Peace for the legislature, § 19 places a *de minimis* burden on the political aspirations of a *current* officeholder. Section 19 discriminates neither on the basis of political affiliation nor on any factor not related to a candidate's qualifications to hold political office. Unlike filing fees or the level-of-support requirements, § 19 in no way burdens access to the political process by those who are outside the "mainstream" of political life. In this case, § 19 burdens only a candidate who has successfully been elected to one office, but whose political ambitions lead him to pursue a seat in the Texas Legislature.

A "waiting period" is hardly a significant barrier to candidacy. In *Storer* v. *Brown*, 415 U. S., at 733–737, we upheld a statute that imposed a flat disqualification upon any candidate seeking to run in a party primary if he had been registered or affiliated with another political party within the 12 months preceding his declaration of candidacy. Similarly, we upheld a 7-year durational residency requirement for can-

[4] In the case of local elected officials whose terms of office typically end in nonelection years, the "waiting period" of § 19 is even shorter.

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didacy in *Chimento* v. *Stark*, 414 U. S. 802 (1973), summarily aff'g 353 F. Supp. 1211 (NH). We conclude that this sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause. See *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S., at 189 (STEVENS, J., concurring in part and in judgment).

Section 19 clearly rests on a rational predicate. That provision furthers Texas' interests in maintaining the integrity of the State's Justices of the Peace.[6] By prohibiting candidacy for the legislature until completion of one's term of office, § 19 seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office. The demands of a political campaign may tempt a Justice of the Peace to devote less than his full time and energies to the responsibilities of his office. A campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office. The State's interests are especially important with regard to judicial officers. It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents.

Texas has a legitimate interest in discouraging its Justices of the Peace from vacating their current terms of office. By requiring Justices of the Peace to complete their current terms of office, the State has eliminated one incentive to vacate one's office prior to the expiration of the term. The State may act to avoid the difficulties that accompany interim elections and appointments. "[T]he Constitution does not require the State to choose ineffectual means to achieve its

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[6] The State's particular interest in maintaining the integrity of the judicial system could support § 19, even if such a restriction could not survive constitutional scrutiny with regard to any other officeholder. See n. 3, *supra*.

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aims." *Storer* v. *Brown, supra*, at 736. Under traditional equal protection principles, a classification is not deficient simply because the State could have selected another means of achieving the desired ends. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 316 (1976); *Mathews* v. *Diaz*, 426 U. S. 67, 83 (1976); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 51.

Finally, it is no argument that § 19 is invalid because it burdens only those officeholders who desire to run for the legislature. In *Broadrick* v. *Oklahoma*, 413 U. S. 601, 607, n. 5 (1973), we rejected the contention that Oklahoma's restrictions on political activity by public employees violated the Equal Protection Clause:

> "Appellants also claim that § 818 violates the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions. The contention is somewhat odd in the context of appellants' principal claim, which is that § 818 reaches too far rather than not far enough. In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. See *McGowan* v. *Maryland*, 366 U. S. 420 (1961). And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed."

It would indeed be a perversion of the Equal Protection Clause were we to conclude that Texas must restrict a Justice of the Peace's candidacy for *all* offices before it can restrict a Justice of the Peace's candidacy for *any* office.

The Equal Protection Clause allows the State to regulate "one step at a time, addressing itself to the phase of the problem which seems most acute." *Williamson* v. *Lee Optical Co.*, 348 U. S., at 489. The State "need not run the risk

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of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *McDonald* v. *Board of Election Comm'rs*, 394 U. S., at 809 (citation omitted).

B

Article XVI, § 65, of the Texas Constitution provides that the holders of certain offices automatically resign their positions if they become candidates for any other elected office, unless the unexpired portion of the current term is one year or less. The burdens that § 65 imposes on candidacy are even less substantial than those imposed by § 19. The two provisions, of course, serve essentially the same state interests. The District Court found § 65 deficient, however, not because of the nature or extent of the provision's restriction on candidacy, but because of the manner in which the offices are classified. According to the District Court, the classification system cannot survive equal protection scrutiny because Texas has failed to explain sufficiently why some elected public officials are subject to § 65 and why others are not. As with the case of § 19, we conclude that § 65 survives a challenge under the Equal Protection Clause unless appellees can show that there is no rational predicate to the classification scheme.

The history behind § 65 shows that it may be upheld consistent with the "one step at a time" approach that this Court has undertaken with regard to state regulation not subject to more vigorous scrutiny than that sanctioned by the traditional principles. Section 65 was enacted in 1954 as a transitional provision applying only to the 1954 election. 2 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 812 (1977). Section 65 extended the terms of those offices enumerated in the provision from two to four years. The provision also staggered the terms of other offices so that at least some county and local offices would be contested at each election. *Ibid.* The auto-

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matic resignation proviso to § 65 was not added until 1958. In that year, a similar automatic resignation provision was added in Art. XI, § 11, which applies to officeholders in home rule cities who serve terms longer than two years. Section 11 allows home rule cities the option of extending the terms of municipal offices from two to up to four years.

Thus, the automatic resignation provision in Texas is a creature of the State's electoral reforms of 1958. That the State did not go further in applying the automatic resignation provision to those officeholders whose terms were not extended by § 11 or § 65, absent an invidious purpose, is not the sort of malfunctioning of the State's lawmaking process forbidden by the Equal Protection Clause. See *McDonald* v. *Board of Election Comm'rs, supra,* at 809. A regulation is not devoid of a rational predicate simply because it happens to be incomplete. See *Williamson* v. *Lee Optical Co., supra,* at 489. The Equal Protection Clause does not forbid Texas to restrict one elected officeholder's candidacy for another elected office unless and until it places similar restrictions on other officeholders. *Broadrick* v. *Oklahoma,* 413 U. S., at 607, n. 5. Cf. *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U. S. 456, 466 (1981). The provision's language and its history belie any notion that § 65 serves the invidious purpose of denying access to the political process to identifiable classes of potential candidates.

V

As an alternative ground to support the judgments of the courts below, appellees contend that § 19 and § 65 violate the First Amendment. Our analysis of appellees' challenge under the Equal Protection Clause disposes of this argument. We have concluded that the burden on appellees' First Amendment interests in candidacy are so insignificant that the classifications of § 19 and § 65 may be upheld consistent with traditional equal protection principles. The State's interests in this regard are sufficient to warrant the *de*

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minimis interference with appellees' interests in candidacy.[6]

There is another reason why appellees' First Amendment challenge must fail. Appellees are *elected* state officeholders who contest restrictions on partisan political activity. Section 19 and § 65 represent a far more limited restriction on political activity than this Court has upheld with regard to *civil servants*. See *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973); *Broadrick* v. *Oklahoma, supra; United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). These provisions in no way restrict appellees' ability to participate in the political campaigns of third parties. They limit neither political contributions nor expenditures. They do not preclude appellees from holding an office in a political party. Consistent with § 19 and § 65, appellees may distribute campaign literature and may make speeches on behalf of a candidate.

In this case, § 19 operates merely to require appellee Baca to await the conclusion of his 4-year term as Justice of the Peace before he may run for the Texas Legislature. By virtue of § 65, appellees in this case will automatically resign their current offices if they announce their candidacy for higher judicial office so long as the unexpired term of their current office exceeds one year. In this sense, § 19 and § 65 are in reality no different than the provisions we upheld in *Mitchell*, *Letter Carriers*, and *Broadrick*, which required dismissal of any civil servant who became a political candidate. See 413 U. S., at 556; 413 U. S., at 617.

Neither the Equal Protection Clause nor the First Amendment authorizes this Court to review in cases such as this the manner in which a State has decided to govern itself. Constitutional limitations arise only if the classification scheme is

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[6] Baca may not utilize the "overbreadth" doctrine to challenge § 19. Baca may not challenge the provision's application to him on the grounds that the provision might be unconstitutional as applied to a class of officeholders not before the Court. *Broadrick* v. *Oklahoma*, 413 U. S., at 612–616. The First Amendment will not suffer if the constitutionality of § 19 is litigated on a case-by-case basis.

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invidious or if the challenged provision significantly impairs interests protected by the First Amendment. Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication.

The judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

In cases presenting issues under the Equal Protection Clause, the Court often plunges directly into a discussion of the "level of scrutiny" that will be used to review state action that affects different classes of persons differently. Unfortunately that analysis may do more to obfuscate than to clarify the inquiry. This case suggests that a better starting point may be a careful identification of the character of the federal interest in equality that is implicated by the State's discriminatory classification. In my opinion, the disparate treatment in this case is not inconsistent with any federal interest that is protected by the Equal Protection Clause. With respect to the state action at issue, there is no federal requirement that the different classes be treated as though they were the same.

It is first helpful to put to one side the claim that the burdens imposed on certain Texas officeholders are inconsistent with the First Amendment. I am satisfied that the State's interest in having its officeholders faithfully perform their public responsibilities they have voluntarily undertaken is adequate to justify the restrictions placed on their ability to run for other offices. Nor is the First Amendment violated by the fact that the restrictions do not apply equally to all offices; while that Amendment requires a State's treatment of speech to be evenhanded, there is no suggestion here that the State's classification of offices operates to promote a certain viewpoint at the expense of another. The federal constitutional inquiry thus is limited to the question whether the

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State's classification offends any interest in equality that is protected by the Equal Protection Clause.

In considering that question, certain preliminary observations are important. The complaining officeholders do not object to the fact that they are treated differently from members of the general public.[1] The only complaint is that certain officeholders are treated differently from other officeholders. Moreover, appellees do not claim that the classes are treated differently because of any characteristic of the persons who happen to occupy the various offices at any particular time or of the persons whom those officeholders serve; there is no suggestion that the attributes of the offices have been defined to conceal an intent to discriminate on the basis of personal characteristics or to provide governmental services of differing quality to different segments of the community. In this case, the disparate treatment of different officeholders is entirely a function of the different offices that they occupy.

The question presented then is whether there is any federal interest in requiring a State to define the benefits and burdens of different elective state offices in any particular manner. In my opinion there is not. As far as the Equal Protection Clause is concerned, a State may decide to pay a justice of the peace a higher salary than a Supreme Court justice. It may require game wardens to work longer hours than park rangers. It may require meat inspectors to wear uniforms without requiring building inspectors to do so. In addition, I see no reason why a State may not provide that certain offices will be filled on a part-time basis and that others will be filled by persons who may not seek other office until they have fulfilled their duties in the first. There may be no explanation for these classifications that a federal judge

[1] The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally.

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would find to be "rational." But they do not violate the Equal Protection Clause because there is no federal requirement that a State fit the emoluments or the burdens of different elective state offices into any particular pattern.[2] The reason, then, that appellees may be treated differently from other officeholders is that they occupy different offices. Cf. *Illinois Elections Board* v. *Socialist Workers Party*, 440 U. S. 173, 189 (STEVENS, J., concurring in part and in judgment).[3]

As in so many areas of the law, it is important to consider each case individually. In the situation presented, however, I believe that there is no federal interest in equality that requires the State of Texas to treat the different classes as though they were the same.[4] This reasoning brings me to the same conclusion that JUSTICE REHNQUIST has reached. It avoids, however, the danger of confusing two quite differ-

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[2] The Federal Constitution does, of course, impose significant constraints on a state government's employment practices. For example, the First Amendment limits the State's power to discharge employees who make controversial speeches. *Pickering* v. *Board of Education*, 391 U. S. 563. The Due Process Clause affords procedural safeguards to tenured employees. *Board of Regents* v. *Roth*, 408 U. S. 564. The Equal Protection Clause prohibits the State from classifying applicants for employment in an arbitrary manner. *Sugarman* v. *Dougall*, 413 U. S. 634. I find no comparable federal interest, however, in this case.

[3] In *Vance* v. *Bradley*, 440 U. S. 93, the Court held that a statutory classification that treated employees of the Foreign Service differently from employees of the Civil Service did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. In my view, such a classification—without more—could not violate equal protection requirements.

[4] In defining the interests in equality protected by the Equal Protection Clause, one cannot ignore the State's legitimate interest in structuring its own form of government. The Equal Protection Clause certainly was not intended to require the States to justify every decision concerning the terms and conditions of state employment according to some federal standard.

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ent questions.[5] JUSTICE REHNQUIST has demonstrated that there is a "rational basis" for imposing the burdens at issue on the offices covered by §§ 19 and 65. He has not, however, adequately explained the reasons, if any, for imposing those burdens on some offices but not others. With respect to the latter inquiry, the plurality is satisfied to note that the State may approach its goals "one step at a time." *Ante*, at 969, 970. In my judgment, this response is simply another way of stating that there need be no justification at all for treating two classes differently during the interval between the first step and the second step—an interval that, of course, may well last forever. Although such an approach is unobjectionable in a case involving the differences between different public offices, I surely could not subscribe to JUSTICE REHNQUIST's formulation of the standard to be used in evaluating state legislation that treats different classes of persons differently.[6] Accordingly, while I join the Court's judgment, I join only Parts I, II, and V of JUSTICE REHNQUIST's opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, and with whom JUSTICE WHITE joins as to Part I, dissenting.

In rejecting appellees' equal protection challenge on the basis that the State is proceeding "one step at a time," the plurality today gives new meaning to the term "legal fic-

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[5] See Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). Professor Westen's article is valuable because it illustrates the distinction between concern with the substantive import of a state restriction and concern with any disparate impact that it may produce. In recognizing that distinction, however, it is important not to lose sight of the fact that the Equal Protection Clause has independent significance in protecting the federal interest in requiring States to govern impartially.

[6] The plurality frames the test that should ordinarily be applied in this way: "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Ante*, at 963.

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tion."[1] The Court's summary dismissal of appellees' First Amendment claim vastly oversimplifies the delicate accommodations that must be made between the interests of the State as employer and the constitutionally protected rights of state employees. I dissent.

I

Putting to one side the question of the proper level of equal protection scrutiny to be applied to these restrictions on candidacy for public office,[2] I find it clear that no genuine justifi-

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[1] I note that a majority of the Court today rejects the plurality's mode of equal protection analysis. See *ante*, at 976 (STEVENS, J., concurring in part and in judgment).

[2] It is worth noting, however, that the plurality's analysis of the level of scrutiny to be applied to these restrictions gives too little consideration to the impact of our prior cases. Although we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters. See, *e. g.*, *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979); *Lubin* v. *Panish*, 415 U. S. 709, 716 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Bullock* v. *Carter*, 405 U. S. 134, 142–143 (1972); *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). With this consideration in mind, we have applied strict scrutiny in reviewing most restrictions on ballot access; thus we have required the State to justify any discrimination with respect to candidacy with a showing that the differential treatment is "necessary to further compelling state interests." *American Party of Texas* v. *White*, *supra*, at 780. See also *Bullock* v. *Carter*, *supra*, at 144. The plurality dismisses our prior cases as dealing with only two kinds of ballot access restrictions—classifications based on wealth and classifications imposing burdens on new or small political parties or independent candidates. *Ante*, at 964–965. But strict scrutiny was required in those cases because of their impact on the First Amendment *rights* of candidates and voters, see *Storer* v. *Brown*, 415 U. S. 724, 729 (1974), not because the *class* of candidates or voters that was burdened was somehow suspect. Compare *Lubin* v. *Panish*, 415 U. S., at 717–718, with *id.*, at 719 (Douglas, J., concurring) (strict scrutiny demanded because classification based on wealth). The plurality offers no explanation as to why the restrictions at issue here, which completely bar some candidates from running and require other candidates to give up their present employment, are

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cation exists that might support the classifications embodied in either Art. III, § 19, or Art. XVI, § 65.

The State seeks to justify both provisions on the basis of its interest in discouraging abuse of office and neglect of duties by current officeholders campaigning for higher office during their terms. The plurality posits an additional justification not asserted by the State for § 19: That section also discourages certain officeholders "from vacating their current terms of office." *Ante*, at 968. But neither the State nor the plurality offers any justification for *differential* treatment of various classes of officeholders, and the search for such justification makes clear that the classifications embodied in these provisions lack any meaningful relationship to the State's asserted or supposed interests.

Article III, § 19, provides:

> "No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this state, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

And the Texas Election Code provides that persons ineligible to hold an office shall not be permitted to campaign for that office. Tex. Rev. Civ. Stat. Ann., Arts. 1.05, 1.06 (Vernon Supp. 1982). Article III, § 19, creates, in effect, two classes of officeholders. Officeholders of state, federal, and even foreign offices seeking Texas *legislative* office whose terms overlap with the legislative term are barred from campaign-

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less "substantial" in their impact on candidates and their supporters than, for example, the $700 filing fee at issue in *Lubin*.

In my view, some greater deference may be due the State because these restrictions affect only public employees, see Part II, *infra*, but this does not suggest that, in subjecting these classifications to equal protection scrutiny, we should completely disregard the vital interests of the candidates and the citizens who they represent in a political campaign.

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ing during their terms, and even after they have resigned, see n. 4, *infra;* those officeholders seeking any other office and those officeholders whose terms do not overlap the legislative term are free to launch campaigns from their current offices, even while they still hold office.

What relationship does the plurality find between the burden placed on the class of all state, federal, and foreign officeholders seeking legislative seats and the asserted state interests? If it faced the question, the plurality would of course have to acknowledge that Texas has no interest in protecting, for example, federal officials—particularly those serving the electorate of another State—from the corrupting influence of a state legislative campaign. The only conceivable state interest in barring these candidacies would be the purely impermissible one of protecting Texas legislative seats against outside competition. But the plurality does not address this question or purport to find any justification for the broad reach of § 19. Instead it defines the equal protection challenge to § 19 as "whether § 19 may be applied to a [Texas] Justice of the Peace," *ante*, at 966, and acknowledges that § 19 would not necessarily survive constitutional scrutiny with regard to any other officeholder, *ante*, at 968, n. 5. The *plurality* defines the question in this manner because Baca, the appellee challenging this provision, is a Justice of the Peace. But the *State* has defined the class of persons restricted by § 19 as all persons "holding a lucrative office under the United States, or [Texas], or any foreign government." And it has always been my understanding that "'[e]qual protection' . . . emphasizes disparity in treatment by a State between classes of individuals," in contrast to "'[d]ue process'," which "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross* v. *Moffitt*, 417 U. S. 600, 609 (1974). Accordingly, our equal protection cases have always assessed the legislative purpose in light of the class as the legislature has drawn it, rather than on the basis

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of some judicially drawn subclass for which it is possible to posit some legitimate purpose for discriminatory treatment. See, *e. g.*, *Lubin* v. *Panish*, 415 U. S. 709, 717–718 (1974).[3] When the class of persons burdened by § 19, as the State has drawn it, is viewed in light of the asserted purposes of discouraging abuse of office and neglect of duty, it is beyond dispute that the class is substantially overbroad.

The plurality cannot, in the same manner that it avoids the overbreadth of the class, avoid the irrationality in the fact that § 19 applies *only* to candidacy for the Texas Legislature. Officeholders are free to run for President, the United States Senate, governor, mayor, city council, and many other offices. The distracting and corrupting effects of campaigning are obviously present in *all* campaigns, not only those for the legislature. The plurality responds to this characteristic of the legislative scheme by stating that "[t]he Equal Protection Clause allows the State to regulate 'one step at a time . . . .'" *Ante*, at 969, quoting *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). But the record in this case belies any assertion by the State that it is proceeding "one step at a time." Article III, § 19, has existed in its present form since 1876. There is no legislative history to explain its intended purpose or to suggest that it is part of a larger, more equitable regulatory scheme.[4] And in the 106 years that

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[3] The plurality's sudden focus on the fairness of the restriction to the individual as opposed to the class, is as episodic as it is novel. For in writing for the Court in *Weinberger* v. *Salfi*, 422 U. S. 749, 781 (1975), JUSTICE REHNQUIST refused to hold that an otherwise valid legislative classification should be *invalidated* on the basis of the characteristics of the individual plaintiff.

[4] Indeed, it may be that Art. III, § 19, was intended to do no more than prohibit dual officeholding. If it had been so construed, there would be no equal protection problem for there are blanket prohibitions in Texas against holding two elected offices at the same time. See Art. II, § 1; Art. XVI, § 40. In *Lee* v. *Daniels*, 377 S. W. 2d 618 (1964), the Texas Supreme Court construed the language in § 19, "during the term for which he was elected or appointed," to mean that even after an otherwise qualified candi-

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have passed since § 19's adoption, the Texas Legislature has adopted no comparable bar to candidacy for other offices.

A state legislature may implement a program step by step, and an underinclusive regulation may be upheld where the record demonstrates that such "one step at a time" regulation is in fact being undertaken. See, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 465–466 (1981); *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 809–811 (1969). I cannot subscribe, however, to the plurality's wholly fictional one-step-at-a-time justification. As JUSTICE STEVENS points out in his concurrence, the plurality's one-step-at-a-time response in this case "is simply another way of stating that there need be no justification at all for treating two classes differently during the interval between the first step and the second step—an interval that, of course, may well last forever." *Ante*, at 976.

Section 19's haphazard reach and isolated existence strikes me as the very sort of "arbitrary scheme or plan" that we distinguished from an as-yet-uncompleted design in *McDonald* v. *Board of Election Comm'rs*, *supra*, at 811, a case the plurality relies on to support the classification in this case, see *ante*, at 971. In *McDonald* the record demonstrated that in providing absentee ballots to certain classes of persons the State was in fact proceeding step by step. The State had demonstrated "a consistent and laudable state policy of add-

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date for the legislature had resigned his current position, he could not hold legislative office. The dissent in *Lee* argued that § 19 was simply a prohibition on dual officeholding and the phrase, "during the term for which he is elected or appointed," simply "negates any basis for the contention that a person" who once held one of the offices covered by the section was still ineligible for the legislature after the completion of his term. *Id.*, at 621 (Steakley, J., dissenting). The Texas Supreme Court was unaided by any legislative history on this provision. We are of course bound by the state court's construction of this state provision, but I point out its ambiguity to highlight the dubious nature of the plurality's hypothesis that Art. III, § 19, marks one step in what will become more complete regulation of a perceived evil.

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ing, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature." 394 U. S., at 811. Article III, § 19, stands in stark contrast to the provision reviewed in *McDonald*. In this case, it is pure fiction for the plurality to declare that § 19 is one step in a broader and more equitable scheme that due to legislative delay and inadvertence is yet to be completed.

Appellants, unlike the plurality, at least attempt to justify the distinction between legislative campaigns and other campaigns. They argue that an officeholder-candidate will not enforce *legislative* policy if he or she is campaigning for a legislative seat. Brief for Appellants 9. But this attempted justification is unpersuasive. Appellants' argument apparently rests on the tenuous premise that a candidate is likely to choose the strategy of undermining the program of an incumbent opponent in order to advance his own prospects. It is plain that whatever force there is to this premise cannot be limited to a candidate for the legislature; it may as logically be argued that a judge will further his ambition for higher judicial office by failing to follow judicial decisions of a higher court, or that a state legislator with gubernatorial aspirations will use his present position to sabotage the program of the present administration. Even assuming that the State has a particular interest in protecting state *legislative* policy, and accepting appellants' somewhat dubious premise, it is still apparent to me that this asserted purpose is ill-served by the group of officeholders covered by § 19. Only those officeholders whose terms happen to *overlap* with the legislative term are prohibited from running for the legislature.[5] The

[5] For example, in *Lee* v. *Daniels*, *supra*, a County Commissioner resigned on February 1, 1964, and he sought thereafter to run for the legislature. However, his term did not expire until December 31, 1964; the legislative term commenced in November 1964, and the court therefore held that his name could not be placed on the legislative ballot. In contrast, in *Chapa* v. *Whittle*, 536 S. W. 2d 681 (Tex. Civ. App. 1976), the Director of a Social Culture Intervention Program began campaigning in February 1966. He resigned from his current office in May of that year. Because the Di-

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District Court noted that this prohibition is most likely to bar the candidacy of mayors and city councilmen—persons who have little if anything to do with carrying out state legislative policy. *Fashing* v. *Moore*, 489 F. Supp. 471, 475 (WD Tex. 1980). Appointed administrators, District Attorneys, and District Judges—to name just a few—whose terms do not overlap with that of the legislature, but who are directly charged with carrying out legislative policy, are left free to campaign for the legislature while remaining in office. See, *e. g.*, *Chapa* v. *Whittle*, 536 S. W. 2d 681 (Tex. Civ. App. 1976). It is thus clear that the prohibition on legislative campaigns in § 19 furthers in no substantial way the State's asserted interest in fidelity to legislative policy. In short, I can discern neither in the appellants' argument nor in the plurality's hypothesis any rational basis for the discriminatory burden placed upon this class of potential candidates.

I turn now to Art. XVI, § 65. That section applies only to persons holding any of approximately 16 enumerated offices.[6] With respect to persons holding these offices, Art. XVI, § 65, provides:

> "[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed

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rector had no set term, the complainant could not show that the Director's term overlapped the legislative term, beginning in November 1966, and the court therefore allowed the Director to run for the legislature.

[6] The assortment of offices restricted by Art. XVI, § 65, are: District Clerks; County Clerks; various County Judges; County Treasurers; Criminal District Attorneys; County Surveyors; Inspectors of Hides and Animals; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.

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one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held . . . ."

Other officeholders, performing similar if not identical duties, are not within the reach of this or any similar restriction and are thus free to campaign for one office while holding another. Article XVI, § 65, while lacking § 19's broad sweep into areas completely beyond the purview of the State's concerns, restricts the candidacy only of an unexplained and seemingly inexplicable collection of administrative, executive, and judicial officials. The only distinguishing features of the officeholders collected in § 65 is that in 1954 their terms of office were increased from two to four years, and they all happen to be precinct, county, and district officials as opposed to members of the legislature or statewide elected officials. See 2 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 813 (1977). Neither appellants nor the plurality offer any explanation why the State has a greater interest in having the undivided attention of a "public weigher" than of a state criminal court judge, or any reason why the State has a greater interest in preventing the abuse of office by an "Inspector of Hides and Animals," than by a justice of the Texas Supreme Court. Yet in each instance § 65 applies to the former office and not to the latter. Again the plurality opines that the State is legislating "one step at a time." But while Art. XVI, § 65, is of more recent vintage than Art. III, § 19, it has been part of the Texas Constitution for 24 years without prompting any corresponding rule applicable to holders of statewide office. Thus § 65, like § 19, cannot in any realistic sense be upheld as one step in an evolving scheme.

In short, in my view, neither Art. III, § 19, nor Art. XVI, § 65, can survive even minimal equal protection scrutiny.[7]

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[7] JUSTICE STEVENS argues in his concurrence that there is no federal interest in requiring the State to treat different elective state offices in a

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II

I also believe that Art. III, § 19, violates the First Amendment. The Court dismisses this contention by stating that this provision is a more limited restriction on political activities of public employees than we have upheld in prior cases. But none of our precedents presented a restriction on campaigning that applied even *after* an official had resigned from public office or to officials who did not serve in the regulating government. Moreover, the Court does not go on to address what is for me the crucial question: What justification does the State have for this restriction and how does this provision address the State's asserted interests?

The Court acknowledges that Art. III, § 19, restrains government employees' pursuit of political office. Such pursuit is clearly protected by the First Amendment and restrictions on it must be justified by the State's interest in ensuring the continued proper performance of current public duties. As the Court notes, similar competing considerations were considered in *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973), *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), and *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947).

In *United Public Workers*, the Court upheld § 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2), which prohibits certain federal civil service employees from taking "an active part in political management or political campaigns." In *Letter Car-*

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fair and equitable manner. *Ante*, at 974. I agree with JUSTICE STEVENS that the State may define *many* of the "benefits and burdens of different elective state offices," in a dissimilar manner without offering an explanation for the classifications that a federal judge will find to be rational, so long as such classifications do not mask any racial or otherwise impermissible discrimination. *Ibid.* But where the differential treatment concerns a restriction on the right to seek public office—a right protected by the First Amendment—that Amendment supplies the federal interest in equality that may be lacking where the State is simply determining salary, hours, or working conditions of its own employees.

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riers the Court reaffirmed *United Public Workers*, and in *Broadrick* the Court upheld a similar state provision. In these cases, the Court determined that the restrictions were necessary to foster and protect efficient and effective government by keeping partisan politics out of the civil service. The Court recognized that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Letter Carriers, supra*, at 564, quoting *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968).

At the same time, this Court has unequivocally rejected the premise that one surrenders the protection of the First Amendment by accepting the responsibilities of public employment. *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Pickering* v. *Board of Education, supra*. And the Court has clearly recognized that restrictions on candidacy impinge on First Amendment rights. See, *e. g.*, *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173 (1979); *Lubin* v. *Panish*, 415 U. S. 709 (1974); *American Party of Texas* v. *White*, 415 U. S. 767 (1974); *Bullock* v. *Carter*, 405 U. S. 134, 142–143 (1972); *Williams* v. *Rhodes*, 393 U. S. 23, 34 (1968).[8] Our precedents establish the guiding principle for applying the strictures of the First Amendment to restrictions of expressional conduct of state employees: The Court must arrive at an accommodation "'between the interests of the [employee]

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[8] Such restrictions affect not only the expressional and associational rights of candidates, but those of voters as well. Voters generally assert their views on public issues by casting their ballots for the candidate of their choice. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S., at 184. The effect on voters from restrictions on candidacy is illustrated in this case by the fact that 20 of the appellees are voters who allege that they would vote for the officeholder-appellees were they to become candidates. See *ante*, at 961.

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. . . and the interest of the [government], as an employer.'" *CSC* v. *Letter Carriers, supra,* at 564, quoting *Pickering* v. *Board of Education, supra,* at 568. And in striking the required balance, "[t]he gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights." *Elrod* v. *Burns, supra,* at 362 (plurality opinion). See also *United Public Workers* v. *Mitchell, supra,* at 96.[9]

In undertaking this balance, I acknowledge, of course, that the State has a vital interest in ensuring that public officeholders perform their duties properly, and that a State requires substantial flexibility to develop both direct and indirect methods of serving that interest. But if the State's interest is not substantially furthered by the challenged restrictions, then the restrictions are an unnecessary intrusion into employee rights. If the restriction is effective, but interferes with protected activity more than is reasonably necessary to further the asserted state interest, then the overintrusive aspects of the restriction lack constitutional justification. In short, to survive scrutiny under the First Amendment, a restriction on political campaigning by government employees must be narrowly tailored and substantially related to furthering the State's asserted interests.

It is clear to me that Art. III, § 19, is not narrowly tailored to conform to the State's asserted interests. Nor does it further those interests in a meaningful way. I have discussed briefly the broad sweep and thus the absence of narrow tailoring of § 19 in Part I, *supra.* Section 19 bars the candidacy of a wide class of state, federal, and foreign officeholders. The offices enumerated in § 19 include the judges of all courts, the Secretary of State, the Attorney General, the

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[9] "[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." 330 U. S., at 96.

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clerks of any court of record, and all persons holding any "lucrative" office under the United States, Texas, or any foreign government. Section 19 by its terms would bar, for example, a retired United States District Court Judge, appointed for life, whose District was outside of Texas, from running for the Texas State Legislature. The Texas courts have interpreted "lucrative" broadly enough to include any office that yields profit, gain, revenue, or salary, regardless of the adequacy of the compensation. See *Willis* v. *Potts*, 377 S. W. 2d 622, 625–627 (Tex. 1964). The state courts have also held that offices created by political bodies subordinate to the State, such as cities, are covered by § 19. See, *id.*, at 624–625.

Section 19 is not merely a resign-to-run law, or a prohibition on dual officeholding. Rather, the Texas Supreme Court has construed the phrase, "during the term for which he was elected or appointed," to bar candidacy for the legislature even *after* an official has resigned from his current office. See n. 4, *supra*. As one commentator has noted, § 19 "has trapped the unwary who believed (not unreasonably) that by resigning their present office they would be eligible to run for the legislature." 1 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 135 (1977).

In many of its applications § 19 has absolutely *no* connection to Texas' interest in how Texas public officials perform their current duties. This provision applies to persons holding office under the United States or any foreign government and would thus bar a person holding *federal* office from resigning from that office and running for the Texas Legislature.[10] Even with respect to persons who, like Baca, are

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[10] The Court, citing *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–616 (1973), states that Baca may not utilize the "overbreadth" doctrine to "challenge the provision's application to him on the grounds that the provision might be unconstitutional as applied to a class of officeholders not before

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currently Texas public officials, § 19 continues to operate after their resignations from current positions have taken effect and their responsibility to the Texas electorate has ceased. A provision directed only at Texas officeholders, that gave those officeholders a choice between resigning and serving out their current terms would serve all of the asserted state interests; yet Texas has inexplicably chosen this far more restrictive alternative.[11]

The same irrationality evident to me when I analyzed § 19 under the Equal Protection Clause convinces me that it is not substantially related to furthering the asserted state interests. Appellants contend that § 19 promotes attention to

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the Court." *Ante*, at 972, n. 6. But all that *Broadrick* holds is "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U. S., at 615. In my view, the overbreadth of Art. III, § 19, is clearly substantial, particularly when its breadth is viewed in relationship to its relatively tenuous "legitimate sweep."

[11] The less intrusive means for accomplishing the State's goals are obvious. A statute requiring persons to take a leave of absence would also preclude an officeholder from misusing his current office during a campaign. See *Bolin* v. *Minnesota*, 313 N. W. 2d 381, 384 (Minn. 1981). Appellants assert an interest in ensuring that defeated candidates do not return to office and administer their old position vindictively or halfheartedly. Brief for Appellants 9. But this would be satisfied by a resign-to-run statute—giving candidates a choice between running for a new office or holding their present position. Appellants suggest that even before an actual announcement of candidacy a potential candidate may begin to abuse his current office. *Id.*, at 13. They thus appear to suggest that a resign-to-run provision is not necessarily adequate because it allows the candidate to stay in his current position until his formal announcement of candidacy. Even if this is a sufficient state concern to justify further intrusion on the interests of potential candidates, it would be fully served by a statute that simply required all potential candidates to resign some period of time *before* they formally announced their candidacy for a new office. Unlike the plurality, I refuse to assume that the State has an interest in having officeholders who no longer desire to hold their office serve out their terms. See *ante*, at 968–969. Indeed, appellants have not asserted this interest in this Court or in the courts below.

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current duties by officeholders and prevents abuse of their current office in the attempt to further political aspirations. But § 19 prohibits the enumerated officeholders from engaging only in Texas *legislative* campaigns. It has absolutely no effect on an officeholder who misuses his current office in order to undertake a campaign for any other office. Even if no improper motive underlies the restriction, it is obvious that § 19 is far more likely to discourage officeholders from running for the state legislature than it is to encourage them to serve properly in their current positions. See *supra*, at 980–983.

In sum, the prohibition of § 19 furthers in no substantial way any of the asserted state interests said to support it, and is not narrowly tailored to avoid unnecessary interference with the First Amendment interests of government employees. Accordingly, in my view, this provision is invalid as an unjustified infringement on appellees' First Amendment rights.[12]

Because the Court finds neither an equal protection nor a First Amendment violation in either of these restrictions on candidacy, I respectfully dissent.

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[12] Article XVI, § 65, also affects appellees' right to run for political office; it has a lesser impact on that right for it merely requires that candidates resign before embarking on political campaigns. Moreover, it bears a more substantial relationship to the State's asserted purposes because it bans political campaigns for all offices. That provision does not in my view violate the First Amendment. Because it applies only to an inexplicable group of elected officials, it does, however, violate the Equal Protection Clause.

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BLUM, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. v. YARETSKY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1952. Argued March 24, 1982—Decided June 25, 1982

As a participating State in the Medicaid program established by the Social Security Act, New York provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either "skilled nursing facilities" (SNF's) or "health related facilities" (HRF's), the latter providing less extensive, and generally less expensive, medical care than the former. The nursing homes are directly reimbursed by the State for the reasonable cost of health care services. To obtain Medicaid assistance, an individual must satisfy eligibility standards in terms of income or resources and must seek medically necessary services. As to the latter requirement, federal regulations require each nursing home to establish a utilization review committee (URC) of physicians whose functions include periodically assessing whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified. Respondents, who were Medicaid patients in an SNF, instituted a class action in Federal District Court after the nursing home's URC decided that they should be transferred to a lower level of care in an HRF and so notified local officials, and after administrative hearings resulting in affirmance by state officials of the local officials' decision to discontinue benefits unless respondents accepted transfer to an HRF. Respondents alleged, *inter alia*, that they had not been afforded adequate notice either of the URC decisions and the reasons supporting them or of their right to an administrative hearing to challenge those decisions, as required by the Due Process Clause of the Fourteenth Amendment. Respondents later added claims as to procedural safeguards that should also apply to URC decisions transferring a patient to a *higher* level of care and to transfers of any kind initiated by the nursing homes themselves or by the patients' attending physicians. Ultimately the court approved a consent judgment establishing procedural rights applicable to URC-initiated transfers to lower levels of care, and ruled in respondents' favor as to transfers to higher levels of care and all transfers initiated by the facility or its agent. The court permanently enjoined petitioner state officials and all SNF's and HRF's in the State from permitting

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or ordering discharges of class members or their transfers to a different level of care, without prior written notice and an evidentiary hearing. The Court of Appeals affirmed, holding that URC-initiated transfers to a higher level of care and all discharges and transfers by nursing homes or attending physicians involved "state action" for purposes of the Fourteenth Amendment.

Held:

1. Respondents have standing to challenge the procedural adequacy of facility-initiated discharges and transfers to lower levels of care. Although respondents were threatened only with URC-initiated transfers to lower levels of care, and although the consent judgment in the District Court halted implementation of such URC decisions, the threat that the nursing homes might determine, independently of the URC decisions, that respondents' continued stay at current levels of care was not medically necessary is not imaginary or speculative but is quite realistic. However, the threat of transfers to *higher* levels of care is not of sufficient immediacy and reality that respondents presently have standing to seek an adjudication of the procedures attending such transfers. Thus the District Court exceeded its authority under Art. III in adjudicating the procedures governing transfers to higher levels of care. Pp. 999–1002.

2. Respondents failed to establish "state action" in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care and thus failed to prove that petitioners have violated rights secured by the Fourteenth Amendment. Pp. 1002–1012.

(a) The mere fact that a private business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. A State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement that the choice must in law be deemed to be that of the State. Pp. 1003–1005.

(b) The fact that the State responds to the nursing homes' discharge or transfer decisions by adjusting the patients' Medicaid benefits does not render it *responsible* for those decisions. Moreover, the pertinent statutes and regulations do not constitute affirmative commands by the State for summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in nursing facilities. The State, by requiring completion by physicians or nursing homes of forms relating to a patient's condition and discharge or transfer decisions, is not responsible for the decisions of the physicians or nursing homes. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State. Similarly, regulations imposing penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate do

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not themselves dictate the decision to discharge or transfer in a particular case. And even though the State subsidizes the cost of the facilities, pays the expenses of the patients, and licenses the facilities, the action of the nursing homes is not thereby converted into "state action." Nor do the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State," *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 353, so as to establish the required nexus between the State and the challenged action. Pp. 1005–1012.

629 F. 2d 817, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *ante*, p. 843. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 1012.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for petitioners. With her on the briefs were *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, *Andrea G. Iason*, Assistant Attorney General, and *Peter H. Schiff*.

John E. Kirklin argued the cause for respondents. With him on the brief were *Kalman Finkel* and *David Goldfarb*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents represent a class of Medicaid patients challenging decisions by the nursing homes in which they reside to discharge or transfer patients without notice or an opportunity for a hearing. The question is whether the State may be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment.

I

Congress established the Medicaid program in 1965 as Title XIX of the Social Security Act, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. IV), to provide federal financial assist-

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**Toby S. Edelman* filed a brief for the National Citizens' Coalition for Nursing Home Reform as *amicus curiae* urging affirmance.

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ance to States that choose to reimburse certain medical costs incurred by the poor. As a participating State, New York provides Medicaid assistance to eligible persons who receive care in private nursing homes, which are designated as either "skilled nursing facilities" (SNF's) or "health related facilities" (HRF's).[1] The latter provide less extensive, and generally less expensive, medical care than the former.[2] Nursing homes chosen by Medicaid patients are directly reimbursed by the State for the reasonable cost of health care services, N. Y. Soc. Serv. Law § 367–a.1 (McKinney Supp. 1981).

An individual must meet two conditions to obtain Medicaid assistance. He must satisfy eligibility standards defined in terms of income or resources and he must seek medically necessary services. See 42 U. S. C. § 1396. To assure that the latter condition is satisfied,[3] federal regulations require each nursing home to establish a utilization review committee (URC) of physicians whose functions include periodically as-

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[1] N. Y. Soc. Serv. Law § 365–a.2(b) (McKinney Supp. 1982). Title XIX requires as a condition to the receipt of federal funds that participating States provide financial assistance to eligible persons in need of "skilled nursing facility services." 42 U. S. C. §§ 1396a(a)(13)(B), 1396d(a)(4)(A) (1976 ed. and Supp. IV). Federal assistance is also available to States that choose to reimburse the cost of "intermediate care facility services." § 1396d(a)(15). See §§ 1396d(c), (f). New York regulations refer to facilities that provide the latter type of care as HRF's. 10 NYCRR § 414.1(a) (1981).

[2] Compare 10 NYCRR §§ 416.1–416.2 with §§ 421.1–421.2 (1978). The parties have stipulated that Medicaid reimbursement rates for HRF's are generally lower than those for SNF's. See App. 169, ¶ 12.

[3] Congress has provided that federal funds supplied to assist in reimbursing nursing home costs will be reduced unless the participating State provides for the periodic review of patient care "to safeguard against unnecessary utilization of such care and services and to assure that payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." 42 U. S. C. § 1396a(a)(30). See §§ 1396b(g)(1)(C), 1396b(i)(4), 1395x(k).

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sessing whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified.[4] 42 CFR §§ 456.305, 456.406 (1981). If the URC determines that the patient should be discharged or transferred to a different level of care, either more or less intensive, it must notify the state agency responsible for administering Medicaid assistance.[5] 42 CFR §§ 456.337(c), 456.437(d) (1981); 10 NYCRR §§ 416.9(f)(2), (3), 421.13(f)(2), (3) (1980).

At the time their complaint was filed, respondents Yaretsky and Cuevas were patients in the American Nursing Home, an SNF located in New York City. Both were recipients of assistance under the Medicaid program. In December 1975 the nursing home's URC decided that respondents did not need the care they were receiving and should be transferred to a lower level of care in an HRF. New York City officials, who were then responsible for administering the Medicaid program in the city, were notified of this decision and prepared to reduce or terminate payments to the nursing home for respondents' care. Following administrative hearings, state social service officials affirmed the decision to discontinue benefits unless respondents accepted a transfer to an HRF providing a reduced level of care.

Respondents then commenced this suit, acting individually and on behalf of a class of Medicaid-eligible residents of New

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[4] These committees must be composed of private physicians who are not directly responsible for the patient whose care is being reviewed. 42 CFR §§ 456.306, 456.406 (1981). Under New York law, the committee members may not be employed by the SNF or HRF and may not have a financial interest in any residential care facility. 10 NYCRR §§ 416.9(b)(2), 421.13(b)(2) (1980).

[5] If the committee determines that a discharge or transfer is called for, it must afford the patient's attending physician an opportunity to present his views, although the committee's decision ultimately is final. 42 CFR §§ 456.336(f), (h), 456.436(f), (i) (1981). See 10 NYCRR §§ 731.11, 741.14 (1980).

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York nursing homes.[6] Named as defendants were the Commissioners of the New York Department of Social Services and the Department of Health. Respondents alleged in part that the defendants had not afforded them adequate notice either of URC decisions and the reasons supporting them or of their right to an administrative hearing to challenge those decisions.[7] Respondents maintained that these actions violated their rights under state and federal law and under the Due Process Clause of the Fourteenth Amendment. They sought injunctive relief and damages.[8]

In January 1978 the District Court certified a class[9] and issued a preliminary injunction, restraining the defendants

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[6] The class was defined to include patients "who have been, are or will be threatened or forced to leave their nursing homes and have their Medicaid benefits reduced or terminated as a result of 'Utilization Review' committee findings alleging that they are not eligible for the level of nursing home care they receive." App. 19, ¶ 1. The complaint also named as a plaintiff the New York chapter of the Gray Panthers, an organization that "has among its objectives the development of a health care system for the elderly which provides quality health care to all persons." *Id.*, at 21, ¶ 5.

[7] The complaint also alleged that URC transfers to lower levels of care and corresponding reductions in Medicaid benefits were arbitrary and were caused by improperly constituted URC's that acted without adequate written criteria and failed to afford adequate notice either to the patients or their attending physicians.

[8] Ten individuals, who are also respondents in this Court, later intervened in the suit. Each intervenor was a resident of either an SNF or an HRF and had been the subject of a URC decision recommending transfer to a lower level of care. The intervenors all were afforded administrative hearings resulting in affirmance of petitioners' decisions to reduce or terminate Medicaid benefits if the intervenors did not follow URC recommendations.

[9] The class was defined to include "all persons who are residents in skilled nursing or intermediate care facilities in the State of New York and who, following utilization review recommendations and/or fair hearings, are determined by defendants to be ineligible to receive the level of care at the facilities in which they reside and to be subject to reduction or termination of their Medicaid benefits." *Id.*, at 45.

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from reducing or terminating Medicaid benefits without timely written notice to the patients, provided by state or local officials, of the reasons for the URC decision, the defendants' proposed action, and the patients' right to an evidentiary hearing and continued benefits pending administrative resolution of the claim. App. 100–101, ¶2.[10] The court's accompanying opinion relied primarily on existing federal and state regulations. *Id.*, at 112–115.

In March 1979 the District Court issued a pretrial order that identified a new claim raised by respondents that a panoply of procedural safeguards should apply to URC decisions transferring a patient to a *higher, i. e.*, more-intensive, level of medical care, as well as to decisions recommending transfers to a lower level of care. In addition, respondents claimed that such safeguards were required prior to transfers of any kind initiated by the nursing homes themselves or by the patients' attending physicians. *Id.*, at 157, ¶II(J); 166–167, ¶II(J). Respondents asserted that all of these transfers deprived patients of interests protected by the Fourteenth Amendment and were the product of "state action." *Id.*, at 167, ¶II(J).[11]

In October 1979 the District Court approved a consent judgment incorporating the relief previously awarded by the preliminary injunction and establishing additional substantive and procedural rights applicable to URC-initiated transfers to lower levels of care. *Id.*, at 227–239. The consent judgment left several issues of law to be decided by the District Court. The most important, for our purposes, was "whether there is state action and a constitutional right to

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[10] The court also required the defendants to afford class members access to all pertinent case files and medical records. *Id.*, at 101–102. The Court of Appeals for the Second Circuit upheld portions of the injunction challenged by petitioners. *Yaretsky* v. *Blum*, 592 F. 2d 65 (1979).

[11] The pretrial order also redefined the class to include "all residents of skilled nursing and health related nursing facilities in New York State who are recipients of Medicaid benefits." App. 151.

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a pre-transfer evidentiary hearing in a patient transfer to a higher level of care and/or a patient transfer initiated by the facility or its agents." *Id.*, at 234–235, ¶ VIII(A)(1). Ultimately, the District Court answered that question in respondents' favor, although without elaborating its reasons. *Id.*, at 240. The court permanently enjoined petitioners, as well as all SNF's and HRF's in the State, from permitting or ordering the discharge of class members, or their transfer to a different level of care, without providing advance written notice and an evidentiary hearing on "the validity and appropriateness of the proposed action." *Id.*, at 242–243.

The Court of Appeals for the Second Circuit affirmed that portion of the District Court's judgment we have described above. 629 F. 2d 817 (1980).[12] The court held that URC-initiated transfers from a lower level of care to a higher one, and all discharges and transfers initiated by the nursing homes or attending physicians, "involve state action affecting constitutionally protected property and liberty interests." *Id.*, at 820. The court premised its identification of state action on the fact that state authorities "responded" to the challenged transfers by adjusting the patients' Medicaid benefits. *Ibid.* Citing our opinion in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974), the court viewed this response as establishing a sufficiently close "nexus" between the State and either the nursing homes or the URC's to justify treating their actions as those of the State itself.

We granted certiorari to consider the Court of Appeals' conclusions about the nature of state action. 454 U. S. 815 (1981). We now reverse its judgment.

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[12] The court modified the injunction by relieving petitioners of obligations that, in the opinion of federal authorities, would render the State ineligible for Medicaid funding. 629 F. 2d, at 822. The court also reversed the District Court's holding that state administrators were precluded by due process or state law from rejecting a hearing officer's recommendation favorable to a patient without reading a verbatim transcript of the hearing and the exhibits. *Id.*, at 822–825. This holding is not before us.

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II

We first address a question raised by petitioners regarding our jurisdiction under Art. III. They contend that respondents, who were threatened with URC-initiated transfers to lower levels of care, are without standing to object either to URC-initiated transfers to higher levels of care or to transfers of any kind initiated by nursing homes or attending physicians. According to petitioners, respondents obtained complete relief in the consent judgment approved by the District Court in October 1979, which afforded substantive and procedural rights to patients who are the subject of URC-initiated transfers to lower levels of care. Since they have not been threatened with transfers of any other kind, they have no standing to object, and the District Court consequently was without Art. III jurisdiction to enter its judgment.

It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979). It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972).

Respondents appear to recognize these principles, but contend that although the October 1979 consent judgment halted the implementation of adverse URC decisions recommending discharge or transfer to lower levels of care, the URC determinations themselves were left undisturbed. These determinations reflected the judgment of physicians, chosen by the

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nursing homes, that respondents' continued stay in their facilities was not medically necessary. Consequently, respondents maintain that they are subject to the serious threat that the nursing home administrators will reach similar conclusions and will themselves initiate patient discharges or transfers without adequate notice or hearings. Petitioners belittle this suggestion, noting that the consent judgment permanently enjoined all New York nursing homes, as well as petitioners, from implementing URC transfers to lower levels of care; this injunction bars the nursing homes from adopting the URC decisions as their own. Petitioners concede, however, that the consent judgment permits the nursing homes and respondents' attending physicians to decide independently to initiate transfers.

We conclude that the threat of facility-initiated discharges or transfers to lower levels of care is sufficiently substantial that respondents have standing to challenge their procedural adequacy. In reaching this conclusion, we are mindful of "the primary conception that federal judicial power is to be exercised . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe* v. *Ullman*, 367 U. S. 497, 504 (1961). Of course, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923), quoted in *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979). "[T]he question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy . . . ." *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974). Even accepting petitioners' characterization of the scope of the permanent injunction embodied in the consent judgment, the nursing homes in which respondents reside remain free to determine independently that respondents' continued stay at current levels of care is not medically necessary. The possibility that they will do so is not "imaginary or speculative." *Younger* v. *Harris*, 401

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U. S. 37, 42 (1971). In light of similar determinations already made by the committee of physicians chosen by the facilities to make such assessments, the threat is quite realistic. See *O'Shea* v. *Littleton*, *supra*, at 496 ("past wrongs are evidence bearing on whether there is real and immediate threat of repeated injury").

We cannot conclude, however, that the threat of transfers to *higher* levels of care, whether initiated by the URC's, the nursing homes, or attending physicians, is "of sufficient immediacy and reality," *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969), that respondents have standing to seek an adjudication of the procedures attending such transfers. Nothing in the record available to this Court suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers. It is not inconceivable that respondents will one day confront this eventuality, but assessing the possibility now would "tak[e] us into the area of speculation and conjecture." *O'Shea* v. *Littleton*, *supra*, at 497.[13]

Moreover, the conditions under which such transfers occur are sufficiently different from those which respondents do have standing to challenge that any judicial assessment of their procedural adequacy would be wholly gratuitous and advisory. Transfers to higher levels of care are recommended when the patient's medical needs cannot be satisfied by the facility in which he or she currently resides. Al-

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[13] Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of URC decisions. Respondents, however, "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). Unless these individuals "can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], 'none may seek relief on behalf of himself or any other member of the class.' *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974)." *Ibid.*

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though respondents contend that all transfers threaten elderly patients with physical or psychological trauma, one may infer that *refusal* to accept a transfer to a higher level of care could itself be a decision with potentially traumatic consequences. The same cannot be said of discharges or transfers to less intensive care. In addition, transfers to more intensive care typically result in an *increase* in Medicaid benefits to match the increased cost of medically necessary care. Respondents' constitutional attack on discharges or transfers to a lower level of care presupposes a *deprivation* of protected property interests. Finally, since July 1978, petitioners have adhered to a policy permitting Medicaid patients to refuse URC-recommended transfers to higher levels of care without jeopardizing their Medicaid benefits. App. 180, ¶56. No similar policy was in force with respect to other transfers until the District Court mandated its adoption.

We conclude, therefore, that although respondents have standing to challenge facility-initiated discharges and transfers to lower levels of care, the District Court exceeded its authority in adjudicating the procedures governing transfers to higher levels of care. We turn now to the "state action" question presented by petitioners.

III

The Fourteenth Amendment of the Constitution provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." Since this Court's decision in the *Civil Rights Cases*, 109 U. S. 3 (1883), "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Ibid.* See *Jackson* v. *Metropolitan Edison Co.*, 419

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U. S. 345 (1974); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).

Faithful adherence to the "state action" requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint. In this case, respondents objected to the involuntary discharge or transfer of Medicaid patients by their nursing homes without certain procedural safeguards.[14] They have named as defendants state officials responsible for administering the Medicaid program in New York. These officials are also responsible for regulating nursing homes in the State, including those in which respondents were receiving care. But respondents are not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated. Their lawsuit, therefore, seeks to hold state officials liable for the actions of private parties, and the injunctive relief they have obtained requires the State to adopt regulations that will prohibit the private conduct of which they complain.

A

This case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it "state" action for purposes of the Fourteenth Amendment. See, *e. g.*, *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, *supra; Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972);

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[14] "From the beginning of this lawsuit the respondents' challenge has been to the involuntary discharge or transfer of Medicaid patients from and by their nursing facilities without adequate safeguards . . . . Thus, the claim before this Court is whether state action attaches to a *nursing facility's summary discharge or transfer of the patient* . . . ." Brief for Respondents 21–22 (emphasis in original).

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Adickes v. *S. H. Kress & Co., supra.* It also differs from other "state action" cases in which the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit; in such cases the question typically is whether the private motives which triggered the enforcement of those laws can fairly be attributed to the State. See, *e. g., Peterson* v. *City of Greenville,* 373 U. S. 244 (1963). But both these types of cases shed light upon the analysis necessary to resolve the present case.

First, although it is apparent that nursing homes in New York are extensively regulated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co.,* 419 U. S., at 350. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.,* at 351. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *Flagg Bros., Inc.* v. *Brooks, supra,* at 166; *Jackson* v. *Metropolitan Edison Co., supra,* at 357; *Moose Lodge No. 107* v. *Irvis, supra,* at 173; *Adickes* v. *S. H. Kress & Co., supra,* at 170. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those

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initiatives under the terms of the Fourteenth Amendment. See *Flagg Bros., supra*, at 164–165; *Jackson* v. *Metropolitan Edison Co., supra*, at 357.

Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson* v. *Metropolitan Edison Co., supra*, at 353; see *Flagg Bros., Inc.* v. *Brooks, supra*, at 157–161.

B

Analyzed in the light of these principles, the Court of Appeals' finding of state action cannot stand. The court reasoned that state action was present in the discharge or transfer decisions implemented by the nursing homes because the State responded to those decisions by adjusting the patient's Medicaid benefits. Respondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Respondents do not rest on the Court of Appeals' rationale, however. They argue that the State "affirmatively commands" the summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in their nursing facilities. Were this characterization accurate, we would have a different question before us. However, our review of the statutes and regulations identified by respondents does not support respondents' characterization of them.

As our earlier summary of the Medicaid program explained, a patient must meet two essential conditions in order to obtain financial assistance. He must satisfy eligibility cri-

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teria defined in terms of income and resources and he must seek medically necessary services. 42 U. S. C. § 1396. To assure that nursing home services are medically necessary, federal law requires that a physician so certify at the time the Medicaid patient is admitted and periodically thereafter. 42 U. S. C. § 1396b(g)(1) (1976 ed. and Supp. IV). New York requires that the physician complete a "long term care placement form" devised by the Department of Health, called the DMS–1. 10 NYCRR §§ 415.1(a), 420.1(b) (1980). A completed form provides, *inter alia*, a numerical score corresponding to the physician's assessment of the patient's mental and physical health. As petitioners note, however, the physicians, and not the forms, make the decision about whether the patient's care is medically necessary.[15] A physician can authorize a patient's admission to a nursing facility despite a "low" score on the form. See 10 NYCRR §§ 415.1(a)(2), 420.1(b)(2) (1978).[16] We cannot say that the

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[15] A completed DMS–1 form provides a summary of the patient's medical condition. Five of the eleven questions devoted to this subject require the assignment of numerical values. See 10 NYCRR App. C–1 (1978). A range of numerical values to be used in completing these questions are set forth in a second form, called the DMS–9. See *ibid.* The dissent's discussion of the DMS–9 suggests that completion of the DMS–1 form is a purely mechanical exercise that does not require the exercise of independent medical judgment. The dissent's discussion is incomplete. The other six questions on the DMS–1 ask the physician such questions as whether the patient requires daily supervision by a registered nurse, whether complications would arise without skilled nursing care, whether a program of therapy is necessary, and if so what kind, whether the patient should be considered for different levels of care, and whether the patient is medically qualified for the level of care he or she is receiving. The physician brings to bear his own medical judgment in answering these questions; their placement on the form would be inexplicable if the numerical scores were dispositive.

[16] The dissent belittles this fact by noting that the decision to depart from the form in admitting a patient is made by a physician member of the nursing home's URC, and that such persons are "part and parcel of the statutory cost control process." *Post*, at 1022. This signifies nothing more

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State, by requiring completion of a form, is responsible for the physician's decision.

In any case, respondents' complaint is about nursing home decisions to discharge or transfer, not to admit, Medicaid patients. But we are not satisfied that the State is responsible for those decisions either.[17] The regulations cited by respondents require SNF's and HRF's "to make all efforts possible to transfer patients to the appropriate level of care or

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than the fact, disputed by no one, that the State requires utilization review in order to reduce unnecessary Medicaid expenditures. It remains true that physician members of the URC's are not employed by the State and, more important, render medical judgments concerning the patient's health needs that the State does not prescribe and for which it is not responsible. We must also emphasize, of course, that we are ultimately concerned with decisions to transfer patients who have already been admitted.

Apropos of this relevant issue, the dissent observes, *post*, at 1023, that once a patient has been admitted, the State requires, as a condition to the disbursement of Medicaid funds, that within five days after admission the nursing home operator assess the patient's status according to standards contained in the DMS–1 and DMS–9 forms. As the dissent is also aware, *post*, at 1023, n. 10, a physician member of the URC has the power to determine that the patient needs the level of care he is receiving despite an adverse score on the DMS–1. 10 NYCRR §§ 416.9(a)(2)(i), 421.13(a)(2)(i) (1980). That decision, rendered after consultation with the patient's attending physician, is purely a medical judgment for which the State, as before, is not responsible.

[17] The dissent condemns us for conducting a "cursory" review of the regulations governing utilization review, *post*, at 1019, and pointedly asks "where . . . is the Court's discussion of the frequent utilization reviews that occur *after* admission?" *Post*, at 1024. The dissent, in its headlong dive into the sea of state regulations, forgets that patient transfers to lower levels of care initiated by utilization review committees are simply not part of this case. As we noted earlier, such transfers were the subject of a consent judgment in October 1979. We are concerned only with transfers initiated by the patients' attending physicians or the nursing home administrators themselves. Therefore, we have focused on regulations that concern decisions which are not the product of URC recommendations. As we explain in the text, those regulations do not demonstrate that the State is responsible for the transfers with which we are concerned.

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home as indicated by the patient's medical condition or needs," 10 NYCRR §§ 416.9(d)(1), 421.13(d)(1) (1980).[18] The nursing homes are required to complete patient care assessment forms designed by the State and "provide the receiving facility or provider with a current copy of same at the time of discharge to an alternate level of care facility or home." 10 NYCRR §§ 416.9(d)(4), 421.13(d)(4) (1980).

These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State.[19] This case, therefore, is not unlike

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[18] Federal regulations also require SNF's and HRF's to obtain from admitting physicians a plan of discharge for each patient. 42 CFR §§ 456.280 (b)(6), 456.380(b)(6) (1981). State regulations require that nursing home staff members assist in the preparation of these plans, which are designed to summarize "the patient's potential for return to the community, for transfer to another more appropriate setting or for achieving or maintaining the best obtainable level of function in the nursing home." 10 NYCRR §§ 416.1(k)(2)(ii), 421.3(b)(2) (1976). These requirements hardly make the State responsible for actual decisions to discharge or transfer particular patients.

[19] The dissent characterizes as "factually unfounded," *post*, at 1014, our conclusion that decisions initiated by nursing homes and physicians to transfer patients to lower levels of care ultimately depend on private judgments about the health needs of the patients. It asserts that different levels of care exist only because of the State's desire to save money, and that the same interest explains the requirement that nursing homes transfer patients who do not need the care they are receiving. *Post*, at 1014–1019. We do not suggest otherwise. Transfers to lower levels of care are not mandated by the patients' health needs. But they occur only after an assessment of those needs. In other words, although "downward" transfers are made possible and encouraged for efficiency reasons, they can occur only after the decision is made that the patient does not need the care he or she is currently receiving. The State is simply not responsible for *that* decision, although it clearly responds to it. In concrete terms, therefore, if a par-

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Polk County v. *Dodson*, 454 U. S. 312 (1981), in which the question was whether a public defender acts "under color of" state law within the meaning of 42 U. S. C. § 1983 when representing an indigent defendant in a state criminal proceeding.[20] Although the public defender was employed by the State and appointed by the State to represent the respondent, we concluded that "[t]his assignment entailed functions and obligations in no way dependent on state authority." *Id.*, at 318. The decisions made by the public defender in the course of representing his client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State. The same is true of nursing home decisions to discharge or transfer particular patients because the care they are receiving is medically inappropriate.[21]

Respondents next point to regulations which, they say, impose a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate. One regulation excludes from participation in the

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ticular patient objects to his transfer to a different nursing facility, the "fault" lies not with the State but ultimately with the judgment, made by concededly private parties, that he is receiving expensive care that he does not need. That judgment is a medical one, not a question of accounting.

[20] This case, of course, does not involve the "under color of law" requirement of § 1983. Nevertheless, it is clear that the reasoning employed in *Polk County* is equally applicable to "state action" cases such as this one.

[21] Respondents also point to statutes requiring the State periodically to send medical review teams to conduct on-site inspections of all SNF's and HRF's. During these inspections, state employees are required to review the appropriateness of each patient's continued stay in the facility and to report their findings to the nursing home and the agency responsible for administering the Medicaid program in the State. 42 U. S. C. §§ 1396a(a)(26), (31), 1396b(g)(1)(D) (1976 ed. and Supp. IV). See 42 CFR § 456.611 (1981). Petitioners concede that these inspections can result in a discharge or transfer directed by state health officials. As they correctly argue, however, transfers of this kind are not the subject of respondents' complaint and none are presented by the record.

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Medicaid program health care providers who "[f]urnished items or services that are substantially in excess of the beneficiary's needs." 42 CFR § 420.101(a)(2) (1981). The State is also authorized to fine health care providers who violate applicable regulations. 10 NYCRR § 414.18 (1978). As we have previously concluded, however, those regulations themselves do not dictate the decision to discharge or transfer in a particular case. Consequently, penalties imposed for violating the regulations add nothing to respondents' claim of state action.

As an alternative position, respondents argue that even if the State does not command the transfers at issue, it reviews and either approves or rejects them on the merits. The regulations cited by respondents will not bear this construction. Although the State requires the nursing homes to complete patient care assessment forms and file them with state Medicaid officials, 10 NYCRR §§ 415.1(a), 420.1(b) (1978), and although federal law requires that state officials review these assessments, 42 CFR §§ 456.271, 456.372 (1981), nothing in the regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients, and petitioners specifically disclaim any such responsibility. Instead, the State is obliged to approve or disapprove continued payment of Medicaid benefits after a change in the patient's need for services. See 42 CFR § 435.916 (1981). Adjustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself.

Finally, respondents advance the rather vague generalization that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer of Medicaid patients. For this proposition they rely upon

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Burton v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Respondents argue that state subsidization of the operating and capital costs of the facilities, payment of the medical expenses of more than 90% of the patients in the facilities, and the licensing of the facilities by the State, taken together convert the action of the homes into "state" action. But accepting all of these assertions as true, we are nonetheless unable to agree that the State is responsible for the decisions challenged by respondents. As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*. *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 357–358. That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 353. Respondents' argument in this regard is premised on their assertion that both the Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services. The state constitutional provisions cited by respondents, however, do no more than authorize the legislature to provide funds for the care of the needy. See N. Y. Const., Art. XVII, §§ 1, 3. They do not mandate the provision of any particular care, much less long-term nursing care. Similarly, the Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal monies. 42 U. S. C. §§ 1396a(a)(13)(B), 1396d(a)(4)(A) (1976 ed. and Supp. IV). It does not require that the States provide the services themselves. Even if respondents' characterization of the State's duties were cor-

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rect, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

IV

We conclude that respondents have failed to establish "state action" in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care.[22] Consequently, they have failed to prove that petitioners have violated rights secured by the Fourteenth Amendment. The contrary judgment of the Court of Appeals is accordingly

Reversed.

[For opinion of JUSTICE WHITE concurring in the judgment, see *ante*, p. 843.]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exercised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent. But if the task that the Fourteenth Amendment assigns to the courts is thus rendered more burdensome, the courts' obligation to perform that task faithfully, and consistently with the constitutional purpose, is rendered more, not less, important.

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[22] As a postscript to their "state action" arguments, respondents suggest that this Court avoid the issue by holding that federal and state statutes and regulations require the procedural safeguards which they seek. The lower courts did not pass on this assertion, and we decline to do so as well.

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In deciding whether "state action"[1] is present in the context of a claim brought under 42 U. S. C. § 1983 (1976 ed., Supp. IV), the ultimate determination is simply whether the § 1983 defendant has brought the force of the State to bear against the § 1983 plaintiff in a manner the Fourteenth Amendment was designed to inhibit. Where the defendant is a government employee, this inquiry is relatively straightforward. But in deciding whether "state action" is present in actions performed directly by persons other than government employees, what is required is a realistic and delicate appraisal of the State's involvement in the total context of the action taken. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961). See *Lugar* v. *Edmondson Oil Co.*, *ante*, at 939–942.[2] The Court today departs from the *Burton* precept, ignoring the

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[1] As the Court noted in *Lugar* v. *Edmondson Oil Co.*, *ante*, at 926–932, the state action necessary to support a claimed violation of the Fourteenth Amendment, and the action "under color of law" required by 42 U. S. C. § 1983, represent parallel avenues of inquiry in a case claiming a remedy under § 1983 for a violation of the Fourteenth Amendment's Due Process Clause. Of course, the "color of law" inquiry required by § 1983 focuses directly on the question whether the conduct of the particular § 1983 defendant is sufficiently connected with the state action that is present whenever the constitutionality of a state law, regulation, or practice is properly challenged. But this question may just as easily be framed as whether the § 1983 defendant is a "state actor."

[2] In *Lugar*, we addressed a decidedly different question of "state action." In that case, the § 1983 plaintiff sought damages against a private party who had availed himself of an unconstitutional state attachment procedure, and had enlisted the aid of government officials to impair plaintiff's property for his own benefit. We concluded that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Ante*, at 941. Here the State affirmatively relies upon and requires private parties to implement specific deprivations of benefits according to standards and procedures that the State has established and enforces for its own benefit. The imprint of state power on the private party's actions would seem in this circumstance to be even more significant.

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nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action. But however correct the Court's tests may be in the abstract, they are worth nothing if they are not faithfully applied. Bolstered by its own preconception of the decisionmaking process challenged by respondents, and of the relationship between the State, the nursing home operator, and the nursing home resident, the Court subjects the regulatory scheme at issue here to only the most perfunctory examination. The Court thus fails to perceive the decisive involvement of the State in the private conduct challenged by the respondents.

I

A

The Court's analysis in this case is simple, but it is also demonstrably flawed, for it proceeds upon a premise that is factually unfounded. The Court first describes the decision to transfer a nursing home resident from one level of care to another as involving nothing more than a physician's independent assessment of the appropriate medical treatment required by that resident. Building upon that factual premise, the Court has no difficulty concluding that the State plays no decisive role in the transfer decision: By reducing the resident's benefits to meet the change in treatment prescribed, the State is simply responding to "medical judgments made by private parties according to professional standards that are not established by the State." *Ante*, at 1008. If this were an accurate characterization of the circumstances of this case, I too would conclude that there was no "state action" in the nursing home's decision to transfer. A doctor who prescribes drugs for a patient on the basis of his independent medical judgment is not rendered a state actor merely because the State may reimburse the patient in different amounts depending upon which drug is prescribed.

But the level-of-care decisions at issue in this case, even when characterized as the "independent" decision of the nurs-

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ing home, see *ante*, at 1000, have far less to do with the exercise of independent professional judgment than they do with the *State's* desire to save money. To be sure, standards for implementing the level-of-care scheme established by the Medicaid program are framed with reference to the underlying purpose of that program—to provide needed medical services. And not surprisingly, the State relies on doctors to implement this aspect of its Medicaid program. But the idea of two mutually exclusive levels of care—skilled nursing care and intermediate care—embodied in the federal regulatory scheme and implemented by the State, reflects no established medical model of health care. On the contrary, the two levels of long-term institutionalized care enshrined in the Medicaid scheme are legislative constructs, designed to serve governmental cost-containment policies.

The fiscal underpinning of the level-of-care determinations at issue here are apparent from the legislative history of the "intermediate care" concept. In 1967, Congress was concerned with the increasing costs of the Medicaid program. Congress' motivation in establishing a program of reimbursement for care in intermediate-care facilities flowed directly from these fiscal concerns. Thus the Senate Finance Committee Report on the Social Security Amendments of 1967, S. Rep. No. 744, 90th Cong., 1st Sess., 188 (1967), expressed concern with the fact that only skilled nursing care was available under Medicaid: "[B]ecause of a decided financial advantage to a State under present matching formulas," States tended to classify recipients as in need of "'skilled nursing home' care." As a consequence, the Report noted, "a strong case exists for introducing another level of care for which vendor payments would be available." *Ibid.* The result was an amendment to Title XI of the Social Security Act, creating a new treatment track for "categorically needy" medicaid patients, called "intermediate care." As summarized on the Senate floor:

> "The committee bill would provide for a vendor payment in behalf of persons . . . who are living in facilities

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which are more than boarding houses but which are less than skilled nursing homes. The rate of Federal sharing for payments for care in those institutions would be at the same rate as for medical assistance under title XIX. Such homes would have to meet safety and sanitation standards comparable to those required for nursing homes in a given state.

"*This provision should result in a reduction in the cost of title XIX by allowing States to relocate substantial numbers of welfare recipients who are now in skilled nursing homes in lower cost institutions.*" 113 Cong. Rec. 32599 (1967) (emphasis added).

To implement this cost-saving mechanism, the Federal Government has required States participating in the Medicaid Program to establish elaborate systems of periodic "utilization review."[3] With respect to patients whose expenses are not reimbursed through Medicaid, these attempts to assign the patient to one of two mutually exclusive "levels of care" would be anomalous. While the criteria used to determine which patients require the services of "skilled-nursing facilities," which require "intermediate care facilities," and which require no long-term institutional care at all, obviously have a medical nexus, those criteria are not geared to the

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[3] The State must provide for the periodic review of patient care "to safeguard against unnecessary utilization of such care and services and to assure that payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." 42 U. S. C. § 1396a(a)(30). See 42 U. S. C. §§ 1395x(k), 1396a(a)(31), 1396b(g)(1)(C) (1976 ed. and Supp. IV); 42 CFR §§ 456.305, 456.406 (1981). There is no need here to dwell on the very detailed federal requirements, except to note that if the State fails to ensure that the physician certifications and utilization review procedures are implemented for each patient in each facility, the State is subject to a loss of Medicaid funds commensurate with the extent of the failure to ensure such utilization review. See 42 U. S. C. §§ 1396b(g), (i)(4) (1976 ed. and Supp. IV); 42 CFR §§ 456.650–456.657 (1981).

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specific needs of particular residents as determined by a physician; the level-of-care determination is *not* analogous to choosing specific medication or rehabilitative services needed by a nursing home patient. The inherent imprecision of using two broad levels to classify facilities and residents has been noted by the commentators.[4] The vigor with which these reviews are performed in the nursing home context, see *infra*, at 1022–1024, is extraordinarily *un*medical in character. From a purely medical standpoint, the idea of shifting nursing home residents from a "higher level of care" to a "lower level of care," which almost invariably involves transfer from one facility to another, rarely makes sense. As one commentator has observed: "These transfers eject helpless, disoriented people from the places they have lived for months or even years to facilities, not of their own choosing, that they have never seen before. The evidence is overwhelming that, without extraordinary preparatory efforts that are hardly ever made, *any* move is harmful for the preponderance of the frail elderly." B. Vladeck, Unloving Care 140 (1980).

The arbitrariness of the statutory system of treatment levels is evident from a comparison of the proportion of nursing home residents in skilled nursing facilities (SNF's) and those in intermediate care facilities (ICF's) in different States. A 1973 survey of 32 States revealed that 47.9% of Medicaid patients were in SNF's, 52.1% were in ICF's. But the proportion of SNF and ICF beds varied enormously from State to State. For example, less than 10% of Medicaid recipients receiving long-term institutional care in States such as Louisiana, Maine, Oregon, and Virginia were in SNF's; the number housed in SNF's in New York and Pennsylvania was nearly 80%, and in Florida and Georgia the figure was closer

[4] See, *e. g.*, Bishop, Plough, & Willemain, Nursing Home Levels of Care: Problems and Alternatives, 2 Health Care Financing Rev., No. 2, pp. 33, 36 (1980).

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to 90%.[5] Quite obviously, the answer to this disparity lies not in medical considerations or judgments, but rather in the varying fiscal policies, and the vigor of enforcement, in the participating States.

In New York, the nursing home operator is required to "maintain a discharge planning program to . . . document that the facility *has made and is continuing to make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs.*" 10 NYCRR § 416.9(d)(1) (1980) (emphasis added). See also § 421.13(d)(1).[6] The responsibility the State assigns to nursing home operators to transfer patients to appropriate levels of care is, of course, designed primarily to implement the State's goal of reducing Medicaid costs,[7] and the termination or reduction of benefits follows forthwith upon the facility's discharge or transfer of a resident. As the court below noted: "The state has, in essence, delegated a de-

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[5] See B. Vladeck, Unloving Care 138 (1980). "There is no reason to believe that Medicaid recipients in Georgia or Pennsylvania are ten times as likely to need skilled care as those in Oklahoma or Oregon, but they are ten times as likely to get it, or at least to get something called 'skilled care.'" *Id.*, at 137.

[6] If the nursing home fails to assign the patients to the level of care the State deems appropriate, it is subject to sanction. Federal regulations provide that health care providers who furnish "items or services that are substantially in excess of the beneficiary's needs" may be excluded from participating in the program. 42 CFR § 420.101(a)(2) (1981). A nursing home that fails to follow state regulations is also subject to state-imposed daily penalties. See 10 NYCRR § 414.18 (1978).

It is also clear that under the federal scheme, the State's responsibility extends to ensuring proper assessment of every resident. See 42 U. S. C. §§ 1396a(26)(A), 1396a(31)(A), 1396b(g)(1)(D) (1976 ed. and Supp. IV).

[7] To acknowledge that the active system of utilization review serves a primarily fiscal purpose is not to demean the importance of that purpose, or the extent of overplacement of Medicaid recipients in skilled nursing facilities. That figure has been variously estimated at 10 to 40 percent. See Bishop, Plough, & Willemain, *supra* n. 4.

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cision to . . . reduce a public assistance recipient's benefits to a 'private' party," 629 F. 2d 817, 820 (CA2 1980), by assigning to that private party the responsibility to determine the recipient's need. But we should not rely on that fact alone in evaluating the nexus between the State and the challenged private action. Here the State's involvement clearly extends to supplying the standards to be used in making the delegated decision.

B

Ignoring the State's fiscal interest in the level-of-care determination, the Court proceeds to a cursory, and misleading, discussion of the State's involvement in the assignment of residents to particular levels of care. In my view, an accurate and realistic appraisal of the procedures actually employed in the State of New York leaves no doubt that not only has the State established the system of treatment levels and utilization review in order to further its own fiscal goals, but that the State prescribes with as much precision as is possible the standards by which individual determinations are to be made.

The Court notes that at the time of admission the admitting physician is required to complete a long-term placement form called the DMS–1. 10 NYCRR §§ 415.1(a), 420.1(b) (1978). The Court dismisses the significance of the form by noting blandly that a "completed form provides . . . a numerical score corresponding to the physician's assessment of the patient's mental and physical health," and then commenting: "As *petitioners* note, . . . the physicians, and not the forms, make the decision about whether the patient's care is medically necessary. A physician can authorize a patient's admission to a nursing facility despite a 'low' score on the form. See 10 NYCRR §§ 415.1(a)(2), 420.1(b)(2) (1978)." *Ante*, at 1006 (footnote omitted and emphasis added). The Court concludes: "We cannot say that the State, *by requiring completion of a form*, is responsible for the physician's decision."

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Ante, at 1006–1007 (emphasis added). A closer look at the regulations at issue suggests that petitioners have been less than candid in their characterization of the admission process and the role of the numerical score.

New York's regulations *mandate* that the nursing home operator shall

> "admit a patient *only* on physician's orders *and* in accordance with the patient assessment criteria and standards as promulgated and published by the department (New York State LongTerm Care Placement Form [DMS–1] and New York State Numerical Standards Master Sheet [DMS–9]) . . . which shall include, as a minimum:
>
> "(1) an assessment, performed prior to admission by or on behalf of the agency or person seeking admission for the patient, of the patient's level of care needs *according to the patient assessment criteria and standards promulgated and published by the department.*" 10 NYCRR § 415.1 (1978) (emphasis added).

The details of the DMS–9 Numerical Standards Master Sheet also bear more emphasis than the Court gives them, for that form describes with particularity the patients who are entitled to SNF care, ICF care, or no long-term residential care at all. The DMS–9 provides numerical scores for various resident dysfunctions. For example, if the resident is incontinent with urine often, he receives a score of 20; if seldom, a score of 10; if never, a score of 0. A similar rating is made as to stool incontinence: often, 40; seldom, 20; never, 0. A tabulation is made with respect to "function status." For example, if the resident can walk only with "some help," he receives 35 points; only with "total help," 70 points; if he cannot walk, 105 points. If the resident needs "total help" to dress, he receives 80 points; if "some help" is required, 40 points. Ratings are also made of the patient's "mental status." For example, if the patient is never alert, he receives 40 points; if sometimes alert, 20 points; always alert, 0 points.

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If his judgment is always impaired, he receives, 30 points; sometimes, 15 points; never, 0 points. And ratings are also set forth for other physical "impairments." For example, if the patient's vision is unimpaired, he receives 0 points; if he has partial sight, 1 point; if he is blind, 2 points.

The criterion for admission to a SNF is a DMS–9 "predictor score" of 180. 10 NYCRR § 415.1(a)(2) (1978). For admission to an HRF (health-related facility), the required score is 60. § 420.1(b)(2). Where the admission, or denial of admission, is based on the guidelines set forth in these regulations, there is, of course, no doubt, that the State is directly, and solely, "responsible for the specific conduct of which the plaintiff complains," *ante*, at 1004 (emphasis omitted), even if it has chosen to authorize a private party to implement that decision.[8]

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[8] The Court mistakes the significance of the DMS–1, and the relevant inquiry, when it attempts to characterize that form as merely an instrument for recording the exercise of an independently exercised medical judgment. See *ante*, at 1006, n. 15. Of course, a medical background is essential in filling out the forms. But it remains clear that the State's *standards* are to be applied in making the transfer determination.

The Court concludes that the patient assessment standards prescribed by the State may be easily disregarded. But the regulations themselves clearly demonstrate that those standards are not merely precatory. Notably, the regulations specify that "patient assessment standards shall *not* be applied to residents admitted to the residential health care facility prior to March 1, 1977." 10 NYCRR §§ 416.9(a)(1), 421.13(a)(1) (1980) (emphasis added). See also §§ 416.9(b)(4)(vi), 421.13(b)(4)(vi). If the forms merely recorded the exercise of an independent medical judgment, rather than prescribed the standards upon which that judgment must be exercised, why would it be necessary to exempt certain patients from the inquiry? Indeed, the regulations specifically provide for a *different* set of standards to be applied to the continued stay review of patients admitted to a facility prior to March 1, 1977. See 10 NYCRR §§ 416.9(b)(4)(vii), 421.13 (b)(4) (vii) (1980) ("the standards for residents admitted to the facility prior March 1, 1977 shall be developed by the utilization review agent and approved by the department"). Again, if the determination were in reality based on an independent medical assessment, it seems inconceivable to me that the State would have any interest in requiring different

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The Court dismisses the specific state standards for denying admission set forth in the regulations, and tabulated according to the DMS–9, by emphasizing what it perceives as an alternative method for gaining admission to a nursing home. In the Court's view, this alternative route to admission takes the whole scheme outside the realm of state action because it hinges on a "physician's assessment" of what is medically necessary. In characterizing the admission process as the independent assessment of a physician, the Court relies upon, but fails to quote, the following state regulations. The language of those regulations bears noting:

> "[F]or those patients failing to meet the criteria and standards for admission to the . . . facility [as measured by the DMS–9], a certification *signed by a physician member of the transferring facility's utilization review agent or signed by the responsible social services district local medicaid medical director or designee* indicating the reason(s) the patient requires [the facility's level of care, is required]." 10 NYCRR § 415.1(a)(2) (1978) (emphasis added).

See also § 420.1(b)(2).

As this provision makes clear, if the potential resident does *not* qualify under the specific standards of the DMS–1, as tabulated on the DMS–9, the patient can be admitted *only* on the basis of direct approval by Medicaid officials themselves, or on the basis of a determination by the utilization review agent of the transferring facility—and, of course, such agents are themselves clearly part and parcel of the statutory cost-control process.[9] See n. 8, *supra*. No decision is made on

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standards for different patients depending on when the patient had been admitted.

[9] Federal regulations require each nursing home to establish a utilization review committee whose functions include review of admission decisions, and the periodic assessment of the resident's condition to determine whether the resident's continued stay in the facility is justified. See 42 CFR §§ 456.301, 456.406 (1981). These review agents, as they are deemed

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the basis of a medical judgment exercised outside the regulatory framework, by the resident's personal physician acting on the basis of his personal medical judgment. The attending physician's role is, at this stage, limited to "scoring" the patient's condition according to standards set forth by the State on the DMS–9.

Yet the State's involvement does not end with the initial certification. Within five days *after* admission, the matter is again subjected to assessment, this time by the operator of the transferee facility. This time the transferee nursing home operator is required to tabulate the DMS–9 score. If the patient's score is not adequate by the standards of the DMS–9, admission must be denied unless sanctioned by the facility's utilization review agent.[10] The utilization review agent of the admitting facility, like that of the transferring facility, operates under a "written utilization control plan, approved by the department [of health]." 10 NYCRR §§ 416.9, 421.13 (1980). And that statutory body has the final say in

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in the New York regulations, are composed of physicians not directly responsible for the patient whose care is being reviewed. §§ 456.306, 456.606. Under New York law, the physicians of the review agent may not have a financial interest in a residential care facility. 10 NYCRR §§ 416.9(b)(2), 421.13(b)(2) (1980). In New York, the review agent generally consists of two or more physicians selected and appointed by the facility. *Medicaid provides reimbursement for their services.* App. 173.

[10] A physician member of the utilization review agent has the power to determine that the patient qualifies for the type of care that the facility offers, even if the patient's score on the DMS–1 is insufficient. 10 NYCRR §§ 416.9(a)(2)(i), 421.13(a)(2)(i) (1980). If that physician member confirms that the patient is not in need of the facility's level of care, he must then notify the patient's attending physician "and afford that physician an opportunity for consultation." § 416.9(a)(2)(ii). But even if the attending physician disagrees with the adverse admission finding of the utilization review agent physician, it is the utilization review agent, not the attending physician, that makes the admission decision. §§ 416.9(a)(2)(iv), 421.13(a)(2)(iv). The utilization review agent must, however, notify "the responsible social services district" of "any adverse admission decision." §§ 416.9(a)(3), 421.13(a)(3).

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each instance. There can thus be little doubt that in the vast majority of cases, decisions as to "level of treatment" in the admission process are made according to the *State's* specified criteria. That some deviation from the most literal application of the State's guidelines is permitted cannot change the character of the State's involvement. Indeed, absent such provision for exceptional cases, the formularized approach embodied in the DMS–9 would be unconscionable. And indeed, even with respect to these exceptional cases, the admissions procedure is administered through bodies whose structure and operations conform to state requirements, and whose decisions follow state guidelines—albeit guidelines somewhat more flexible than the DMS–1, in allowing some "psycho-social" factors to be taken into account. See *infra*, this page and 1025–1026.

The Court dismisses all this by noting that "[w]e cannot say that the State, by requiring completion of a form, is responsible for the physician's decision." *Ante*, at 1006–1007. The Court then notes that "[i]n any case, respondents' complaint is about nursing home decisions to discharge or transfer, not to admit, Medicaid patients." *Ante*, at 1007. This is true, of course. But where, one might ask, is the Court's discussion of the frequent utilization reviews that occur *after* admission? The State's regulations require that the operator shall provide for "continued stay reviews . . . to promote efficient and effective use of available health facilities and services *every 30 days for the first 90 days, and every 90 days thereafter*, for each nursing home patient." 10 NYCRR §416.9(b)(1) (1980) (skilled nursing facilities) (emphasis added). See also §421.13(b)(1) (health-related facilities, every 90 days).

The continued stay reviews parallel the admission determination with respect to both the State's procedural and substantive standards.[11] Again, the DMS–1 and the DMS–9

[11] The Court takes issue with our reliance on the nature of continued stay reviews performed by the utilization review agent, noting that "patient

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channel the medical inquiry and function as the principal determinants of the resident's status, for whenever a resident does not achieve an appropriate score on the DMS–1, as determined by a nonphysician representative of the utilization review agent, the resident's case is directed to a physician member. That physician member does not personally examine the resident, but rather relies on the DMS–1 and other documentary information. See App. 172–173. If the matter is resolved adversely to the resident, only then must the attending physician be notified. The attending physician is allowed to present relevant information, though the final decision remains with the utilization review agent. See 10 NYCRR §§416.9(b)(2), 421.13(b)(2) (1980). And again, the *State's* substantive standards, not independent medical judgment, pervade review determinations. Evaluations are based only on the DMS–1 and DMS–9 tabulation, on a "psychosocial" evaluation respecting the resident's response to transfer and other physical, emotional, and mental characteristics of the patient, on the resident's discharge plan (prepared according to state regulations), and upon "additional criteria and standards . . . *which shall have been approved*

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transfers to lower levels of care initiated by utilization review committees are simply not part of this case." *Ante*, at 1007, n. 17. The Court's position with respect to the work of the utilization review committee is schizophrenic at best: The Court expressly relies on its characterization of the review committee's work as representing an independent physician's assessment in reaching its conclusion that the DMS–1 and DMS–9 do not supply the criterion controlling the nursing home operator's decision to admit or retain a patient in the home. *Ante*, at 1006; see discussion *supra*, at 1022. In any event, the Court simply misses the point. The *nursing home operator* is under a continuing duty "to make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs." 10 NYCRR §§416.9(d)(1), 421.13(d)(1) (1980). Whether performed through the utilization review agent, or whether undertaken by the nursing home operator directly, transfers premised on the "patient's medical condition or needs" are to be made with reference to the *State's* definition of "need."

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by the department [of health]." 10 NYCRR §§ 416.9(b)(4), 421.13(b)(4) (1980).[12]

The Court concludes with this assessment of the statutory scheme:

> "These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Ante*, at 1008.

The Court is wrong. As a fair reading of the relevant regulations makes clear, the State (and Federal Government) have created, and administer, the level system as a cost-saving tool of the Medicaid program. The impetus for this

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[12] If it is finally determined by the utilization review agent that the patient should be assigned to a lower level of care, the regulations set forth an elaborate scheme of review before the State Department of Health. See 10 NYCRR §§ 416.9(f), 421.13(f) (1980). These provisions apply even when the attending physician concurs in the determination. The utilization review committee must notify the Department of Health of its adverse finding and

"send to the department a written statement setting forth, in specific detail, the changed medical conditions or other circumstances of the individual which support the utilization review agent's decision for transfer, and a copy of the completed patient assessment form (DMS–1) used by the utilization review agent in this review. *The department shall review the adverse continued stay finding.*" §§ 416.9(f)(2)(i), 421.13(f)(2)(i).

See also §§ 421.13(f)(3)(i), 416.9(f)(3)(i). Of course, there is no doubt that the determinations made on this review represent state action because they are performed by state officials. But if the initial determinations were not made according to state-established standards and for the State's purposes, and were in fact "independent" medical decisions as characterized by the Court, it is difficult to understand the State's active role in reviewing the substance of those determinations.

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active program of review imposed upon the nursing home operator is primarily this fiscal concern. The State has set forth precisely the standards upon which the level-of-care determinations are to be made, and has delegated administration of the program to the nursing home operators, rather than assume the burden of administering the program itself. Thus, not only does the program implement the State's fiscal goals, but, to paraphrase the Court, "[t]hese requirements . . . make the State responsible for actual decisions to discharge or transfer particular patients." See *ante*, at 1008, n. 18. Where, as here, a private party acts on behalf of the State to implement state policy, his action is state action.

II

The deficiency in the Court's analysis is dramatized by its inattention to the special characteristics of the nursing home. Quite apart from the State's specific involvement in the transfer decisions at issue in this case, the nature of the nursing home as an institution, sustained by state and federal funds, and pervasively regulated by the State so as to ensure that it is properly implementing the governmental undertaking to provide assistance to the elderly and disabled that is embodied in the Medicaid program, undercuts the Court's sterile approach to the state action inquiry in this case. The private nursing homes of the Nation exist, and profit, at the sufferance of state and federal Medicaid and Medicare agencies. The degree of interdependence between the State and the nursing home is far more pronounced than it was between the State and the private entity in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). The State subsidizes practically all of the operating and capital costs of the facility, and pays the medical expenses of more than 90% of its residents. And, in setting reimbursement rates, the State generally affords the nursing homes a profit as well. Even more striking is the fact that the residents of those homes are, by definition, utterly dependent on the State for

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their support and their placement. For many, the totality of their social network is the nursing home community. Within that environment, the nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care, and, in every significant respect, the functional equivalent of a State. Cf. *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Surely, in this context we must be especially alert to those situations in which the State "has elected to place its power, property and prestige behind" the actions of the nursing home owner. See *Burton* v. *Wilmington Parking Authority*, *supra*, at 725.

Yet, whatever might be the status of the nursing home operator where the State has simply left the resident in his charge, while paying for the resident's support and care, it is clear that the State has not simply left nursing home patients to the care of nursing home operators. No one would doubt that nursing homes are "pervasively regulated" by State and Federal Governments; virtually every action by the operator is subject to state oversight. But the question at this stage is not whether the procedures set forth in the state and federal regulatory scheme are sufficient to protect the residents' interests. We are confronted with the question *preliminary* to any Fourteenth Amendment challenge: whether the State has brought its force to bear against the plaintiffs through the office of these private parties. In answering that question we may safely assume that when the State chooses to perform its governmental undertakings through private institutions, and with the aid of private parties, not every action of those private parties is state action. But when the State directs, supports, and encourages those private parties to take specific action, that is state action.

We may hypothesize many decisions of nursing home operators that affect patients, but are not attributable to the State.[13] But with respect to decisions to transfer patients

[13] Of course, the nursing home's power to make transfer decisions for other than medical reasons is severely limited by regulation. He may only

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downward from one level of care to another, if that decision is in any way connected with the statutory review structure set forth above,[14] then there is no doubt that the standard for decision, and impetus for the decision, is the responsibility of the State. Indeed, with respect to the level-of-care determination, the State does everything but pay the nursing home operator a fixed salary. Because the State is clearly responsible for the specific conduct of petitioners about which respondents complain, and because this renders petitioners state actors for purposes of the Fourteenth Amendment, I dissent.

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discharge or transfer the resident for valid medical reasons, for the welfare of the affected patient or other patients, or for nonpayment. 42 CFR §§ 405.1121(k)(4), 442.311(c) (1981); 10 NYCRR § 414.14(4) (1980).

[14] The issue presented in this case—the issue that the Court decides presents a live controversy—concerns *facility-initiated* discharges or transfers. See *ante*, at 1000. Transfers initiated by the Utilization Review Committee are within the terms of the consent decree entered by the District Court below, and are not before the Court today. These transfers even more clearly show the State's hand in the transfer decision—indeed, it appears that the physicians on the Committees are reimbursed for their services by Medicaid. But there is absolutely no basis upon which to conclude that that decision to transfer a patient to a lower level of care can be made in any meaningful way independently of the state regulatory standards described in text. Of course, we might hypothesize a decision of the resident's personal physician, not premised on the State's view of what constitutes an appropriate level-of-care for the patient, to remove the patient from the particular facility. In these circumstances, I would agree that the nursing home owner, in simply responding to the personal physician's request, is not a state actor. But it appears to me that the Court's decision sweeps more broadly than that, and clearly reaches transfers based directly upon and arising from the State's procedures and standards.

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
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WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 458 U. S., Part 1)

ADMISSION OF ALIENS TO STATE UNIVERSITY. See **Constitutional Law.**

ALIENS. See **Constitutional Law.**

ANTITRUST ACTS.

Chiropractors' fees—Arrangement between insurer and chiropractic association—"Business of insurance."—In chiropractor's action alleging price-fixing violation of Sherman Act by an arrangement whereby insurance company used advice of chiropractic association's Peer Review Committee to determine reasonableness of a chiropractor's charges to, and necessity for his treatment of, company's health insurance policyholders, company's use of Peer Review Committee did not constitute "business of insurance" within meaning of § 2(b) of McCarran-Ferguson Act and thus was not exempt from antitrust scrutiny. Union Labor Life Ins. Co. v. Pireno, p. 119.

APPORTIONMENT OF CORPORATE INCOME FOR STATE TAXATION. See **Constitutional Law.**

APPRENTICESHIP PROGRAMS. See **Civil Rights Act of 1866.**

ARTICLE III JUDGES. See **Bankruptcy.**

AUTOMOBILE SEARCHES. See **Constitutional Law.**

BACKPAY LIABILITY FOR EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

BAD CHECKS. See **Criminal Law.**

BANKRUPTCY.

Bankruptcy Act of 1978—Judges—Art. III.—District Court's judgment dismissing action in bankruptcy court by reorganization debtor seeking damages for defendant's alleged breach of contract and warranty, misrepresentation, coercion, and duress, based on District Court's conclusion that Bankruptcy Act of 1978 unconstitutionally conferred Art. III judicial power upon bankruptcy court judges, who lacked life tenure and protection against salary diminution, is affirmed. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., p. 50.

BANKS. See **Criminal Law.**

BUSINESS OF INSURANCE. See **Antitrust Acts.**

CALIFORNIA. See **Home Owners' Loan Act of 1933.**

"CHECK KITING." See **Criminal Law.**

CHIROPRACTORS. See **Antitrust Acts.**

CIVIL RIGHTS ACT OF 1866.

Discrimination by union—Vicarious liability of employers and trade associations.—Liability may not be imposed under 42 U. S. C. § 1981 without proof of intentional discrimination, and in an action by a State and blacks representing a class of racial minorities against a local union, trade associations, and employers, alleging discrimination in operation of an exclusive hiring hall and of an apprenticeship program established by union and trade associations, District Court erred in imposing vicarious liability on defendant trade associations and employers on basis of union's discriminatory conduct, where court found discriminatory intent only on union's part and was unable to find any basis for imposing liability under doctrine of *respondeat superior;* District Court thus lacked power to allocate to trade associations and employers portion of costs of remedial decree. General Building Contractors Assn. v. Pennsylvania, p. 375.

CIVIL RIGHTS ACT OF 1964.

Discrimination in hiring—Tolling backpay liability—Seniority benefits.—An employer charged with discrimination in hiring can toll continuing accrual of backpay liability under § 706(g) of Act by unconditionally offering claimant job previously denied, and is not required to offer seniority retroactive to date of alleged discrimination. Ford Motor Co. v. EEOC, p. 219.

COLLATERAL ORDERS. See **Jurisdiction.**

CONSTITUTIONAL LAW. See also **Bankruptcy.**

Due process—Taxation of corporations—Validity of Idaho law.—Idaho may not, consistent with Due Process Clause, include within taxable income of a nondomiciliary parent corporation doing some business in State a portion of intangible income (dividends, interest payments, and capital gains from sale of stock) that corporation received from subsidiary corporations having no other connection with State. ASARCO Inc. v. Idaho State Tax Comm'n, p. 307.

Due process—Taxation of corporations—Validity of New Mexico law.—Due Process Clause was violated by New Mexico's income tax on portion of dividends received by parent corporation operating chainstores within State from its foreign subsidiaries operating chainstores in foreign countries, and by New Mexico's inclusion in parent corporation's income of fictitious sum never actually received from foreign subsidiaries but deemed by Federal Government to have been received by parent corporation for purposes of calculating its federal foreign tax credit, where each subsidiary op-

CONSTITUTIONAL LAW—Continued.

erated a discrete business enterprise. F. W. Woolworth Co. v. Taxation and Revenue Dept., p. 354.

Searches and seizures—Automobile—Warrantless inventory search.—There was no violation of respondent's Fourth Amendment rights by warrantless search of his automobile, where (1) after car was stopped for a traffic violation, he was arrested for possession of open intoxicants and driver was issued a citation for not having a driver's license, (2) an inventory search, made before car was towed, disclosed marihuana in unlocked glove compartment and a loaded revolver in an air vent under dashboard, and (3) respondent was convicted in a Michigan state court for possession of a concealed weapon. Michigan v. Thomas, p. 259.

Supremacy Clause—Nonimmigrant aliens—Denial of in-state status by state university.—University of Maryland's policy of categorically denying domiciled nonimmigrant aliens who hold G-4 visas (those issued to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families) in-state status under which preferential treatment is given to domiciled citizen and immigrant alien students for purposes of tuition and fees, is invalid under Supremacy Clause. Toll v. Moreno, p. 1.

CORPORATIONS. See **Constitutional Law.**

COURTS OF APPEALS. See **Jurisdiction.**

CRIMINAL LAW. See also **Constitutional Law; Jurisdiction.**

False statements to banks—"Check kiting."—Title 18 U. S. C. § 1014, which makes it a crime to knowingly make any false statement or report or to willfully overvalue any land, property, or security for the purpose of influencing the action of certain financial institutions upon any application, advance, commitment, or loan, was not violated by petitioner's "check kiting" whereby he first drew a check far in excess of his account balance in one bank and deposited it in his account in another, and then reversed process between his accounts. Williams v. United States, p. 279.

DISCRIMINATION AGAINST BLACKS. See **Civil Rights Act of 1866.**

DISCRIMINATION AGAINST NONIMMIGRANT ALIENS BY STATE UNIVERSITY. See **Constitutional Law.**

DISCRIMINATION AGAINST WOMEN. See **Civil Rights Act of 1964.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1866; Civil Rights Act of 1964.**

DISMISSAL OF INDICTMENTS. See **Jurisdiction.**

DISTRICT COURTS. See **Jurisdiction.**

DOMICILE OF NONIMMIGRANT ALIENS. See **Constitutional Law.**

DUE-ON-SALE CLAUSES IN MORTGAGES. See **Home Owners' Loan Act of 1933.**

DUE PROCESS. See **Constitutional Law.**

EDUCATION OF THE HANDICAPPED ACT.

Individualized instruction for handicapped children—Adequacy of state programs.—Act's requirement that a participating State must adopt a policy assuring all handicapped children right to a "free appropriate public education" is satisfied when State provides personalized instruction with sufficient support services to permit handicapped child to benefit educationally from that instruction, and under Act's judicial-review provisions a court must first determine whether State has complied with statutory procedures and then determine whether individualized program is reasonably calculated to enable child to receive educational benefits; Act did not require provision of sign-language interpreter in instant case for child with only minimal residual hearing. Board of Education of Hendrick Hudson Central School Dist. v. Rowley, p. 176.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1866; Civil Rights Act of 1964.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1866; Civil Rights Act of 1964.**

FALSE STATEMENTS TO BANKS. See **Criminal Law.**

FEDERAL HOME LOAN BANK BOARD. See **Home Owners' Loan Act of 1933.**

FEDERAL SAVINGS AND LOAN ASSOCIATIONS. See **Home Owners' Loan Act of 1933.**

FEDERAL-STATE RELATIONS. See **Constitutional Law; Education of the Handicapped Act; Home Owners' Loan Act of 1933.**

FINAL DECISIONS. See **Jurisdiction.**

FOURTEENTH AMENDMENT. See **Constitutional Law.**

FOURTH AMENDMENT. See **Constitutional Law.**

FRAUDULENT CHECKING ACTIVITIES. See **Criminal Law.**

GENDER-BASED DISCRIMINATION. See **Civil Rights Act of 1964.**

HANDICAPPED CHILDREN. See **Education of the Handicapped Act.**

HEALTH INSURANCE. See **Antitrust Acts.**

HIRING HALLS. See **Civil Rights Act of 1866.**

HOME OWNERS' LOAN ACT OF 1933.

Federal savings and loan associations—Due-on-sale clauses in mortgages—Pre-emption of state law.—A Federal Home Loan Bank Board reg-

HOME OWNERS' LOAN ACT OF 1933—Continued.
ulation, authorized by Act, providing that a federal savings and loan association may include a clause in its loan instruments that permits association to declare balance of loan immediately due if property securing loan is sold or transferred without association's prior written consent, pre-empts conflicting state limitations on due-on-sale practices of such associations, and thus bars application to such associations of California rule limiting a lender's right to exercise a due-on-sale clause to cases where lender demonstrates that transfer of property impaired lender's security. Fidelity Federal Savings & Loan Assn. v. De la Cuesta, p. 141.

IDAHO. See **Constitutional Law.**

IMMIGRATION AND NATIONALITY ACT OF 1952. See **Constitutional Law.**

INCOME TAXES. See **Constitutional Law.**

INDICTMENTS. See **Jurisdiction.**

INSURANCE. See **Antitrust Acts.**

INTERLOCUTORY ORDERS. See **Jurisdiction.**

INVENTORY SEARCHES OF AUTOMOBILES. See **Constitutional Law.**

JUDGES. See **Bankruptcy.**

JURISDICTION. See also **Bankruptcy.**

Court of Appeals—District Court's refusal to dismiss indictment—"Final decision."—Where, after respondents obtained a change of venue as to two-count federal indictment, Government secured a superseding indictment that added new counts but later voluntarily dismissed some of counts, District Court's denial of respondents' motion to dismiss remaining counts on asserted ground that superseding indictment manifested prosecutorial vindictiveness was not a "final decision" under 28 U. S. C. § 1291 and did not fall within "collateral order" exception to § 1291's rule of finality; thus, Court of Appeals lacked jurisdiction to review District Court's interlocutory order refusing to dismiss indictment. United States v. Hollywood Motor Car Co., p. 263.

McCARRAN-FERGUSON ACT. See **Antitrust Acts.**

MORTGAGE DUE-ON-SALE CLAUSES. See **Home Owners' Loan Act of 1933.**

MOTOR VEHICLE SEARCHES. See **Constitutional Law.**

NEW MEXICO. See **Constitutional Law.**

NONIMMIGRANT ALIENS. See **Constitutional Law.**

PENNSYLVANIA. See **Civil Rights Act of 1866.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See Home Owners' Loan Act of 1933.

PRICE FIXING. See Antitrust Acts.

PROSECUTORIAL VINDICTIVENESS. See Jurisdiction.

PUBLIC EDUCATION OF HANDICAPPED CHILDREN. See Education of the Handicapped Act.

RACIAL DISCRIMINATION. See Civil Rights Act of 1866.

RESPONDEAT SUPERIOR. See Civil Rights Act of 1866.

SAVINGS AND LOAN ASSOCIATIONS. See Home Owners' Loan Act of 1933.

SCHOOLS. See Education of the Handicapped Act.

SEARCHES AND SEIZURES. See Constitutional Law.

SENIORITY RIGHTS OF EMPLOYEES. See Civil Rights Act of 1964.

SEX DISCRIMINATION. See Civil Rights Act of 1964.

SHERMAN ACT. See Antitrust Acts.

STATE INCOME TAXES. See Constitutional Law.

STATE UNIVERSITY'S DISCRIMINATION AGAINST NONIMMIGRANT ALIENS. See Constitutional Law.

SUBSIDIARY CORPORATIONS. See Constitutional Law.

SUPREMACY CLAUSE. See Constitutional Law.

SUPREME COURT.

Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Ninth Circuit, p. 1117.

TAXES. See Constitutional Law.

TOLLING BACKPAY LIABILITY FOR EMPLOYMENT DISCRIMINATION. See Civil Rights Act of 1964.

UNIONS. See Civil Rights Act of 1866.

UNIVERSITY'S DISCRIMINATION AGAINST NONIMMIGRANT ALIENS. See Constitutional Law.

VEHICLE SEARCHES. See Constitutional Law.

VICARIOUS LIABILITY. See Civil Rights Act of 1866.

WARRANTLESS SEARCHES OF AUTOMOBILES. See Constitutional Law.

WORDS AND PHRASES.

1. *"Business of insurance."* § 2(b), McCarran-Ferguson Act, 15 U. S. C. § 1012(b). Union Labor Life Ins. Co. v. Pireno, p. 119.

2. *"Free appropriate public education."* §§ 602(18), 612(1), Education of the Handicapped Act, 20 U. S. C. §§ 1401(18), 1412(1). Board of Education of Hendrick Hudson Central School Dist. v. Rowley, p. 176.

TABLE OF CASES REPORTED

(Vol. 458 U. S., Part 1)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Abbott & Associates, Inc.; Illinois *v.*	1103
ABC Containerline, N.V. *v.* Kingston Shipping Co.	1108
Adams *v.* Howerton	1111
Advance Ross Electronics Corp. *v.* Green	1108
Aetna Ins. Co.; Roy Wilt & Son *v.*	1108
Aetna Ins. Co.; Wilt *v.*	1108
Ahmed *v.* Eikerenkoetter	1116
Akron *v.* Akron Center for Reproductive Health, Inc.	1104
Akron; Akron Center for Reproductive Health, Inc. *v.*	1104
Akron Center for Reproductive Health, Inc. *v.* Akron	1104
Akron Center for Reproductive Health, Inc.; Akron *v.*	1104
Alabama *v.* Graddick	1106
American Consulting Assn., Inc.; J & M Design Co. *v.*	1112
American Consulting Assn., Inc.; Spencer *v.*	1112
American Laundry Press Co. *v.* OK NYO Rexrode	1103
American Society of Mechanical Engineers *v.* Hydrolevel Corp.	1116
Andrews *v.* United States	1108
Arthur Treacher's Fish & Chips, Inc. *v.* Horstmyer	1107
Arthur Young & Co. *v.* Summer	1106
ASARCO Inc. *v.* Idaho State Tax Comm'n	307
Ashcroft *v.* National Organization for Women, Inc.	1102
Ashcroft *v.* Planned Parenthood Assn. of Kansas City	1104

Page
Ashcroft; Planned Parenthood Assn. of Kansas City *v.* 1104
Attorney General; Reynolds *v.* 1110
Attorney General; Weigang *v.* 1103
Attorney General of Mich.; Lake Carriers' Assn. *v.* 1116
Attorney General of Mo. *v.* National Organization for Women, Inc.. 1102
Attorney General of Mo. *v.* Planned Parenthood Assn. of K. C. .. 1104
Attorney General of Mo.; Planned Parenthood Assn. of K. C. *v.*.. 1104
Baker *v.* Zant 1115
Bearden *v.* Georgia 1105
Bechtel Power Corp. *v.* Pennsylvania 375
Binkley Co.; Williams Enterprises, Inc. *v.* 1107
Blackburn; Wilkerson *v.* 1105
Board of Ed., Hendrick Hudson Central School Dist. *v.* Rowley.. 176
Board of Governors, FRS; Option Advisory Service, Inc. *v.* 1108
Board of Trustees of Insts. of Higher Ed. *v.* Miss. Council on H. R. 1116
Burlington Northern R. Co.; Tatum *v.* 1111
Bush *v.* Lucas 1104
California; Romano *v.* 1109
California; Villareal *v.* 1109
Campbell *v.* Civiletti 1116
Capps *v.* New Mexico 1107
Casari *v.* First Federal Savings & Loan Assn. of Lincoln 1106
Chaney *v.* Warden, Maryland Penitentiary 1116
City. See name of city.
Civiletti; Campbell *v.* 1116
Combs *v.* United States 1111
Commissioner; Sutain *v.* 1110
Commissioner of Internal Revenue. See Commissioner.
Commodity Futures Trading Comm'n; Monex International Ltd. *v.* 1103
Commonwealth. See name of Commonwealth.
Connecticut; Frazier *v.* 1112
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania 375
Cook *v.* United States 1116
County. See name of county.
Coward *v.* United States 1116
Dawson *v.* New York 1112
De La Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 141
Delaware; Doe *v.* 1117
Devine *v.* Illinois 1109
Director of penal or correctional institution. See name or title of director.
District Court of Colorado, Seventeenth Judicial District *v.* Marks 1107
District Judge. See U. S. District Judge.
District of Columbia Court of Appeals *v.* Feldman 1105

Page
District of Columbia Court of Appeals; Feldman *v.* 1106
District of Columbia Court of Appeals; Hickey *v.* 1106
Doe *v.* Delaware 1117
Eikerenkoetter; Ahmed *v.* 1116
Electrical Workers; Lord *v.* 1106
Equal Employment Opportunity Comm'n; Ford Motor Co. *v.* 219
Estelle *v.* Moore 1111
Estelle; Norris *v.* 1109
Etlin *v.* Robb 1112
Fannon *v.* Florida 1107
Feldman *v.* District of Columbia Court of Appeals 1106
Feldman; District of Columbia Court of Appeals *v.* 1105
Fidelity Federal Savings & Loan Assn. *v.* De La Cuesta 141
First Federal Savings & Loan Assn. of Lincoln; Casari *v.* 1106
First Tennessee Bank N. A. Memphis; Smith *v.* 1105
First Tennessee Bank N. A. Memphis; Sullivan *v.* 1105
Florida; Fannon *v.* 1107
Florida; Messer *v.* 1116
Florida; Sireci *v.* 1116
Florida Dept. of Labor and Employment Security; Paschal *v.* 1116
Ford *v.* Kentucky 1103
Ford Motor Co. *v.* Equal Employment Opportunity Comm'n 219
Frazier *v.* Connecticut 1112
F. W. Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 354
Gault *v.* United States 1109
General Building Contractors Assn., Inc. *v.* Pennsylvania 375
Georgia; Bearden *v.* 1105
Georgia; Gilreath *v.* 1116
Gillespie; United States *v.* 1111
Gilman Paper Co.; Wilder *v.* 1107
Gilmore *v.* Pennsylvania 1103
Gilreath *v.* Georgia 1116
Glasgow, Inc. *v.* Pennsylvania 375
Glover-El *v.* Illinois 1110
Goldfarb *v.* United States 1108
Governor of Va.; Etlin *v.* 1112
Grace & Co. *v.* Plastic Workers 1105
Graddick; Alabama *v.* 1106
Graham *v.* New York 1101
Green; Advance Ross Electronics Corp. *v.* 1108
Guice, *In re* 1104
Hampton Roads Shipping Assn. *v.* Longshoremen 1105
Harris *v.* Housewright 1110
Hickey *v.* District of Columbia Court of Appeals 1106

Page
Hogan *v.* Pennsylvania 1110
Holland, *In re* 1104
Hollywood Motor Car Co.; United States *v.* 263
Hondo Boats, Inc. *v.* McCraine 1105
Hood *v.* United States 1109
Horstmyer; Arthur Treacher's Fish & Chips, Inc. *v.* 1107
Housewright; Harris *v.* 1110
Howell *v.* Steffey 1110
Howerton; Adams *v.* 1111
Huey *v.* Teledyne, Inc. 1106
Hydrolevel Corp.; American Society of Mechanical Engineers *v.* . 1116
Idaho State Tax Comm'n; ASARCO Inc. *v.* 307
Ieva *v.* Stamford 1106
Ieva; Stamford *v.* 1106
Illinois *v.* Abbott & Associates, Inc. 1103
Illinois; Devine *v.* 1109
Illinois; Glover-El *v.* 1110
Illinois; Thompson *v.* 1109
Ingram *v.* Smith 1110
In re. See name of party.
Insurance Comm'r of N. H.; Sharon Steel Corp. *v.* 1101
International. For labor union, see name of trade.
Iron Arrow Honor Society *v.* Schweiker 1102
Irwin *v.* Montgomery County, Md. 1106
Jackson *v.* Leeke 1110
J & M Design Co. *v.* American Consulting Assn., Inc. 1112
Johnson *v.* Johnson 1107
Johnson; Mariscal *v.* 1112
Kelley; Lake Carriers' Assn. *v.* 1116
Kelly *v.* United States 1109
Kentucky; Ford *v.* 1103
Kingston Shipping Co.; ABC Containerline, N.V. *v.* 1108
Kulwiec, *In re* 1104
Labor Union. See name of trade.
Lake Carriers' Assn. *v.* Kelley 1116
Land & Leisure, Inc. *v.* Summer 1106
Leeke; Jackson *v.* 1110
Leighton; Wright *v.* 1116
Local. For labor union, see name of trade.
Longshoremen; Hampton Roads Shipping Assn. *v.* 1105
Longval; Meachum *v.* 1102
Lord *v.* Electrical Workers 1106
Lucas; Bush *v.* 1104
Marathon Pipe Line Co.; Northern Pipeline Construction Co. *v.* .. 50

Page
Marathon Pipe Line Co.; United States *v.* 50
Marinello *v.* New York City 1108
Mariscal *v.* Johnson 1112
Marks; District Court of Colorado, Seventeenth Judicial District *v.* 1107
Mathis *v.* United States 1116
McCarthy; United States *ex rel.* Miller *v.* 1109
McCraine; Hondo Boats, Inc. *v.* 1105
McGraw-Edison Co. *v.* Sikes 1108
Meachum *v.* Longval 1102
Messer *v.* Florida 1116
Michigan *v.* Thomas 259
Miller *v.* McCarthy 1109
Miller *v.* New York 1102
Miller *v.* United States 1110
Mississippi Council on Hum. Rel.; Trustees of Insts. of Higher Ed. *v.* 1116
Monex International Ltd. *v.* Commodity Futures Trading Comm'n 1103
Montgomery *v.* United States 1116
Montgomery County, Md.; Irwin *v.* 1106
Moore; Estelle *v.* 1111
Moreau; Oppenheim *v.* 1107
Moreno; Toll *v.* 1
Morris *v.* Slappy 1103
Morrow; Thompson *v.* 1116
National Broadcasting Co.; Niemi *v.* 1108
National Organization for Women, Inc.; Ashcroft *v.* 1102
Nebeker *v.* United States 1111
Nebraska; South Dakota *v.* 276
New Mexico; Capps *v.* 1107
New Mexico; Stevens *v.* 1109
New York; Dawson *v.* 1112
New York; Graham *v.* 1101
New York; Miller *v.* 1102
New York City; Marinello *v.* 1108
New York Shipping Assn. *v.* Waterfront Comm'n of N. Y. Harbor 1101
New York State Chiropractic Assn. *v.* Pireno 119
Niemi *v.* National Broadcasting Co. 1108
Norris *v.* Estelle 1109
Northern Pipeline Construction Co. *v.* Marathon Pipe Line Co. .. 50
Ohio; Scott *v.* 1108
OK NYO Rexrode; American Laundry Press Co. *v.* 1103
Olson *v.* United States 1110
Oppenheim *v.* Moreau 1107
Option Advisory Service, Inc. *v.* Board of Governors, FRS 1108
Panzirer; Price Waterhouse *v.* 1105

Page
Panzirer *v.* Wolf 1107
Paschal *v.* Florida Dept. of Labor and Employment Security 1116
Pennsylvania; Bechtel Power Corp. *v.* 375
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 375
Pennsylvania; General Building Contractors Assn., Inc. *v.* 375
Pennsylvania; Gilmore *v.* 1103
Pennsylvania; Glasgow, Inc. *v.* 375
Pennsylvania; Hogan *v.* 1110
Pennsylvania; United Engineers & Constructors, Inc. *v.* 375
Perry *v.* Perry 1109
Pireno; New York State Chiropractic Assn. *v.* 119
Pireno; Union Labor Life Ins. Co. *v.* 119
Planned Parenthood Assn. of Kansas City *v.* Ashcroft 1104
Planned Parenthood Assn. of Kansas City; Ashcroft *v.* 1104
Plante *v.* Scott 1101
Plastic Workers; W. R. Grace & Co. *v.* 1105
Pope *v.* United States 1110
Price Waterhouse *v.* Panzirer 1105
Quiros *v.* United States 1111
Raymond, James & Associates, Inc. *v.* Summer 1106
Reynolds *v.* Attorney General 1110
Rheaume *v.* Saffell 1106
Rice *v.* United States 1111
Robb; Etlin *v.* 1112
Romano *v.* California 1109
Rowley; Board of Ed., Hendrick Hudson Central School Dist. *v.* . 176
Roy Wilt & Son *v.* Aetna Ins. Co. 1108
Ruppel *v.* United States 1107
Saffell; Rheaume *v.* 1106
Sanborn *v.* Wolfel 1102
Schweiker; Iron Arrow Honor Society *v.* 1102
Scott *v.* Ohio 1108
Scott; Plante *v.* 1101
Secretary of Health and Human Services; Iron Arrow Honor Soc. *v.* 1102
Secretary of Interior *v.* Western Nuclear, Inc. 1104
Shabazz, *In re* 1104
Sharon Steel Corp. *v.* Insurance Comm'r of N. H. 1101
Sikes; McGraw-Edison Co. *v.* 1108
Simopoulos *v.* Virginia 1104
Sireci *v.* Florida 1116
Slappy; Morris *v.* 1103
Smith *v.* First Tennessee Bank N. A. Memphis 1105
Smith; Ingram *v.* 1110
Smith *v.* United States 1110

Page
Smith; Weigang *v.* 1103
Snyder *v.* United States 1111
South Dakota *v.* Nebraska 276
Spencer *v.* American Consulting Assn., Inc. 1112
Spivey; Zant *v.* 1111
Stamford *v.* Ieva 1106
Stamford; Ieva *v.* 1106
State. See name of State.
Steffey; Howell *v.* 1110
Stevens *v.* New Mexico 1109
Stine *v.* United States 1110
Sullivan *v.* First Tennessee Bank N. A. Memphis 1105
Summer; Arthur Young & Co. *v.* 1106
Summer; Land & Leisure, Inc. *v.* 1106
Summer; Raymond, James & Associates, Inc. *v.* 1106
Superintendent of penal or correctional institution. See name or title of superintendent.
Sutain *v.* Commissioner 1110
Tatum *v.* Burlington Northern R. Co. 1111
Taxation and Revenue Dept. of N. M.; F. W. Woolworth Co. *v.* ... 354
Teledyne, Inc.; Huey *v.* 1106
Thomas; Michigan *v.* 259
Thomas; Wedra *v.* 1109
Thompson *v.* Illinois 1109
Thompson *v.* Morrow 1116
Toll *v.* Moreno 1
Trapp, *In re* 1116
Treacher's Fish & Chips, Inc. *v.* Horstmyer 1107
Troy *v.* United States 1111
Union. For labor union, see name of trade.
Union Labor Life Ins. Co. *v.* Pireno 119
United Engineers & Constructors, Inc. *v.* Pennsylvania 375
United States. See name of other party.
U. S. District Judge; Wright *v.* 1116
United States *ex rel.* Miller *v.* McCarthy 1109
Villareal *v.* California 1109
Virginia; Simopoulos *v.* 1104
Virginia; Weisen *v.* 1107
Wade *v.* United States 1116
Warden. See also name of warden.
Warden, Maryland Penitentiary; Chaney *v.* 1116
Waterfront Comm'n of New York Harbor; N. Y. Shipping Assn. *v.* 1101
Watt *v.* Western Nuclear, Inc. 1104
Wedra *v.* Thomas 1109

Page
Weigang, *In re* 1103
Weigang *v.* Smith 1103
Western Nuclear, Inc.; Watt *v.* 1104
Wiesen *v.* Virginia 1107
Wilder *v.* Gilman Paper Co. 1107
Wilkerson *v.* Blackburn 1105
Williams *v.* United States 279
Williams Enterprises, Inc. *v.* Binkley Co. 1107
Wilson *v.* Wilson 1107
Wilt *v.* Aetna Ins. Co. 1108
Wilt & Son *v.* Aetna Ins. Co. 1108
Wolf; Panzirer *v.* 1107
Wolfel; Sanborn *v.* 1102
Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 354
W. R. Grace & Co. *v.* Plastic Workers 1105
Wright *v.* Leighton 1116
Young & Co. *v.* Summer 1106
Zant; Baker *v.* 1115
Zant *v.* Spivey 1111

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL. *v.* MORENO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-2178. Argued March 2, 1982—Decided June 28, 1982

Held: The University of Maryland's policy of categorically denying domiciled nonimmigrant aliens who hold G-4 visas (visas issued to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families) in-state status under which preferential treatment is given to domiciled citizen and immigrant alien students for purposes of tuition and fees, is invalid under the Supremacy Clause. Pp. 10-19.

(a) "[St]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *De Canas* v. *Bica*, 424 U. S. 351, 358, n. 6. Here, in light of Congress' explicit decision in the Immigration and Nationality Act of 1952 not to bar G-4 aliens from acquiring domicile in the United States, the State's decision to deny "in-state" status to G-4 aliens, *solely* on account of such aliens' immigration status, amounts to an ancillary "burden not contemplated by Congress" in admitting these aliens to the United States. Moreover, by imposing on domiciled G-4 aliens higher tuition and fees than are imposed on other domiciliaries of the State, the University's policy frustrates the federal policies embodied in the special tax exemptions afforded G-4 aliens by various treaties, international agreements, and federal statutes. Pp. 10-17.

(b) The Eleventh Amendment did not preclude the District Court from ordering the University to pay refunds to various G–4 alien class members who would have obtained in-state status but for the stay, pending appeal, of that court's original order granting partial summary judgment in favor of the named plaintiffs, where the University, in seeking the stay, represented that if the order was affirmed on appeal, it would make appropriate refunds. Contrary to petitioners' contention, the order was not vacated when this Court vacated the Court of Appeals' judgment affirming the District Court and remanded the case to the District Court for reconsideration. Pp. 17–19.

645 F. 2d 217, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 19. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 24. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 25.

Robert A. Zarnoch, Assistant Attorney General of Maryland, argued the cause for petitioners. With him on the briefs was *Stephen H. Sachs*, Attorney General.

James R. Bieke argued the cause for respondents. With him on the brief was *John Townsend Rich*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Wilson L. Condon* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *George Deukmejian* of California, *J. D. MacFarlane* of Colorado, *Carl R. Ajello* of Connecticut, *Richard S. Gebelein* of Delaware, *Jim Smith* of Florida, *Arthur K. Bolton* of Georgia, *Tany S. Hong* of Hawaii, *David H. Leroy* of Idaho, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Francis X. Bellotti* of Massachusetts, *Frank J. Kelley* of Michigan, *Warren R. Spannaus* of Minnesota, *William A. Allain* of Mississippi, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Richard H. Bryan* of Nevada, *Gregory H. Smith* of New Hampshire, *James R. Zazzali* of New Jersey, *Jeff Bingaman* of New Mexico, *Robert Abrams* of New York, *Rufus L. Edmisten* of North Carolina, *Robert Wefald* of North Dakota, *William J. Brown* of Ohio, *Jan Eric Cartwright* of Oklahoma, *Dave Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *Daniel R. McLeod*

JUSTICE BRENNAN delivered the opinion of the Court.

The state-operated University of Maryland grants preferential treatment for purposes of tuition and fees to students with "in-state" status. Although citizens and immigrant aliens may obtain in-state status upon a showing of domicile within the State, nonimmigrant aliens, even if domiciled, are not eligible for such status. The question in this case is whether the University's in-state policy is invalid under the Supremacy Clause of the Constitution, insofar as the policy categorically denies in-state status to domiciled nonimmigrant aliens who hold G–4 visas.

I

The factual and procedural background of this case, which has prompted two prior decisions of this Court, requires some elaboration. The focus of the controversy has been a policy adopted by the University in 1973 governing the eligibility of students for in-state status with respect to admission and fees. The policy provides in relevant part:

> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

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of South Carolina, *Mark V. Meierhenry* of South Dakota, *William J. Leech, Jr.*, of Tennessee, *Mark White* of Texas, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *J. Marshall Coleman* of Virginia, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven Freudenthal* of Wyoming; and for the American Council on Education et al. by *Sheldon Elliot Steinbach*.

Bruce J. Ennis, *Donald N. Bersoff*, and *Paul R. Friedman* filed a brief for the International Bank for Reconstruction and Development et al. as *amici curiae* urging affirmance.

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." App. to Pet. for Cert. 167a–168a.

In 1975, when this action was filed, respondents Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg were students at the University of Maryland. Each resided with, and was financially dependent on, a parent who was a nonimmigrant alien holding a "G–4" visa. Such visas are issued to nonimmigrant aliens who are officers or employees of certain international organizations, and to members of their immediate families. 66 Stat. 168, 8 U. S. C. § 1101(a)(15)(G)(iv).[1] Despite respondents' residence in the State, the University denied them in-state status pursuant to its policy of excluding all nonimmigrant aliens. Seeking declaratory and injunctive relief, the three respondents filed a class action against the University of Maryland and its President.[2] They contended that the University's policy violated various federal laws, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause.

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[1] The international organizations covered by the provision are those that are entitled to the privileges, exemptions, and immunities conferred under the International Organizations Immunities Act, 59 Stat. 669, 22 U. S. C. § 288 *et seq.* At the time suit was brought, the named plaintiffs in this case were dependents of employees of either the Inter-American Development Bank or the International Bank for Reconstruction and Development (World Bank).

[2] A fourth individual, Rene Otero, Jr., a respondent in this Court, was made a named plaintiff in 1980 when a supplemental complaint was filed.

The District Court granted partial summary judgment in favor of the three named plaintiffs and the class of G–4 visaholders represented by them.[3] In the view of the District Court, the University's denial of in-state status to these plaintiffs rested upon an irrebuttable presumption that a G–4 alien cannot establish Maryland domicile. Concluding that the presumption was "not universally true" as a matter of either federal or Maryland law, the District Court held that under *Vlandis* v. *Kline*, 412 U. S. 441 (1973), the in-state policy violated the Due Process Clause of the Fourteenth Amendment. *Moreno* v. *University of Maryland*, 420 F. Supp. 541, 559 (Md. 1976). Accordingly, in an order dated July 13, 1976, the District Court enjoined the President of the University[4] from denying respondents the opportunity to establish in-state status *solely* on the basis of an "irrebuttable presumption of non-domicile." *Id.*, at 565.[5] The court stayed its order pending appeal in reliance on the University's representation that it would make appropriate refunds "in the event the Court's Order of July 13, 1976, were finally affirmed on appeal." App. to Pet. for Cert. 100a. The Court of Appeals for the Fourth Circuit affirmed, adopt-

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[3] The court certified a class of G–4 visaholders or their dependents who, "residing in Maryland, . . . are current students at the University of Maryland, or . . . chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish 'in-state' status, or . . . are currently students in senior high schools in Maryland." *Moreno* v. *University of Maryland*, 420 F. Supp. 541, 563 (Md. 1976).

[4] Citing *Monroe* v. *Pape*, 365 U. S. 167 (1961), the District Court dismissed the claim against the University itself. 420 F. Supp., at 548–550. The plaintiffs did not appeal that dismissal.

[5] The District Court did not order the University to grant the named plaintiffs in-state status. Rather, it merely barred the University from denying them and the members of the class "the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differential determinations." *Id.*, at 565.

ing the reasoning of the District Court. *Id.*, at 102a.[6] Affirmance order reported at 556 F. 2d 573 (1977).

We reviewed the case on writ of certiorari. *Elkins* v. *Moreno*, 435 U. S. 647 (1978). We held that "[b]ecause petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi*, [422 U. S. 749 (1975)]." *Id.*, at 660.[7] It was therefore necessary to decide whether the presumption was universally true. With respect to federal law, we concluded that G–4 visaholders could "adopt the United States as their domicile." *Id.*, at 666.[8] We were thus left with the "potentially dispositive" question whether G–4 aliens are as a matter of state law incapable of becoming domiciliaries of Maryland. We certified this question to the Maryland Court of Appeals.[9] The state court answered the

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[6] The Court of Appeals stayed its mandate "on the same terms as the district court originally granted its stay." App. to Pet. for Cert. 103a–104a.

[7] *Salfi* limited *Vlandis* "to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.'" *Elkins* v. *Moreno*, 435 U. S., at 660, quoting *Weinberger* v. *Salfi*, 422 U. S. 749, 771 (1975).

[8] We noted that as to some categories of nonimmigrant aliens, Congress had "expressly conditioned admission . . . on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." 435 U. S., at 665. See, *e. g.*, 8 U. S. C. §§ 1101(a)(15)(B), (F), (H). With respect to G–4 nonimmigrant aliens, however, we concluded that Congress had deliberately declined to "impose restrictions on intent," thereby permitting them to "adopt the United States as their domicile." 435 U. S., at 666.

[9] The certified question was phrased as follows:

"Are persons residing in Maryland who hold or are named in a visa under 8 U. S. C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Id.*, at 668–669 (footnote omitted).

certified question in the negative, advising us that "nothing in the general Maryland law of domicile renders G-4 visa holders, or their dependents, incapable of becoming domiciled in this State." *Toll* v. *Moreno*, 284 Md. 425, 444, 397 A. 2d 1009, 1019 (1979).

After our certification, but before the state court's response, the University adopted a "clarifying resolution" concerning its in-state policy.[10] By its terms the resolution did not offer a new definition of "in-state" students; rather, it purported to "reaffirm" the existing policy.[11] The resolution indicated, however, that the University's policy, "insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law." App. to Pet. for Cert. 173a. The interests assertedly served by the policy were described in the following terms:

> "(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
>
> "(b) achieving equalization between the affected classes of the expenses of providing educational services;
>
> "(c) efficiently administering the University's in-state determination and appeals process; and

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[10] It was entitled "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." App. to Pet. for Cert. 172a.

[11] "*Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy . . . ." *Id.*, at 174a.

"(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials." *Id.*, at 173a–174a.

Following the Maryland Court of Appeals' decision, the case returned to this Court. But we declined to restore the case to the active docket for full briefing and argument, concluding that the University's clarifying resolution had "fundamentally altered the posture of the case." *Toll* v. *Moreno*, 441 U. S. 458, 461 (1979) *(per curiam)*. We noted that "if domicile [was] not the 'paramount' policy consideration of the University, this case [was] no longer 'squarely within *Vlandis* as limited by *Salfi*,'" and thus raised "new issues of constitutional law which should be addressed in the first instance by the District Court." *Id.*, at 461–462, quoting *Elkins* v. *Moreno*, *supra*, at 660.[12] Accordingly, we vacated the judgment of the Court of Appeals and remanded the case "to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U. S., at 462.

On remand, the District Court determined that the clarifying resolution constituted a change in the University's position. Before that resolution, the University's primary concern had in fact been domicile; after the resolution, domicile was no longer "the paramount consideration in the University's policy." 480 F. Supp. 1116, 1124 (Md. 1979). Thus,

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[12] We further noted:

"Our decision in *Elkins* rests on the premise that 'the University apparently has no interest in continuing to deny in-state status to G–4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G–4 aliens were the Maryland courts to hold that G–4 aliens can' acquire such domicile. 435 U. S., at 661. After the clarifying resolution, this premise no longer appears to be true." 441 U. S., at 461.

with respect to the period preceding the issuance of the resolution, the District Court reaffirmed its earlier determination that insofar as the policy precluded G–4 aliens (or their dependents) from acquiring in-state status, it denied due process under *Vlandis*. 480 F. Supp., at 1122–1125. With respect to the period following the promulgation of the resolution, however, the court held that *Vlandis* did not control: The University had abandoned its position that G–4 aliens could not establish domicile in Maryland. 480 F. Supp., at 1125. Nevertheless, the District Court concluded that the revised in-state policy was constitutionally invalid, basing its conclusion on two alternative grounds. First, the court held that the policy ran afoul of the Equal Protection Clause of the Fourteenth Amendment. According to the court, the challenged portion of the University's policy contained a classification based on alienage, requiring strict scrutiny, an analysis which the policy did not survive, since the policy did not further any compelling interest. 489 F. Supp. 658, 660–667 (Md. 1980). Alternatively, the court held that the in-state policy violated the Supremacy Clause by encroaching upon Congress' prerogatives with respect to the regulation of immigration. *Id.*, at 667–668.[13]

The Court of Appeals affirmed for "reasons sufficiently stated" by the District Court. *Moreno* v. *University of Maryland*, 645 F. 2d 217, 220 (1981) *(per curiam)*. We granted certiorari. 454 U. S. 815 (1981). For the reasons that follow, we hold that the University of Maryland's in-state policy, as applied to G–4 aliens and their dependents, violates the Supremacy Clause of the Constitution,[14] and on

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[13] The District Court's pre-emption holding rested in part on its equal protection analysis; according to the court, "the standard utilized to uphold a state regulation dealing with benefits to be accorded to aliens is essentially the strict scrutiny analysis" of equal protection. 489 F. Supp., at 668.

[14] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made,

that ground affirm the judgment of the Court of Appeals. We therefore have no occasion to consider whether the policy violates the Due Process or Equal Protection Clauses.

II

Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders. See, *e. g.*, *Mathews* v. *Diaz*, 426 U. S. 67 (1976); *Graham* v. *Richardson*, 403 U. S. 365, 377–380 (1971); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 418–420 (1948); *Hines* v. *Davidowitz*, 312 U. S. 52, 62–68 (1941); *Truax* v. *Raich*, 239 U. S. 33, 42 (1915). Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power "[t]o establish [a] uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4, its power "[t]o regulate Commerce with foreign Nations", *id.*, cl. 3, and its broad authority over foreign affairs, see *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936); *Mathews* v. *Diaz*, *supra*, at 81, n. 17; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952).

Not surprisingly, therefore, our cases have also been at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage. In *Takahashi* v. *Fish & Game Comm'n*, *supra*, we considered a California statute that precluded aliens who were "ineligible for citizenship under federal law" from obtaining commercial fishing licenses, even though they "met all other state requirements" and were lawful inhabitants of the State. 334 U. S., at 414.[15] In seeking to defend the statute, the State

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under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

[15] At the time *Takahashi* was decided, federal law "permitted Japanese and certain other non-white racial groups to enter and reside in the coun-

argued that it had "simply followed the Federal Government's lead" in classifying certain persons as "ineligible for citizenship." *Id.*, at 418. We rejected the argument, stressing the delicate nature of the federal-state relationship in regulating aliens:

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.*" *Id.*, at 419 (emphasis added) (citation and footnote omitted).[16]

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try, but . . . made them ineligible for United States citizenship." 334 U. S., at 412 (footnote omitted).

[16] JUSTICE REHNQUIST, in dissent, suggests that the italicized language should not be interpreted literally. *Post*, at 28–29. Rather, he suggests, the language can only be understood as explaining three prior Court cases that *Takahashi* cited in a footnote immediately after the italicized language. 334 U. S., at 419, n. 6, citing *Truax* v. *Raich*, 239 U. S. 33 (1915), *Chy Lung* v. *Freeman*, 92 U. S. 275, 280 (1876), and *Hines* v. *Davidowitz*, 312 U. S. 52, 65–68 (1941). According to JUSTICE REHNQUIST, "in each of these cases, the Court found either a clear encroachment on exclusive federal power to admit aliens into the country or a clear conflict with a specific congressional purpose." *Post*, at 29. JUSTICE REHNQUIST thus concludes that the language in *Takahashi* does not mean what it says; instead it means that absent a clear encroachment on exclusive federal power or clear conflict with a federal statute, the States are free to treat aliens as they will. JUSTICE REHNQUIST is wrong. If the language were read in the manner suggested by the dissent, it would fail to explain *Takahashi*

The decision in *Graham* v. *Richardson*, *supra*, followed directly from *Takahashi*. In *Graham* we held that a State may not withhold welfare benefits from resident aliens "merely because of their alienage." 403 U. S., at 378. Such discrimination, the Court concluded, would violate not only the Equal Protection Clause, but would also encroach upon federal authority over lawfully admitted aliens. In support of the latter conclusion, the Court noted that Congress had "not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States," *id.*, at 377, but rather had chosen to afford "lawfully admitted resident aliens . . . the full and equal benefit of all state laws for the security of persons and property," *id.*, at 378. The States had thus imposed an "auxiliary burde[n] upon the entrance or residence of aliens" that was never contemplated by Congress. *Id.*, at 379.

Read together, *Takahashi* and *Graham* stand for the broad principle[17] that "state regulation not congressionally sanc-

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itself: The California statute at issue in *Takahashi*, denying certain lawful aliens the right to obtain commercial fishing licenses from the State, presented neither "a clear encroachment on exclusive federal power to admit aliens" nor "a clear conflict with a specific congressional purpose." JUSTICE REHNQUIST's *non*literal interpretation of the *Takahashi* holding is simply wishful thinking on his part.

While pre-emption played a significant role in the Court's analysis in *Takahashi*, the actual basis for invalidation of the California statute was apparently the Equal Protection Clause of the Constitution. Commentators have noted, however, that many of the Court's decisions concerning alienage classifications, such as *Takahashi*, are better explained in preemption than equal protection terms. See, *e. g.*, Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1060–1065 (1979); Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069 (1979).

[17] Our cases do recognize, however, that a State, in the course of defining its political community, may, in appropriate circumstances, limit the participation of noncitizens in the States' political and governmental functions. See, *e. g.*, *Cabell* v. *Chavez-Salido*, 454 U. S. 432 (1982); *Ambach* v. *Norwick*, 441 U. S. 68, 72–75 (1979); *Foley* v. *Connelie*, 435 U. S. 291, 295–296 (1978); *Sugarman* v. *Dougall*, 413 U. S. 634, 646–649 (1973).

tioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *De Canas* v. *Bica*, 424 U. S. 351, 358, n. 6 (1976).[18] To be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute. But the instant case does not present such a situation, and there can be little doubt regarding the invalidity of the challenged portion of the University's in-state policy.

The Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* (1976 ed. and Supp. IV), represents "a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Elkins* v. *Moreno*, 435 U. S., at 664. The Act recognizes two basic classes of aliens, immigrant and nonimmigrant.[19] With respect to the nonimmigrant class,

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[18] In *De Canas*, we considered whether a California statute making it unlawful in some circumstances to employ *illegal* aliens was invalid under the Supremacy Clause. We upheld the statute. JUSTICE REHNQUIST's dissent in the present case suggests that the pre-emption claim was rejected in *De Canas* because "the Court found no strong evidence that Congress intended to pre-empt" the State's action. *Post*, at 31. JUSTICE REHNQUIST has misread *De Canas*. We rejected the pre-emption claim not because of an absence of congressional intent to pre-empt, but because Congress *intended* that the States be allowed, "to the extent consistent with federal law, [to] regulate the employment of illegal aliens." 424 U. S., at 361.

[19] Immigrant aliens are subject to stricter qualitative tests than nonimmigrant aliens. See E. Harper, Immigration Laws of the United States 228 (3d ed. 1975). And whereas there are no quantitative restrictions on the admission of nonimmigrant aliens, there are, with a few exceptions, quota limitations for immigrant aliens. See 8 U. S. C. § 1151(a) (1976 ed., Supp. IV); Harper, *supra*, at 228. As we noted in *Elkins* v. *Moreno:*

"Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce, each of which requires that aliens be admitted to the United States from time to time and all of which would be hampered if every alien entering the United States were subject

the Act establishes various categories, the G–4 category among them. For many of these nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States. *Id.*, at 665.[29] But significantly, Congress has allowed G–4 aliens—employees of various international organizations, and their immediate families—to enter the country on terms permitting the establishment of domicile in the United States. *Id.*, at 666. In light of Congress' explicit decision not to bar G–4 aliens from acquiring domicile, the State's decision to deny "in-state" status to G–4 aliens, *solely* on account of the G–4 alien's federal immigration status, surely amounts to an ancillary "burden not contemplated by Congress" in admitting these aliens to the United States. We need not rely, however, simply on Congress' decision to permit the G–4 alien to establish domicile in this country; the Federal Government has also taken the additional affirmative step of conferring special tax privileges on G–4 aliens.

As a result of an array of treaties, international agreements, and federal statutes, G–4 visaholders employed by the international organizations described in 8 U. S. C. § 1101(a)(15)(G)(iv) are relieved of federal, and in many instances, state and local taxes, on the salaries paid by the organizations. For example, the international agreements governing the international banks for which the parents of the named respondents are employed specifically exempt the parents from all taxes on their organizational salaries. See Articles of Agreement of the International Bank for Reconstruction and Development, Art. VII, § 9(b), 60 Stat. 1458, T. I. A. S. No. 1502 (1945) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to ex-

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to a quota and to the more strict entry conditions placed on immigrant aliens." 435 U. S., at 665 (footnote omitted).

[29] See, *e. g.*, 8 U. S. C. § 1101(a)(15)(B) (temporary visitors for pleasure or business); § 1101(a)(15)(C) (aliens in transit); § 1101(a)(15)(F) (foreign students); § 1101(a)(15)(H) (temporary workers).

ecutive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals"); Agreement Establishing the Inter-American Development Bank, Art. XI, § 9(b), [1959] 10 U. S. T. 3029, 3096, T. I. A. S. No. 4397 (1959) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to . . . employees of the Bank who are not local citizens or other local nationals").[21] Not only have some of the specific tax exemptions contained in international agreements been incorporated into a federal statute, see 22 U. S. C. § 286h, but also the International Organizations Immunities Act has explicitly afforded a federal tax exemption for those G–4 visaholders employed by international organizations for which no treaty or international agreement has provided a tax exemption for foreign employees.[22] § 4(b), 59 Stat. 670, reenacted, 68A Stat. 284, as § 893 of the Internal Revenue

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[21] Among the similar agreements pertaining to other international organizations are the following: Articles of Agreement of the International Finance Corporation, Art. VI, § 9(b), [1956] 7 U. S. T. 2197, 2216, T. I. A. S. No. 3620 (1955) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Corporation to . . . employees of the Corporation who are not local citizens, local subjects, or other local nationals"); Articles of Agreement of the International Development Association, Art. VIII, § 9(b), [1960] 11 U. S. T. 2284, 2306, T. I. A. S. No. 4607 (1960) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Association to . . . employees of the Association who are not local citizens, local subjects, or other local nationals"); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 24, § 2, [1966] 17 U. S. T. 1270, 1279, T. I. A. S. No. 6090 (1965) ("Except in the case of local nationals, no tax shall be levied . . . on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat"); Articles of Agreement of the International Monetary Fund, Art. IX, § 9(b), 60 Stat. 1414, T. I. A. S. No. 1501 (1945) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to . . . employees of the Fund who are not local citizens, local subjects, or other local nationals").

[22] And by virtue of Md. Ann. Code, Art. 81, § 280(a) (1980), this group of G–4 visaholders is able to shield organizational income from Maryland income tax.

379-676 O—83——2 : QL 3

Code of 1954, 26 U. S. C. § 893 ("Wages, fees, or salary of any employee [except citizens of the United States and of the Republic of the Philippines] of . . . an international organization . . . , received as compensation for official services to such . . . international organization shall not be included in gross income and shall be exempt from [federal] taxation").

In affording G–4 visaholders such tax exemption, the Federal Government has undoubtedly sought to benefit the employing international organizations by enabling them to pay salaries not encumbered by the full panoply of taxes, thereby lowering the organizations' costs. See 41 Op. Atty. Gen. 170, 172–173 (1954). The tax benefits serve as an inducement for these organizations to locate significant operations in the United States. See, *e. g.*, H. R. Rep. No. 1203, 79th Cong., 1st Sess., 2–3 (1945); S. Rep. No. 861, 79th Cong., 1st Sess., 2–3 (1945). By imposing on those G–4 aliens who are domiciled in Maryland higher tuition and fees than are imposed on other domiciliaries of the State, the University's policy frustrates these federal policies. Petitioners' very argument in this Court only buttresses this conclusion. One of the grounds on which petitioners have sought to *justify* the discriminatory burden imposed on the named respondents is that the salaries their parents receive from the international banks for which they work are exempt from Maryland income tax. Indeed, petitioners suggest that the "dollar differential . . . at stake here [is] an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year." Brief for Petitioners 23 (footnote omitted). But to the extent this is indeed a justification for the University's policy with respect to the named respondents, it is an impermissible one: The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting.[23]

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[23] Petitioners point out that the international banks for which the named respondents' parents work provide reimbursement for the difference be-

In sum, the Federal Government has not merely admitted G–4 aliens into the country; it has also permitted them to establish domicile and afforded significant tax exemptions on organizational salaries. In such circumstances, we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification.[24] We therefore conclude that insofar as it bars domiciled G–4 aliens (and their dependents) from acquiring in-state status, the University's policy violates the Supremacy Clause.[25]

III

Finally, we must address petitioners' contention that the Eleventh Amendment precluded the District Court from ordering the University to pay refunds to various class members who would have obtained in-state status but for the stay of the District Court's original order of July 13, 1976. As petitioners concede, in seeking a stay of that order the Univer-

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tween in-state and out-of-state tuition. Certainly, this fact does not assist—but undermines—petitioners' argument. Such reimbursements only add to the employment costs of the international organizations, thereby frustrating the federal intention of benefiting the international organizations.

[24] Some members of the class represented by the respondents derive their state tax exemption not from a treaty or international agreement, but from the combination of federal and state statutes. See *supra*, at 15–16, and n. 22. As to these G–4 aliens, it is true, as the dissent notes, *post*, at 34–35, that the Federal Government has not precluded the collection of a state income tax that is imposed on domiciliaries of the State. But even with respect to this group of G–4 aliens, the Federal Government has taken the affirmative steps of permitting the establishment of domicile and of providing federal income tax exemption on organizational salaries. This special status afforded by the Federal Government is, in our view, inconsistent with the University of Maryland's *discriminatory* denial of in-state status to G–4 aliens who are domiciled in the State.

[25] It is important to note that this case does not involve, and we express no views regarding, a State's imposition of a burden on all individuals sharing a common relevant characteristic, of whom only some are aliens.

sity made the representation to the District Court that in the event the 1976 order was "finally affirmed on appeal," it would make appropriate refunds. This representation was incorporated in the stay orders of both the District Court and Court of Appeals. It is petitioners' contention, however, that the 1976 order was "effectively" vacated when this Court, in *Toll* v. *Moreno*, 441 U. S. 458 (1979), vacated the judgment of the Court of Appeals and remanded the case to the District Court for reconsideration. Petitioners therefore conclude that the terms of the University's waiver of sovereign immunity can no longer be satisfied.

Petitioners' argument is not persuasive. We do not interpret *Toll* as having vacated the judgment of the District Court. In *Toll* the Court recognized that the University had altered its position through the promulgation of the clarifying resolution, raising "new issues of constitutional law which should be addressed in the first instance by the District Court." *Id.*, at 462. The Court declined, however, to decide whether the District Court, in issuing its 1976 order, had improperly relied on due process grounds, and whether continuation of the order was justified on equal protection or pre-emption grounds. Thus, while we vacated "the judgment of the Court of Appeals," *ibid.*, we left the judgment of the District Court undisturbed.[28] And contrary to petitioners' suggestion, a vacatur of the District Court's judgment was not necessary to give the District Court jurisdiction to reconsider the case. See *Goldberg* v. *United States*, 425

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[28] Petitioners note, however, that whereas the District Court's 1976 order was based solely on due process grounds, the District Court, on remand, held the in-state policy as it operated during the period following the clarifying resolution invalid on two different grounds—equal protection and pre-emption. In our view, this fact is of little moment. Just as a respondent is entitled to defend in this Court a judgment on grounds different from those relied on by the court below, *e. g.*, *Colautti* v. *Franklin*, 439 U. S. 379, 397, n. 16 (1979), respondents in this case were entitled, following our remand, to support a reaffirmance of the earlier order on grounds previously urged but not relied on.

U. S. 94, 111–112 (1976); *Campbell* v. *United States*, 365 U. S. 85, 98–99 (1961); 28 U. S. C. §2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment . . . and may . . . require such further proceedings to be had as may be just under the circumstances").[27]

IV

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. Its action today provides an eloquent and sufficient answer to JUSTICE REHNQUIST's dissent: despite the vehemence with which his opinion is written, JUSTICE REHNQUIST has persuaded only one Justice to his position. But because the dissent attempts to plumb the Court's psyche, see *post*, at 41–42, n. 12,[1] I feel compelled to add comments addressed to JUSTICE REHNQUIST's ruminations on equal protection. In particular, I cannot leave unchallenged his suggestion that the Court's decisions holding resident aliens to be a "suspect class" no longer are good law.

JUSTICE REHNQUIST's analysis on this point is based on a simple syllogism. Alienage classifications have been subjected to strict scrutiny, he suggests, because "aliens [are]

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[27] Even if we were to assume that the judgment of the District Court was indeed vacated, we could not say that the terms of the University's waiver of sovereign immunity—that the District Court's order be "finally affirmed on appeal"—would not be satisfied. Petitioners have not prevailed on the merits in a single court, despite the numerous decisions that this litigation has prompted. By its original order, the District Court held that the University's in-state policy was invalid insofar as it discriminated against G–4 aliens. Today, we reaffirm that conclusion.

[1] The Justice opines that "[i]f the Court has eschewed strict scrutiny in the 'political process' [alienage-equal protection] cases, it may be because the Court is becoming uncomfortable with the categorization of aliens as a suspect class." *Post*, at 42, n. 12.

barred from asserting their interests in the governmental body responsible for imposing burdens upon them." *Post*, at 40. But "[m]ore recent decisions," he continues, have established that "the political powerlessness of aliens is itself the consequence of distinctions on the basis of alienage that are constitutionally permissible." *Ibid.* This prompts JUSTICE REHNQUIST to pose what one supposes to be a rhetorical question: "whether political powerlessness is any longer a legitimate reason for treating aliens as a 'suspect class' deserving of 'heightened judicial solicitude.'" *Post*, at 41. The reader would infer from this analysis that JUSTICE REHNQUIST would uphold state enactments disadvantaging aliens unless those enactments are wholly irrational.

With respect, in my view it is JUSTICE REHNQUIST's analysis that is wholly irrational; simply to state his proposition is to demonstrate its logical flaws. Most obviously, his exegesis of the Court's reasons for according aliens "suspect class" status is simplistic to the point of caricature. By labeling aliens a "'discrete and insular' minority," *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971), the Court did something more than provide a historical description of their political standing. That label also reflected the Court's considered conclusion that for most legislative purposes there simply are no meaningful differences between resident aliens and citizens, see *Ambach* v. *Norwick*, 441 U. S. 68, 75 (1979), so that aliens and citizens are "persons similarly circumstanced" who must "be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). At the same time, both common experience and the unhappy history reflected in our cases, see *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 462–463 (1982) (dissenting opinion); *Ambach* v. *Norwick*, 441 U. S., at 82 (dissenting opinion), demonstrate that aliens often have been the victims of irrational discrimination.

In combination, these factors—disparate treatment accorded a class of "similarly circumstanced" persons who historically have been disabled by the prejudice of the major-

ity—led the Court to conclude that alienage classifications "in themselves supply a reason to infer antipathy," *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979), and therefore demand close judicial scrutiny. This understanding, which is at the heart of the Court's modern alienage decisions, was unreservedly reaffirmed this Term in *Cabell* v. *Chavez-Salido*, 454 U. S., at 438 ("citizenship is not a relevant ground for the distribution of economic benefits").

JUSTICE REHNQUIST nevertheless suggests that the Court's original understanding somehow has been undercut by "more recent decisions" recognizing that aliens may be excluded from the governmental process. For this proposition he cites *Cabell* v. *Chavez-Salido, supra; Ambach* v. *Norwick, supra;* and *Foley* v. *Connelie*, 435 U. S. 291 (1978). Again, with all due respect, JUSTICE REHNQUIST is simply wrong. The idea that aliens may be denied political rights is not a recently discovered concept or a newly molded principle that can be said to have eroded the prior understanding. To the contrary, the Court always has recognized that aliens may be denied use of the mechanisms of self-government, and *all* of the alienage cases have been decided against the backdrop of that principle. Indeed, this aspect of the alienage-equal protection doctrine was explored at length in *Sugarman* v. *Dougall*, 413 U. S. 634, 647–649 (1973), the second of the Court's modern decisions in the area.[2] See *Cabell* v. *Chavez-Salido*, 454 U. S., at 438–442 (citing *Sugarman*); *Ambach* v.

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[2] Among other things, the Court noted in *Sugarman* that the State may exclude aliens from governmental positions "that go to the heart of representative government," in an attempt "'to preserve the basic conception of a political community.'" 413 U. S., at 647, quoting *Dunn* v. *Blumstein*, 405 U. S. 330, 344 (1972). The *Sugarman* Court thus recognized the "State's historical power to exclude aliens from participation in its democratic political institutions." 413 U. S., at 648. This makes JUSTICE REHNQUIST's analysis particularly perplexing; his discussion appears to suggest that *Sugarman*—decided in 1973—somehow undercut the analysis of *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976). See *post*, at 40.

Norwick, 441 U. S., at 74 (citing *Sugarman*); *Foley* v. *Connelie*, 435 U. S., at 294–296 (citing *Sugarman*). Yet in cases postdating *Sugarman* the Court has experienced no noticeable discomfort in applying strict scrutiny to alienage classifications that did not involve political interests. See *In re Griffiths*, 413 U. S. 717 (1973); *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976); *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977).

It is not surprising, then, that none of the "more recent decisions" relied on by JUSTICE REHNQUIST so much as suggested that the Court's earlier analysis had been undercut. Instead, those cases pointedly have *declined* to "retrea[t] from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny." *Cabell* v. *Chavez-Salido*, 454 U. S., at 439. See *Ambach* v. *Norwick*, 441 U. S., at 75 (that aliens may be denied political rights "is an exception to the general standard applicable to classifications based on alienage"); *Foley* v. *Connelie*, 435 U. S., at 296. This reflects the Court's proper judgment that the alienage cases are not irreconcilable or inconsistent with one another. For while the Court has recognized, as the Constitution suggests, that alienage may be taken into account when it is relevant—that is, when classifications bearing on political interests are involved—"[t]he distinction between citizens and aliens . . . ordinarily [is] *irrelevant* to private activity," *Ambach* v. *Norwick*, 441 U. S., at 75 (emphasis added). And it hardly need be demonstrated that governmental distinctions based on irrelevant characteristics cannot stand. If this dual aspect of alienage doctrine is unique, it is because aliens constitute a unique class.[3]

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[3] JUSTICE REHNQUIST suggests that alienage classifications involving political interests are subjected to a lesser standard of review because "the strength of the State's interest is great when it seeks to exclude aliens from its political processes." *Post*, at 41, n. 12. This suggestion is inaccurate. Such classifications are permissible because the Court has rec-

Finally, even were I to accept JUSTICE REHNQUIST's view that powerlessness is the end-all of alienage-equal protection doctrine, I would find preposterous his further suggestion that, because States do not violate the Constitution when they exclude aliens from participation in the government of the community, the alien's powerlessness therefore is constitutionally irrelevant. From the moment the Court began constructing modern equal protection doctrine in *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938), it never has been suggested that the *reason* for a discrete class' political powerlessness is significant; instead, the *fact* of powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests that "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*, at 152–153, n. 4. The very powerlessness of a discrete minority, then, is itself the factor that overcomes the usual presumption that "'even improvident decisions [affecting minorities] will eventually be rectified by the democratic process.'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272, quoting *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979). If anything, the fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage. I might add that the Court explicitly has endorsed this seemingly self-evident proposition: in *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976), after noting that "[s]ome of [an alien's] disadvantages stem directly from the Constitution itself," the Court declared that "[t]he legitimacy of the delineation of the affected class [of aliens] buttresses the conclusion that it is 'a "discrete and insular" minority' . . . and, of course, is consistent with the premise that the class is one whose members suffer spe-

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ognized that they are likely to be based on meaningful distinctions: alienage "is a relevant ground for determining membership in the political community." *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 438 (1982).

cial disabilities." *Id.*, at 102, n. 22. I find JUSTICE REHNQUIST's attempt to stand this principle on its head perplexing, to say the least.

One of the few assertions that can be made with complete confidence about the Court's alienage-equal protection decisions is that no opinion for the Court has ever so much as suggested that JUSTICE REHNQUIST's lone dissent in *Sugarman*, 413 U. S., at 649—which espoused a view similar to the one he hints at today—expressed the proper approach for deciding these cases. Of course, one cannot condemn another for sticking to his guns. Barring a radical change in the Court's reasoning in cases concerning alienage, however, one can expect that today's equal protection writing by JUSTICE REHNQUIST will join his opinion in *Sugarman*, to use his phrase, as "lifeless words on the pages of these Reports." *Post*, at 48.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I concur in the Court's opinion insofar as it holds that the State may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both State and federal taxes, and who are domiciled in the State. Imposition of out-of-state tuition on such aliens conflicts with federal law exempting them from state taxes, since, after all, the University admits that it seeks to charge the higher tuition in order to recover costs that state income taxes normally would cover.

I cannot join the remainder of the Court's opinion, however, for it wholly fails to address the criticisms leveled in JUSTICE REHNQUIST's dissenting opinion. As JUSTICE REHNQUIST makes clear, the class of G–4 aliens is not homogenous: some G–4 aliens are exempt under federal law from state taxes, while other G–4 aliens are not. Moreover, the legislative history of § 4(b) of the International Organizations Immunities Act, later reenacted as § 893 of the Internal Revenue Code of 1954, 26 U. S. C. § 893, from which many G–4

aliens derive their federal tax immunity, demonstrates that Congress did not intend to exempt such aliens from state taxes, choosing instead to leave the matter to the state and local authorities. Thus, I disagree with the Court when it states that the "State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting," *ante*, at 16, for in fact Congress has not barred the State from collecting state taxes from many G–4 aliens. Accordingly, I conclude that the Supremacy Clause does not prohibit the University from charging out-of-state tuition to those G–4 aliens who are exempted by federal law from federal taxes only.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Despite rather broad dicta regarding the conditions under which federal power over immigration will pre-empt state statutes that adversely affect aliens, the Court's holding is narrow. Purporting to rely on a collection of treaties and statutes that concern the *tax* liability of certain nonimmigrant aliens, it concludes that no room is left for the State of Maryland to charge such aliens nonresident *tuition* for attending the State's university. The Court's dicta seems to me inconsistent with our prior cases, and its conclusion about the effect of the statutes and treaties is strained at best. In short, the Court reaches a result that I find quite out of step with our normal approach to federal pre-emption of state law.

Its holding has the additional vice of foreclosing governmental autonomy in an area plainly within the State's traditional responsibilities—education. And it acts, not on behalf of a disadvantaged minority, but at the behest of a group of individuals who have been accorded a status by the Federal Government *superior* to that of the average citizen, and in a case where the State has demonstrated, by virtue of its favorable treatment of resident aliens, that its policy is not the result of an invidious or irrational motive. I find the Court's

actions unjustified and unnecessary and, accordingly, I dissent. Because I would reverse the judgment of the Court of Appeals, I also address other grounds relied on by the lower courts and argued by respondents in support of their judgments.

I

Our prior decisions indicate that "when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978). State laws will survive such a challenge unless there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 141 (1963).

Unquestionably, federal power over immigration and naturalization is plenary and exclusive. Our decision in *De Canas* v. *Bica*, 424 U. S. 351 (1976), however, unambiguously forecloses any argument that this power, either unexercised or as manifested in the Immigration and Nationality Act, preempts the field of regulations affecting aliens once federal authorities have admitted them into this country. In light of the Court's expansive observations in the instant case, that opinion bears quoting at some length:

> "[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by [the Federal Government's] constitutional power, whether latent or exercised. For example, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 415–422 (1948), and *Graham* v. *Richardson*, 403 U. S. 365, 372–373 (1971), cited a line of

cases that upheld certain discriminatory state treatment of aliens lawfully within the United States. Although the 'doctrinal foundations' of the cited cases, which generally arose under the Equal Protection Clause 'were undermined in *Takahashi*,' they remain authority that, standing alone, the fact that aliens are the subject of a state statute *does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.*" *Id.*, at 355 (citations omitted; emphasis added).

In *De Canas* the Court also held that Congress' enactment of the Immigration and Nationality Act (INA) was insufficient to oust "harmonious state regulation touching on aliens in general." *Id.*, at 358.

Thus, neither Congress' unexercised constitutional power over immigration and naturalization, nor its exercise of that power in passing the INA, precludes the States from enforcing laws and regulations that prove burdensome to aliens. Under our precedents, therefore, state law is invalid only if there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, *supra*, at 141,[1] or if Congress has in some other way unambiguously declared its intention to foreclose the state law in question, see *Ray* v. *Atlantic Richfield Co.*, *supra*, at 157–158. In the absence of a conflict, "we are not to conclude that Congress legislated the ouster of [a state law] in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers*, *supra*, at 146–147.

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[1] The state courts in *De Canas* v. *Bica*, 424 U. S. 531 (1976), had not addressed the question in light of their determination that Congress had completely barred state action in the field of employment of illegal aliens. Consequently, this Court also deferred consideration of the issue. *Id.*, at 363.

Notwithstanding these settled principles, the Court suggests in dicta that any state law which discriminates against lawfully admitted aliens is void, presumably without regard to the strength of the State's justification, if Congress did not contemplate such a law. *Ante*, at 12–13. This standard seems to me clearly to reverse the presumption that normally prevails when state laws are challenged under the Supremacy Clause. The Court relies on language in three cases to support this proposition. On closer inspection, none of the three offers the precedential support for which the Court obviously grasps.

The first case, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948), involved a California statute that prohibited the issuance of commercial fishing licenses to aliens who were ineligible for citizenship. The language emphasized by the Court explains that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Id.*, at 419 (footnote omitted). In the *Takahashi* opinion, this statement is immediately followed by three citations, which the Court omits. These citations explain, and qualify, the otherwise broad language quoted by the Court. In the first of these cases, *Chy Lung* v. *Freeman*, 92 U. S. 275 (1876), the Court considered a California law that, with certain extremely limited exceptions, prohibited any alien who was, or would likely become, "a public charge," from entering the State through any of its ports. The Court held that the statute was pre-empted by federal law: "The passage of laws which concern the *admission* of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States." *Id.*, at 280 (emphasis added).

The second case cited in *Takahashi*, *Truax* v. *Raich*, 239 U. S. 33 (1915), concerned an Arizona statute limiting virtually all employment opportunities in the State to citizens. Although *Truax* involved an asserted repugnancy to the

Equal Protection Clause, the Court also suggested that the challenged statute was in conflict with federal law. It is important to note that the Court interpreted the statute as "deny[ing] to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." *Id.*, at 41. The Court subsequently stated: "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them *entrance and abode*, for in ordinary cases they cannot live where they cannot work." *Id.*, at 42 (emphasis added).

The final case relied on in *Takahashi* is *Hines* v. *Davidsitz*, 312 U. S. 52 (1941). The Pennsylvania statute at issue there required adult aliens to register with the State and to carry an identification card, which they were required to present on demand to state agents. The Court held that the statute was pre-empted by the federal Alien Registration Act of 1940, finding that "[t]he basic subject of the state and federal laws [was] identical," *id.*, at 61, and that the state law embodied requirements that Congress had studiously avoided in passing the federal Act, *id.*, at 70–74.

Thus, in each of these cases, the Court found either a clear encroachment on exclusive federal power to admit aliens into the country or a clear conflict with a specific congressional purpose. It was with these cases in mind that the Court in *Takahashi* condemned "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States." 334 U. S., at 419. It is most unlikely, therefore, that the Court intended with one stroke of the pen to reverse the normal presumption applicable in cases challenging state enactments under the Supremacy Clause, and to declare such laws invalid without regard to the existence of a conflict with federal statutes or a usurpation of federal power over immigration.

The Court also relies on *Graham* v. *Richardson*, 403 U. S. 365 (1971), which struck down as a denial of equal protection a California law that withheld welfare benefits from lawfully

resident aliens. As an alternative ground, the Court also declared the law invalid as an encroachment on federal power. On the basis of specific federal statutes barring the admission of aliens likely to become public charges, and providing for the deportation of aliens who become public charges because of factors that existed prior to entry, the Court inferred a congressional purpose not "to impose any burden or restriction on aliens who become indigent after their entry into the United States." *Id.*, at 377. The Court also concluded, relying on *Truax*, *supra*, that the law denied indigent aliens the "necessities of life," and therefore "equate[d] with the assertion of a right, inconsistent with federal policy, to deny entrance and abode." The holding in *Graham*, therefore, offers no support for a presumption that *all* state laws burdening aliens conflict with amorphous federal power over immigration.

Finally, the Court quotes from dictum appearing in a footnote in *De Canas* v. *Bica*, 424 U. S., at 358, n. 6, that "'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.'" *Ante*, at 12–13. The principal support for this assertion was the passage previously quoted by the Court from *Takahashi*. As I have already indicated, that passage in context means a good deal less than it does out of context. Most important, however, *De Canas* itself suggests that the quoted footnote is not a fair description of the law. Although the statute at issue only affected illegal aliens, the principles recognized in the Court's opinion were not so limited. Thus, the Court emphasized that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration," 424 U. S., at 355, that *Takahashi*, *Graham*, and *Hines* found pre-emption only after examining specific congressional enactments, 424 U. S., at 355, that it was necessary to look for some "specific indication . . . that Congress intended to preclude even harmonious state regulation touching on aliens in general," *id.*, at 358, and that pre-

emption should be found only when it is possible to say "'either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained,'" *id.*, at 356 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142).

In sum, the fact that a state statute can be said to discriminate against aliens does not, standing alone, demonstrate that the statute is pre-empted, absent some form of congressional sanction. The statute in *De Canas* discriminated against aliens, yet the Court found no strong evidence that Congress intended to pre-empt it. Obviously, the fact that the aliens were in this country illegally was an important factor in ascertaining Congress' intent. But, just as clearly, the fact that disadvantaged aliens are *lawfully* in the country does not authorize the Court to dispense with the particularized inquiry into congressional intent that pre-emption analysis traditionally has demanded.[2] Discriminatory legislation may well be invalid under the federal civil rights laws as a denial of equal treatment, but under our precedents such a conclusion is possible only after an examination of the classification drawn by the State and its justification for doing so. Under the Court's summary of pre-emption principles applicable to laws discriminating against aliens, these factors would be irrelevant.[3] I cannot agree that such a summary accurately reflects the law.

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[2] As the Court obligatorily notes, *ante*, at 12, n. 17, but promptly ignores, our decisions in *Foley* v. *Connelie*, 435 U. S. 291 (1978); *Ambach* v. *Norwick*, 441 U. S. 68 (1979); and *Cabell* v. *Chavez-Salido*, 454 U. S. 432 (1982), all upheld state laws that expressly discriminated against lawfully admitted resident aliens. Such decisions would not have been possible if the mere fact that a law discriminated against aliens placed it in irreconcilable conflict with federal power over immigration.

[3] As I have always understood the Supremacy Clause, if a state law is inconsistent with federal law, the state law is unenforceable. The inconsistency is made no less fatal because the State has a rational basis for, or a compelling interest in, its actions. Under the majority's formulation, a state law that arguably discriminates against aliens conflicts with federal

The Court concedes that the proper application of its pre-emption principle "is likely to be a matter of some dispute," *ante*, at 13, and then proceeds to resolve the case by finding a conflict between Maryland's tuition policy and a collection of treaties and statutes that address the tax liability of certain nonimmigrant aliens. Although I find this conclusion quite unconvincing, it is gratifying to learn that in practice perhaps the Court's new principle still demands proof of a conflict with federal law, just as traditional pre-emption cases instruct. Because the Court's judgment relies on the asserted presence of such a conflict, its statements suggesting that such a particularized inquiry is unnecessary must be regarded as dicta, though unwise dicta at that. With this said, I turn to the Court's discovery of a conflict with federal law.

II

The Court relies on two features of federal law. First, it notes that Congress has permitted nonimmigrant aliens holding G–4 visas to establish domicile in the United States. *Ante*, at 14. It then reasons that denying these aliens in-state tuition conflicts with Congress' decision. The Court offers no evidence that Congress' intent in permitting respondents to establish "domicile in the United States" has any bearing at all on the tuition available to them at state universities. Federal law does not require the States to make residence or domicile the determinant of their tuition policies, and as the Court recognizes, Maryland has chosen not to do so in the case of nonimmigrant aliens. Moreover, unlike the state laws scrutinized in *Truax* and *Graham*, Maryland's policy does not deprive respondents of a livelihood or the means of subsistence such that it could fairly be characterized as denying respondents "entrance and abode," 239 U. S., at 42.

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law, and unless further modifications of the pre-emption doctrine are in the offing, that will be the end of the matter.

The Court's reference to "domicile in the United States," therefore, is little more than a restatement of its more general principle that any laws burdensome to aliens who have been lawfully admitted are presumptively pre-empted absent congressional intent to "sanction" them. As I have already suggested, this turns pre-emption analysis on its head.

The second feature of federal law on which the Court relies consists of certain statutes and treaties that affect the tax liability of G–4 visaholders. The Court considers these statutes and treaties as an amorphous whole and concludes that the University's policy "frustrates" the policies embodied in them. "The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting." *Ante*, at 16. There are two serious flaws in this argument. First, the Federal Government has not barred the States from collecting taxes from many, if not most, G–4 visaholders. Second, as to those G–4 nonimmigrants who *are* immune from state income taxes by treaty, Maryland's tuition policy cannot fairly be said to conflict with those treaties in a manner requiring its pre-emption.

The individual respondents in this case represent a class of G–4 visaholders or their dependents who are or may become students at the University of Maryland. The Court, contrary to the teaching of our cases,[4] reasons as though the class members were a homogenous group. They are not, and the Court's ignorance of relevant differences leads it into error. The named class representatives are dependents of employees of either the Inter-American Development Bank or the International Bank for Reconstruction and Develop-

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[4] "[A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogenous multitude of persons with a wide-ranging variety of ties to this country." *Mathews* v. *Diaz*, 426 U. S. 67, 78–79 (1976) (footnote omitted).

ment (the World Bank). As the Court notes, the salaries paid employees of these organizations are exempt by international agreement from taxation by any country other than their own. *Ante*, at 15. As the Court also notes, the exemption contained in the agreement establishing the World Bank has by statute been given the force of federal law in the United States. 22 U. S. C. § 286h; see *ante*, at 15–16.

Most G–4 visaholders, however, derive whatever tax immunity they enjoy in this country from § 4(b) of the International Organizations Immunities Act (IOIA or Act), later reenacted as § 893 of the Internal Revenue Code of 1954, 26 U. S. C. § 893. That statute exempts the salaries paid to alien employees of international organizations from *federal* income tax. The principal purpose of the Act as a whole, which is now divided among many Titles of the United States Code, was to extend governmental privileges and immunities to international organizations and their officers and employees located in this country. H. R. Rep. No. 1203, 79th Cong., 1st Sess., 4 (1945). As noted, § 4 amended the Internal Revenue Code to exempt the salaries of such officers and employees from federal income tax. As the relevant Committee Reports demonstrate, the exemption was strictly limited to salaries; income derived from commercial activities, investments, and other similar sources was not to enjoy an exemption, and all federal taxes other than those applicable to income remained fully effective. *Ibid.;* S. Rep. No. 861, 79th Cong., 1st Sess., 4–5 (1945).

Section 6 of the bill, as originally introduced in the House, provided an exemption from state and local taxes as well.[5]

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[5] Section 6 of the original bill, H. R. 4489, read as follows:

"International organizations shall be exempt from all property taxes imposed by, or under the authority of, any act of Congress, including such acts as are applicable solely to the District of Columbia or the Territories; and shall be entitled to the same exemptions and immunities from State or local taxes as is the United States Government." 91 Cong. Rec. 10867 (1945).

The Senate Committee deleted the exemption, reasoning that "this matter should be properly dealt with by the State and local authorities." S. Rep. No. 861, *supra*, at 5. The House eventually agreed to the amendment, and the bill as enacted contains no exemption from state or local taxes.[6] Floor debates confirm what the Committee amendment implied: although the Act provides an exemption from the federal income tax, it was not intended to foreclose the States from taxing employees of international organizations.[7] Accordingly, employees of international organizations whose tax immunity derives solely from the IOIA can claim no federal immunity from state taxes. According to petitioners, approximately three-quarters of the international organizations whose employees hold G–4 visas fall into that category. Brief for Petitioners 29, n. 22. Therefore, even if one were to accept the Court's reasoning that immunity from state taxes implies a right to in-state college tuition, many, if not most of the class members cannot benefit from the argument.[8]

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[6] Section 6 is codified at 22 U. S. C. § 288c and now reads:

"International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories."

[7] Thus, sponsors of the legislation in the House assured their colleagues that the bill would not admit such employees as immigrants. In addition, the following exchange occurred:

"MR. RANKIN. This bill does not interfere with State laws in any way?

"MR. ROBERTSON of Virginia. None whatever." 91 Cong. Rec. 10866 (1945).

In the Senate, Senator Taft explained that his Committee had deleted the proposed exemption contained in § 6 because it "felt that that was wholly beyond the power of Congress." 91 Cong. Rec. 12432 (1945).

[8] G–4 visa holders residing in Maryland who are relieved of federal taxes under the Internal Revenue Code have also been exempted from Maryland taxes by operation of *state* law. Maryland's tax code provides that, with certain exceptions not relevant here, the net income taxable under state law is the taxpayer's federal adjusted gross income. Md. Ann. Code, Art. 81, § 280(a) (1980). By operation of 26 U. S. C. § 893, that amount will not

The Court's reasoning is flawed, however, and cannot help even those class members whose parents' tax immunity is based on treaty or international agreement.[9] The State's tuition policy is void under the Supremacy Clause only "to the extent that it actually conflicts with a valid federal statute," *Ray* v. *Atlantic Richfield Co.*, 435 U. S., at 158, or, of course, a valid treaty. As the Court stated in *Ray*, *ibid.*:

> "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, *supra*, at 526, 540–541. Accord, *De Canas* v. *Bica*, 424 U. S. 351, 363 (1976)."

There is, of course, no physical impossibility in the coexistence of the two policies. The treaties and agreements insure that signatory nations will not tax the salaries of foreign

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include wages paid by an international organization. The *State's* decision indirectly to relieve class members of state taxes on their salaries of course provides no basis for pre-emption of the State's tuition policy under the Supremacy Clause.

[9] The District Court, which concluded that the State's tuition policy interfered with Congress' exclusive control over immigration, nevertheless rejected the argument that the policy conflicted with the treaties and agreements relieving respondents of liability for income taxes.

"In this case it is apparent that there is no 'clear conflict' between the policies in question. The University's Policy seeks to confer certain economic benefits on individuals closely affiliated with the State of Maryland. The mere fact that one of the factors which is considered in determining eligibility for this benefit is whether or not the applicant's income is taxed by Maryland does not necessarily imply that the policy conflicts with the tax policies contained in the relevant international agreements. The 'conflict' between these policies, in and of itself, is too attenuated to warrant invalidating the University's Policy." 489 F. Supp. 658, 667 (Md. 1980).

nationals employed by the designated organizations. The State of Maryland does not tax these salaries. It merely charges tuition for enrollment in its University that is higher than the tuition charged to American citizens and other foreign nationals who have been admitted to this country as immigrants.

The remaining question is whether Maryland's tuition policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the treaties and agreements. *Hines* v. *Davidowitz*, 312 U. S., at 67. In answering this question, it is well to bear in mind certain guideposts that the Court appears to have forgotten: "It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." *United States* v. *Pink*, 315 U. S. 203, 230 (1942). "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them." *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143 (1938). In this case, the Court has gone out of its way to raise the banner of federal supremacy over the State's University, without support in the language of the treaties and without examining the intent of the negotiating parties.

It is one thing to exempt employees of an international organization from tax liability on their salaries, which otherwise would be incurred by the employees simply by doing what they came to this country to do—working for international organizations such as the World Bank. It is another matter to restrict the State's ability to recover its costs in providing educational services, which respondents were certainly not required to use. Cf. *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 262 (1934). Although a college education over the years has become accessible to increasing numbers of Americans, it can hardly be characterized as an unavoidable feature of life in this country.

Thus, although the negotiating parties undoubtedly intended to lower the cost of international organizations by exempting employees from income taxes, it does not at all follow that they *further* intended to require the States to subsidize the cost of services which those employees or their families might choose to use.[10]

Indeed, the United States, which unlike the State of Maryland negotiated the agreements in question, clearly does not understand them to require that education for G–4 visa-holders be subsidized to the same extent as education for citizens or resident aliens. For example, the Federal Guaranteed Student Loan Program, which provides significant aid to students attending qualifying colleges and graduate schools, is available to American citizens and permanent resident aliens, but *not* to nonimmigrant aliens such as respondents. See 34 CFR § 682.201(a)(2) (1981). If this reflects the federal policy embodied in the treaties on which the Court relies, I fail to see how Maryland's tuition policy "frustrates" it.

III

The lower courts' principal basis for invalidating Maryland's tuition policy was not the Supremacy Clause, but the Equal Protection Clause. Those courts interpreted the State's policy as a classification based on alienage, and there-

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[10] As petitioners explain, tuition and fee charges do not pay the full cost of a university education at the University of Maryland. In fiscal year 1981, for example, the University received appropriations from general fund revenues in the amount of $164 million. Brief for Petitioners 29, n. 23. Nearly half of general fund revenues are provided by the State's income tax. *Ibid.* The State, therefore, subsidizes the cost of education at the University. The amount of the subsidy, of course, is considerably greater for students who are eligible for in-state tuition. Since residents of the State normally pay income tax, and thereby indirectly contribute to the subsidy, it is not unreasonable for the State to accord such persons a reduced tuition. By charging respondents out-of-state tuition, the University is merely asking them to pay their fair share of the cost of state-supported education.

fore subjected it to "strict scrutiny" on the authority of *Graham* v. *Richardson*, 403 U. S. 365 (1971), and later cases. In light of several recent decisions, however, it is clear that not every alienage classification is subject to strict scrutiny. In my view, the classification relied upon by the State in this case cannot fairly be called "suspect," and therefore I would ask only whether it rests upon a rational basis. Because I believe it does, I cannot agree with the lower courts that it denies the equal protection of the laws.

The Equal Protection Clause of the Fourteenth Amendment has been interpreted by this Court as embodying the principle that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). By the same token, however, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940).

All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment. The Equal Protection Clause, however, reflects the judgment of its Framers that some distinguishing characteristics may seldom, if ever, be the basis for difference in treatment by the legislature. The key question in all equal protection cases, of course, is whether the distinguishing characteristics on which the State relies are constitutional.

In the vast majority of cases our judicial function permits us to ask only whether the judgment of relevance made by the State is rational. See *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961).[11] In a very few other cases, we have required that the State pass a more demanding test because of

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[11] "This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members, and until recently it has been followed in all kinds of 'equal protection' cases." *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 681–682 (1966) (Harlan, J., dissenting).

the judgment that the classification drawn by the State is virtually never permissible from a constitutional perspective. Such classifications are deemed "suspect" and strictly scrutinized. Until 1971, only race and national origin had been so classified by the Court. See *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Oyama* v. *California*, 332 U. S. 633 (1948).

In *Graham* v. *Richardson*, *supra*, the Court added alienage to this select list. Apart from the abbreviated conclusion that "[a]liens as a class are a prime example of a 'discrete and insular' minority," *id.*, at 372, the Court did not elaborate on the justification for "heightened judicial solicitude," *ibid.* Subsequently, the Court observed that aliens, unlike other members of the community, were subject to the particular disadvantage of being unable to vote, and thus were barred from participating formally in the process of self-government. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 102 (1976). One could infer that rigorous judicial scrutiny normally was necessary because aliens were barred from asserting their interests in the governmental body responsible for imposing burdens upon them.

More recent decisions have established, however, that the political powerlessness of aliens is itself the consequence of distinctions on the basis of alienage that are constitutionally permissible.

> "[I]t is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. See [*Sugarman* v. *Dougall*, 413 U. S. 634, 647–649 (1973)]. Similar considerations support a legislative determination to exclude aliens from jury service. See *Perkins* v. *Smith*, 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976). Likewise, we have recognized that citizenship may be a relevant qualification for fulfilling those 'important non-elective executive, legislative, and judicial positions,' held by 'officers who participate directly in the formu-

lation, execution, or review of broad public policy.' *Dougall, supra*, at 647." *Foley* v. *Connelie*, 435 U. S. 291, 296 (1978).

As the Court explained earlier this Term:

> "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community. Judicial incursions into this area may interfere with those aspects of democratic self-government that are most essential to it." *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 439–440 (1982).

If the exclusion of aliens from the political processes is legitimate, as it clearly is, there is reason to doubt whether political powerlessness is any longer a legitimate reason for treating aliens as a "suspect class" deserving of "heightened judicial solicitude." Indeed, in *Foley* v. *Connelie*, *supra*, *Ambach* v. *Norwick*, 441 U. S. 68 (1979), and *Cabell* v. *Chavez-Salido*, *supra*, the Court plainly eschewed the application of strict scrutiny to the States' exclusion of aliens from particular public offices.[12] In my view, these decisions merely

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[12] As suggested earlier, we have affirmed "the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Ambach* v. *Norwick*, 441 U. S., at 73–74. "[I]n those areas the State's exclusion of aliens need not 'clear the high hurdle of "strict scrutiny," because [that] would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship."' *Foley* v. *Connelie*, 435 U. S., at 295 (citation omitted)." *Cabell* v. *Chavez-Salido*, 454 U. S., at 439 (footnote omitted). The Court has recognized that the strength of the State's interest is great when it seeks to exclude aliens from its political processes, but selection of the appropriate level of "scrutiny" traditionally

reflect the judgment that alienage, or the other side of the coin, citizenship, is for certain important state purposes a constitutionally relevant characteristic and therefore cannot always be considered invidious in the same manner as race or national origin.[13]

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has depended, not on the nature of the State's interest, but on the nature of the burdened class. If the Court has eschewed strict scrutiny in the "political process" cases, it may be because the Court is becoming uncomfortable with the categorization of aliens as a suspect class.

[13] That judgment was shared by the Framers of the Fourteenth Amendment. Indeed, the first clause of the first section of that Amendment confirms the importance of citizenship by defining the means of obtaining it in a way that encompassed the freed slaves: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." Citizenship is also a concept fundamental to structures and processes established elsewhere in the Constitution:

"The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall*, *supra*, at 651–652 (REHNQUIST, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Ambach* v. *Norwick*, *supra*, at 75.

JUSTICE BLACKMUN has chosen to respond to this portion of the dissent, but misunderstands my point. I have observed that the political powerlessness of aliens is the result of state-created classifications which this Court has upheld as constitutional. One may nevertheless conclude, as JUSTICE BLACKMUN does, that the political powerlessness of aliens is still a reason for applying strict scrutiny to alienage classifications. My point, to which JUSTICE BLACKMUN's concurrence is unresponsive, is that a classification which is constitutionally relevant to many important state purposes should not be considered "suspect." It is beside the point to recognize that alienage may be irrelevant for some other purposes. Were this consideration conclusive, all state classifications would be considered "suspect" under the Equal Protection Clause because every classification is relevant to some purposes and irrelevant to others.

IV

The State's policy in this case is to provide in-state tuition to residents of the State who are citizens and immigrant aliens lawfully admitted for permanent residence. In-state tuition is not available to certain students, however, regardless of whether they have established residence within the State. Within this class are citizens who are financially dependent either on parents or on a spouse who is not domiciled in the State, as well as citizens who are members of the Armed Forces and have been assigned by the military to attend the University.[14] Also within the class are nonimmigrant aliens, who have not been admitted to this country for permanent residence.

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[14] The State's written policy, effective since 1975, reads in part as follows:

"1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

"c. Where a student is the spouse or a dependent child of a full-time employee of the University.

"d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

"e. Where a student is a full-time employee of the University of Maryland.

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases." App. to Pet. for Cert. 167a–168a.

In each case in which the Court has tested state alienage classifications under the Equal Protection Clause, the question has been the extent to which the States could permissibly distinguish between citizens and permanent resident aliens. See *Graham* v. *Richardson*, 403 U. S. 365 (1971); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973); *In re Griffiths*, 413 U. S. 717 (1973); *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976); *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977). We recently summarized these decisions as implying "that there would be few—if any—areas in which a State could legitimately distinguish between its citizens and *lawfully resident aliens*." *Cabell* v. *Chavez-Salido*, 454 U. S., at 438 (emphasis added). In this case, however, the question is whether the State can distinguish between two groups, each of which consists of citizens and aliens. For two reasons, the State's classification should not be deemed "suspect" and subjected to strict scrutiny.

First, unlike immigrant aliens, nonimmigrants such as G–4 visaholders are significantly different from citizens in certain important respects. Our previous decisions have emphasized that immigrant aliens have been lawfully admitted to this country for permanent residence and share many of the normal burdens of citizenship, such as the duty to pay taxes and to serve in the Armed Forces. *Nyquist* v. *Mauclet*, *supra*, at 12; *Hampton* v. *Mow Sun Wong*, 426 U. S., at 107, n. 30; *Sugarman* v. *Dougall*, *supra*, at 645; *Graham* v. *Richardson*, *supra*, at 376. Implicit in these cases is the judgment that because permanent resident aliens are in so many respects situated similarly to citizens, distinctions between them are to be carefully scrutinized.[15] Although there is le-

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[15] For example, in *Nyquist*, the Court stated:

"Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis." 432 U. S., at 12.

gitimate doubt whether these decisions have survived *Foley*, *Ambach*, and *Cabell* intact, their judgment about the need for strict scrutiny simply does not apply to state policies that distinguish between permanent resident aliens and nonimmigrants.

As noted earlier, nonimmigrant aliens holding G–4 visas, unlike resident aliens, are exempt from Maryland's income tax, by operation of either international agreement or a combination of federal and state law.[16] The University is substantially supported by general state revenues appropriated by the legislature, and of this sum nearly half is generated by the state income tax. See Brief for Petitioners 29, n. 23. Consequently, for the purpose of assessing tuition to the State's University, G–4 nonimmigrant aliens are not situated similarly either to most citizens or to permanent resident aliens. They are distinguished by a trait that is obviously quite relevant from the State's perspective, and legitimately so. Other nonimmigrant aliens are subject to state income taxes, but, as respondents concede, Brief for Respondents 12, 14, 23, they are admitted to this country only temporarily and for limited purposes. These aliens are also not situated similarly to resident citizens or to permanent resident aliens because most are admitted on the condition that they cannot establish domicile in the United States. See *Elkins* v. *Moreno*, 435 U. S. 647, 665 (1978). As a group, then, nonimmigrant aliens are sufficiently different from citizens in relevant respects that distinctions between them and citizens or immigrant aliens should not call for heightened scrutiny.

Second, the State's tuition policy, as it applies to G–4 visaholders, simply cannot be broadly characterized as a classification that discriminates on the basis of alienage. It is more accurately described as a policy that classifies on the basis of

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[16] In addition, nonimmigrant aliens are not required to register for military service. See 50 U. S. C. App. § 453(a) (1976 ed., Supp. V); 32 CFR § 1611.2 (1980).

financial contribution toward the costs of operating the University. In one class are citizens and permanent resident aliens, all of whom have lived in the State and have contributed to state revenues through the payment of income taxes. To these students the State offers its in-state tuition, which covers only a portion of the cost of educating each student. The remainder is subsidized through state revenues, to which the students themselves have contributed by paying the full spectrum of state taxes.

In the other class is an equally mixed group of citizens and aliens. Some of these citizens do not reside in the State and therefore do not pay state taxes. Others do reside in the State, but are financially dependent on parents or a spouse who is domiciled elsewhere and therefore do not help finance the operation of the University through income taxes. Nonimmigrant aliens holding G–4 visas also reside in the State but, like citizens in this class, do not pay state income taxes.[17] To all members of this class the State charges a higher, so-called "out-of-state" tuition, although one that still does not fully cover the cost of education. Just as it may seem unfair for a State to deny to a resident alien the right to participate in public benefits to which he has contributed through taxes, it might seem equally unfair to allow G–4 visaholders to participate, on a par with taxpaying resident citizens and permanent resident aliens, in public benefits to which they have *not* contributed. Whether or not such a judgment is correct, a policy justified in such terms cannot fairly be called the product of xenophobic prejudice. Given the State's decision to treat immigrant aliens on a par with citizens, its decision to require a higher tuition of G–4 nonimmigrant aliens cannot

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[17] Other nonresident aliens whose tax liability is not the subject of a treaty or special law such as the IOIA are subject to taxation only on income received from sources within the United States at a maximum rate of 30%. 26 U. S. C. § 871(a)(1).

be characterized as a classification on the basis of alienage.[18]

Consequently, for either of these reasons, the "strict scrutiny" authorized by *Graham* v. *Richardson*, 403 U. S. 365 (1971), even if it is still applicable to discrimination against permanent resident aliens, has no proper application to the State's policy in this case. The only question, therefore, is whether "the State's classification rationally furthers the purpose identified by the State." *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976). The State has articulated several purposes for its policy of denying in-state tuition to nonimmigrant aliens. One purpose is roughly to equalize the cost of higher education borne by those students who do and those who do not financially contribute to the University through income tax payments. The purpose surely is a legitimate one, and I should think it evident that the State's classification rationally furthers that purpose.[19]

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[18] Respondents, citing *Nyquist* v. *Mauclet*, 432 U. S., at 9, argue that strict scrutiny applies even when the State discriminates only against a certain subclass of aliens rather than all aliens. In *Nyquist*, the State argued that its law limiting financial assistance for higher education to citizens and resident aliens who declared their intention to seek citizenship was not a classification on the basis of alienage. Rather, it distinguished between aliens who intended to become citizens and those who did not. The Court rejected this argument, noting that the statute was "directed at aliens and that only aliens [were] harmed by it." *Ibid.* In this case, however, the State also denies in-state tuition to certain resident citizens, as well as to G–4 visaholders. Moreover, even if the State denied in-state tuition to G–4 visaholders alone, strict scrutiny would not be called for. As argued in the text, G–4 visaholders and other nonimmigrant aliens, unlike permanent resident aliens who were the subject of discrimination in *Nyquist*, are not so similarly situated to citizens as to render distinctions between such aliens and citizens "suspect."

[19] As respondents note, G–4 visaholders do pay state taxes other than the income tax. State and local property taxes, however, do not enter the general funds of the State and thus do not support the operation of the University. Brief for Petitioners 29, n. 23. In any event, "a State does not

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V

On June 23, 1978, approximately two months after our decision in *Elkins* v. *Moreno*, 435 U. S. 647 (1978), the University's Board of Regents adopted a "clarifying" resolution establishing beyond doubt that the State's policy excluding G–4 visaholders from eligibility for in-state tuition was not based on their lack of domicile. For this reason, we remanded the case to the District Court for further proceedings, having concluded that this case was no longer controlled by *Vlandis* v. *Kline*, 412 U. S. 441 (1973), as limited by *Weinberger* v. *Salfi*, 422 U. S. 749, 771 (1975). *Toll* v. *Moreno*, 441 U. S. 458, 461–462 (1979). On remand, the District Court concluded that although the clarifying resolution adopted on June 23, 1978, eliminated the "conclusive presumption" that respondents could not establish domicile, the existence of such a presumption before that date denied respondents due process under the teaching of *Vlandis* v. *Kline*, *supra*.

There is legitimate doubt whether at this late date anything remains of *Vlandis* v. *Kline* but its lifeless words on the pages of these Reports. Such doubts, however, need not be resolved in this case. The University has made clear that domicile is not the principal consideration underlying its tuition policy as applied to respondents, and in my view that policy is rationally related to other legitimate purposes proffered by the State. The classification challenged by respondents did not change on June 23, 1978. If the classification is valid today, as I believe it is, then it was valid before the State issued its "clarifying" resolution. A statute's con-

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violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). Respondents' exemption from the income tax sufficiently distinguishes them from citizens and other aliens who do pay such taxes, and therefore contribute a greater portion of their incomes to support the University, that the State's decision to require higher tuition payments is certainly rational.

sistency with the Due Process Clause or the Equal Protection Clause should not depend on which purpose state officials choose to emphasize at a particular time, as long as one of the State's purposes is rationally served by the statute. See *McGowan* v. *Maryland*, 366 U. S., at 426 ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 81-150. Argued April 27, 1982—Decided June 28, 1982*

The Bankruptcy Act of 1978 (Act) established a United States bankruptcy court in each judicial district as an adjunct to the district court for such district. The bankruptcy court judges are appointed for 14-year terms, subject to removal by the judicial council of the circuit in which they serve on grounds of incompetence, misconduct, neglect of duty, or disability. Their salaries are set by statute and are subject to adjustment. The Act grants the bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 [bankruptcy] [of the United States Code] or arising in or related to cases under title 11." See 28 U. S. C. § 1471(b) (1976 ed., Supp. IV). After it had filed a petition for reorganization in a Bankruptcy Court, appellant Northern Pipeline Construction Co. (Northern) filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon) seeking damages for an alleged breach of contract and warranty, as well as for misrepresentation, coercion, and duress. Marathon sought dismissal of the suit on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The Bankruptcy Court denied the motion to dismiss, but on appeal the District Court granted the motion.

Held: The judgment is affirmed.

12 B. R. 946, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that:

1. Section 1471's broad grant of jurisdiction to bankruptcy judges violates Art. III. Pp. 57-87.

(a) The judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Art. III. These attributes were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches. There is

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*Together with No. 81-546, *United States* v. *Marathon Pipe Line Co. et al.*, also on appeal from the same court.

no doubt that bankruptcy judges created by the Act are not Art. III judges. Pp. 57–62.

(b) Article III bars Congress from establishing under its Art. I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations—non-Art. III courts of the Territories or of the District of Columbia, courts-martial, and resolution of "public rights" issues—in which the principle of independent adjudication commanded by Art. III does not apply. The bankruptcy courts do not lie exclusively outside the States, like the courts of the Territories or of the District of Columbia, or bear any resemblance to courts-martial, nor can the substantive legal rights at issue in the present action—the right to recover contract damages to augment Northern's estate—be deemed "public rights." There is no persuasive reason in logic, history, or the Constitution, why bankruptcy courts lie beyond the reach of Art. III. Pp. 63–76.

(c) Section 1471 impermissibly removed most, if not all, the essential attributes of the judicial power from the Art. III district court and vested those attributes in a non-Art. III adjunct. *Crowell* v. *Benson*, 285 U. S. 22, and *United States* v. *Raddatz*, 447 U. S. 667, distinguished. Congress does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates. The grant of jurisdiction to bankruptcy courts cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts. Pp. 76–87.

2. The above holding that the broad grant of jurisdiction in § 1471 is unconstitutional shall not apply retroactively but only prospectively. Such grant of jurisdiction presents an unprecedented question of interpretation of Art. III, and retroactive application would not further the operation of the holding but would visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. Pp. 87–88.

JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, concluded that where appellee Marathon Pipe Line Co. has simply been named defendant in appellant Northern Pipeline Construction Co.'s suit on a contract claim arising under state law, the constitutionality of the Bankruptcy Court's exercise of jurisdiction over that kind of suit is all that need be decided in this case; that resolution of any objections Marathon might make to the exercise of authority conferred on bankruptcy courts by the Bankruptcy Act of 1978, on the ground that the suit must be decided by an Art. III court, should await the exercise of such authority; that so much of that Act as enables a Bankruptcy Court to entertain and decide

Northern's suit over Marathon's objection violates Art. III; and that the Court's judgment should not be applied retroactively. Pp. 89–92.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 89. BURGER, C. J., filed a dissenting opinion, *post*, p. 92. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 92.

John L. Devney argued the cause for appellant in No. 81–150. With him on the briefs was *Jeffrey F. Shaw*. *Solicitor General Lee* argued the cause for the United States in both cases. With him on the briefs were *Assistant Attorney General McGrath*, *Deputy Solicitor General Shapiro*, *Alan I. Horowitz*, *William Kanter*, and *Michael F. Hertz*.

Melvin I. Orenstein argued the cause for appellee Marathon Pipe Line Co. With him on the brief was *Charles S. Cassis*, *John E. Compson*, and *Kenneth J. Orlowski*.†

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U. S. C. § 1471 (1976 ed., Supp. IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution.

I

A

In 1978, after almost 10 years of study and investigation, Congress enacted a comprehensive revision of the bank-

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†Briefs of *amici curiae* urging reversal were filed by *Louis W. Levit* for the Commercial Law League of America; and by *Helen Davis Chaitman*, *Joel B. Zweibel*, *Theodore Gewertz*, and *Peter Buscemi* for the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York.

Abe Fortas, *Henry F. Field*, *Phil C. Neal*, and *Joseph M. Berl* filed a brief for Beneficial Corp. as *amicus curiae*.

ruptcy laws. The Bankruptcy Act of 1978 (Act)[1] made significant changes in both the substantive and procedural law of bankruptcy. It is the changes in the latter that are at issue in this case.

Before the Act, federal district courts served as bankruptcy courts and employed a "referee" system. Bankruptcy proceedings were generally conducted before referees,[2] except in those instances in which the district court elected to withdraw a case from a referee. See Bkrtcy. Rule 102. The referee's final order was appealable to the district court. Bkrtcy. Rule 801. The bankruptcy courts were vested with "summary jurisdiction"—that is, with jurisdiction over controversies involving property in the actual or constructive possession of the court. And, with consent, the bankruptcy court also had jurisdiction over some "plenary" matters—such as disputes involving property in the possession of a third person.

The Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U. S. C. § 151(a) (1976 ed., Supp. IV). The judges of these courts are appointed to office for 14-year terms by the President, with the advice and consent of the Senate. §§ 152, 153(a) (1976 ed., Supp IV). They are subject to removal by the "judicial council of the circuit" on account of "incompetency, misconduct, neglect of duty or physical or mental disability." § 153(b) (1976 ed., Supp. IV). In addition, the salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act, 2 U. S. C. §§ 351–361 (1976 ed. and Supp. IV). 28 U. S. C. § 154 (1976 ed., Supp. IV).

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[1] Pub. L. 95–598, 92 Stat. 2549. The Act became effective October 1, 1979.

[2] Bankruptcy referees were redesignated as "judges" in 1973. Bkrtcy. Rule 901(7). For purposes of clarity, however, we refer to all judges under the old Act as "referees."

The jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system. Eliminating the distinction between "summary" and "plenary" jurisdiction, the Act grants the new courts jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. IV) (emphasis added).[3] This jurisdictional grant empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under Title 11. Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law. See 1 W. Collier, Bankruptcy ¶ 3.01, pp. 3–47 to 3–48 (15th ed. 1982).[4]

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[3] Although the Act initially vests this jurisdiction in district courts, 28 U. S. C. § 1471(a) (1976 ed., Supp. IV), it subsequently provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all* of the jurisdiction conferred by this section on the district courts," § 1471(c) (1976 ed., Supp. IV) (emphasis added). Thus the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts. See 1 W. Collier, Bankruptcy ¶ 3.01, pp. 3–37, 3–44 to 3–49 (15th ed. 1982).

[4] With respect to both personal jurisdiction and venue, the scope of the Act is also expansive. Although the Act does not in terms indicate the extent to which bankruptcy judges may exercise personal jurisdiction, it has been construed to allow the constitutional maximum. See, *e. g.*, *In re Whippany Paper Board Co.*, 15 B. R. 312, 314–315 (Bkrtcy. NJ 1981). With two exceptions not relevant here, the venue of "a proceeding arising in or related to a case under title 11 [is] in the bankruptcy court in which such case is pending." 28 U. S. C. § 1473(a) (1976 ed., Supp. IV). Furthermore, the Act permits parties to remove many kinds of actions to the bankruptcy court. Parties "may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or

The judges of the bankruptcy courts are vested with all of the "powers of a court of equity, law, and admiralty," except that they "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U. S. C. § 1481 (1976 ed., Supp. IV). In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451 (1976 ed. and Supp. IV); see 28 U. S. C. § 1651; and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. IV).

The Act also establishes a special procedure for appeals from orders of bankruptcy courts. The circuit council is empowered to direct the chief judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U. S. C. § 160 (1976 ed., Supp. IV). These panels have jurisdiction of all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. § 1482. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. § 1334. The court of appeals is given jurisdiction over appeals from the appellate panels or from the district court. § 1293. If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a bankruptcy court. § 1293(b).[5]

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a civil action by a Government unit to enforce such governmental unit's police or regulatory power." § 1478(a) (1976 ed., Supp. IV). The bankruptcy court may, however, remand such actions "on any equitable ground"; the decision to remand or retain an action is unreviewable. § 1478(b).

[5] Although no particular standard of review is specified in the Act, the parties in the present cases seem to agree that the appropriate one is the

The Act provides for a transition period before the new provisions take full effect in April 1984. §§ 401–411, 92 Stat. 2682–2688. During the transition period, previously existing bankruptcy courts continue in existence. § 404(a), 92 Stat. 2683. Incumbent bankruptcy referees, who served 6-year terms for compensation subject to adjustment by Congress, are to serve as bankruptcy judges until March 31, 1984, or until their successors take office. § 404(b), 92 Stat. 2683.[6] During this period they are empowered to exercise essentially all of the jurisdiction and powers discussed above. See §§ 404, 405, 92 Stat. 2683–2685. See generally 1 Collier *supra*, ¶¶ 7.04–7.05, pp. 7–23 to 7–65. The procedure for taking appeals is similar to that provided after the transition period. See § 405(c)(1), 92 Stat. 2685.[7]

B

This case arises out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Co. (Northern) filed a petition for reorganization in January 1980. In March 1980 Northern, pursuant to the Act, filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon). Appellant sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress. Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III ju-

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clearly-erroneous standard, employed in the old Bankruptcy Rule 810 for review of findings of fact made by a referee. See Brief for United States 41; Tr. of Oral Arg. 27. See also *In re Rivers*, 19 B. R. 438 (Bkrtcy. ED Tenn. 1982); 1 Collier, *supra* n. 3, ¶ 3.03, p. 3–315.

[6] Under the old Bankruptcy Act, referees could be removed by the district court for "incompetency, misconduct, or neglect of duty," 11 U. S. C. § 62(b) (repealed); the same grounds for removal apply during the transition period, see § 404(d), 92 Stat. 2684.

[7] It appears, however, that during the transition period an appeal of a bankruptcy judge's decision may be taken to the district court even if an appellate panel of bankruptcy judges has been established.

dicial power upon judges who lacked life tenure and protection against salary diminution. The United States intervened to defend the validity of the statute.

The Bankruptcy Judge denied the motion to dismiss. 6 B. R. 928 (1980). But on appeal the District Court entered an order granting the motion, on the ground that "the delegation of authority in 28 U. S. C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges" was unconstitutional. 12 B. R. 946, 947 (1981). Both the United States and Northern filed notices of appeal in this Court.[8] We noted probable jurisdiction. 454 U. S. 1029 (1981).[9]

II

A

Basic to the constitutional structure established by the Framers was their recognition that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the

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[8] After Northern docketed an appeal in this Court, the District Court supplemented its order with an opinion. 12 B. R. 946, 947 (1981).

[9] Two other Bankruptcy Courts have considered the constitutionality of § 1471: The Bankruptcy Court for the District of Puerto Rico determined it to be constitutional, *In re Segarra*, 14 B. R. 870 (1981), while the Bankruptcy Court for the Eastern District of Tennessee reached the opposite conclusion, *In re Rivers*, *supra*.

expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*.

The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. Hamilton explained the importance of an independent Judiciary:

> "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." The Federalist No. 78, p. 489 (H. Lodge ed. 1888).

The Court has only recently reaffirmed the significance of this feature of the Framers' design: "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U. S. 200, 217–218 (1980).

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The inexorable command of this provision is clear and defi-

nite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:

> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1.

The "good Behaviour" Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment. *Toth* v. *Quarles*, 350 U. S. 11, 16 (1955). The Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services. *United States* v. *Will*, *supra*, at 218–221. Both of these provisions were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government.[10] As we have only recently emphasized, "[t]he Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary," 449 U. S., at 217, while the principle of life tenure can be traced back at least as far as the Act of Settlement in 1701, *id.*, at 218. To be sure, both principles were eroded during the late colonial period, but that departure did not escape notice and indignant rejection by the Revolutionary generation. Indeed, the guarantees eventually included

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[10] These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations. See The Federalist No. 78 (A. Hamilton). The security that they provide to members of the Judicial Branch helps to attract well-qualified persons to the federal bench. *Ibid.* The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism. See Kaufman, Chilling Judicial Independence, 88 Yale L. J. 681, 713 (1979). See generally Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 583–585 (1980).

in Art. III were clearly foreshadowed in the Declaration of Independence, "which, among the injuries and usurpations recited against the King of Great Britain, declared that he had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'" *O'Donoghue* v. *United States*, 289 U. S. 516, 531 (1933). The Framers thus recognized:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 79, p. 491 (H. Lodge ed. 1888) (A. Hamilton) (emphasis in original).[11]

In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

B

It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for

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[11] Further evidence of the Framers' concern for assuring the independence of the Judicial Branch may be found in the fact that the Constitutional Convention soundly defeated a proposal to allow the removal of judges by the Executive and Legislative Branches. See 2 M. Farrand, Records of the Federal Convention of 1787, pp. 428–429 (1911); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 7 (2d ed. 1973). Mr. Wilson, of Pennsylvania, commented that "[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." 2 Farrand, *supra*, at 429.

14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetency, misconduct, neglect of duty, or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. See *supra*, at 53. In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges.

That Congress chose to vest such broad jurisdiction in non-Art. III bankruptcy courts, after giving substantial consideration to the constitutionality of the Act, is of course reason to respect the congressional conclusion. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 472–473 (1980) (opinion of BURGER, C. J.); *Palmore* v. *United States*, 411 U. S. 389, 409 (1973). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 655 (1949) (Frankfurter, J., dissenting).[12] But at the same time,

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[12] It should be noted, however, that the House of Representatives expressed substantial doubts respecting the constitutionality of the provisions eventually included in the Act. The House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights gave lengthy consideration to the constitutional issues surrounding the conferral of broad powers upon the new bankruptcy courts. The Committee, the Subcommittee, and the House as a whole initially concluded that Art. III courts were constitutionally required for bankruptcy adjudications. See H. R. 8200, 95th Cong., 1st Sess. (1977); Hearings on H. R. 31 and H. R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2081–2084 (1976); *id.*, at 2682–2706; H. R. Rep. No. 95–595, p. 39 (1977) ("Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context"); *id.*, at 21–38; Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Constitutional Bankruptcy Courts, 95th Cong., 1st Sess., 33 (Comm. Print No. 3, 1977) (concluding that the proposed bankruptcy courts should be established "under Article III, with all of the protection that the Framers intended for an independent judiciary"); Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Report on Hearings on the Court Administrative Structure for Bankruptcy Cases, 95th Cong., 2d Sess., 5 (Comm. Print No. 13, 1978) (same); see generally Klee, Legislative History of the New Bankruptcy Law, 28 De Paul L. Rev. 941, 945–949, 951 (1979). The

> "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U. S. 186, 211 (1962).

With these principles in mind, we turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends." Brief for United States 9. Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in 'specialized areas having particularized needs and warranting distinctive treatment,'" such as the area of bankruptcy law. *Ibid.*, quoting *Palmore* v. *United States*, *supra*, at 408. Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bank-

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Senate bankruptcy bill did not provide for life tenure or a guaranteed salary, instead adopting the concept of a bankruptcy court with similarly broad powers but as an "adjunct" to an Art. III court. S. 2266, 95th Cong., 2d Sess. (1978). The bill that was finally enacted, denying bankruptcy judges the tenure and compensation protections of Art. III, was the result of a series of last minute conferences and compromises between the managers of both Houses. See Klee, *supra*, at 952–956.

ruptcy jurisdiction was vested in the district court" of the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court." Brief for United States 12. Analogizing the role of the bankruptcy court to that of a special master, appellants urge us to conclude that this "adjunct" system established by Congress satisfies the requirements of Art. III. We consider these arguments in turn.

III

Congress did not constitute the bankruptcy courts as legislative courts.[13] Appellants contend, however, that the bankruptcy courts could have been so constituted, and that as a result the "adjunct" system in fact chosen by Congress does not impermissibly encroach upon the judicial power. In advancing this argument, appellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III courts], as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856).[14] But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III

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[13] The Act designates the bankruptcy court in each district as an "adjunct" to the district court. 28 U. S. C. § 151(a) (1976 ed., Supp. IV). Neither House of Congress concluded that the bankruptcy courts should be established as independent legislative courts. See n. 12, *supra*.

[14] At one time, this Court suggested a rigid distinction between those subjects that could be considered only in Art. III courts and those that could be considered only in legislative courts. See *Williams* v. *United States*, 289 U. S. 553 (1933). But this suggested dichotomy has not withstood analysis. See C. Wright, Law of the Federal Courts 33–35 (3d ed. 1976). Our more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended. *E. g.*, *Palmore* v. *United States*, 411 U. S. 389 (1973). See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 549–551 (1962) (opinion of Harlan, J.).

courts.[15] Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

Appellants first rely upon a series of cases in which this Court has upheld the creation by Congress of non-Art. III "territorial courts." This exception from the general prescription of Art. III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. For example, in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), the Court observed that Art. IV bestowed upon Congress alone a complete power of government over

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[15] JUSTICE WHITE's dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. *Post*, at 116. But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state-court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges. See Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L. J. 297, 304–305 (1981). The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. See Hart and Wechsler's The Federal Courts and the Federal System, *supra* n. 11, at 11. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

territories not within the States that comprised the United States. The Court then acknowledged Congress' authority to create courts for those territories that were not in conformity with Art. III. Such courts were

> "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." 1 Pet., at 546.

The Court followed the same reasoning when it reviewed Congress' creation of non-Art. III courts in the District of Columbia. It noted that there was in the District

> "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." *Kendall* v. *United States*, 12 Pet. 524, 619 (1838).[16]

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[16] We recently reaffirmed the principle, expressed in these early cases, that Art. I, § 8, cl. 17, provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. *Palmore* v. *United States*, 411 U. S., at 397. See also *Wallace* v. *Adams*, 204 U. S. 415, 423 (1907) (recognizing Congress' authority to establish legislative courts to determine questions of tribal membership relevant to property claims within Indian territory); *In re Ross*, 140 U. S. 453 (1891) (same, respecting consular courts established by concession

Appellants next advert to a second class of cases—those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts-martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too involves a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue. Article I, § 8, cls. 13, 14, confer upon Congress the power "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for "cases arising in the land or naval forces." And Art. II, § 2, cl. 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Noting these constitutional directives, the Court in *Dynes* v. *Hoover*, 20 How. 65 (1857), explained:

> "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." *Id.*, at 79.[17]

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from foreign countries). See generally 1 J. Moore, J. Lucas, H. Fink, D. Weckstein, & J. Wicker, Moore's Federal Practice 46–49, 53–54 (1982). But see *Reid* v. *Covert*, 354 U. S. 1 (1957).

[17] See also *Burns* v. *Wilson*, 346 U. S. 137, 139–140 (1953). But this Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts mat-

Finally, appellants rely on a third group of cases, in which this Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[18] The "public rights" doctrine was first set forth in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856):

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284 (emphasis added).

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See *id.*, at 283–285; see also *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929). But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political branches of government. The doctrine extends only to matters arising "between the Gov-

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ters beyond that jurisdiction, and properly within the realm of "judicial power." See, *e. g.*, *Reid* v. *Covert*, *supra*; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955).

[18] Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 450 (1977).

ernment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see *Ex parte Bakelite Corp.*, *supra*, at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. *Crowell* v. *Benson*, *supra*, at 50.[19]

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial." *Ex parte Bakelite Corp.*, *supra*, at 458. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., at 280–282. For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. *Ibid.* Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.[20] On the same premise, the Court in *Ex*

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[19] See *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909); Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 915 (1930).

[20] Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

parte Bakelite Corp., supra, held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court:

> "The *full* province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. . . . The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of *which may be, and at times has been, committed exclusively to executive officers.*" 279 U. S., at 458 (emphasis added).[21]

The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." *Ex parte Bakelite Corp., supra*, at 451.[23] In contrast, "the liability of

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[21] See also *Williams* v. *United States*, 289 U. S. 553 (1933) (holding that Court of Claims was a legislative court and that salary of a judge of that court could therefore be reduced by Congress).

[22] *Crowell* v. *Benson*, 285 U. S. 22 (1932), attempted to catalog some of the matters that fall within the public-rights doctrine:

"Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.*, at 51 (footnote omitted).

[23] Congress cannot "withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (emphasis added). It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." And it is also clear that even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. See *Glidden Co.* v. *Zdanok*, 370

one individual to another under the law as defined," *Crowell* v. *Benson*, *supra*, at 51, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 450, n. 7 (1977); *Crowell* v. *Benson*, *supra*, at 50–51. See also Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 917–918 (1930).[24] Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.[25]

U. S., at 548–549, and n. 21 (opinion of Harlan, J.). See also Currie, The Federal Courts and the American Law Institute, Part 1, 36 U. Chi. L. Rev. 1, 13–14, n. 67 (1968). Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 455, n. 13.

[24] Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party. See, *e. g.*, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955).

[25] The "unifying principle" that JUSTICE WHITE's dissent finds lacking in all of these cases, see *post*, at 105, is to be found in the exceptional constitutional grants of power to Congress with respect to certain matters. Although the dissent is correct that these grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. When these three exceptional grants are properly constrained, they do not threaten the Framers' vision of an independent Federal Judiciary. What clearly remains subject to Art. III are all private adjudications in federal courts

We discern no such exceptional grant of power applicable in the cases before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. See Brief for United States 34. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one

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within the States—matters from their nature subject to "a suit at common law or in equity or admiralty"—and all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Art. III Branch, these matters lay at what they perceived to be the protected core of that power.

Although the dissent recognizes that the Framers had something important in mind when they assigned the judicial power of the United States to Art. III courts, it concludes that our cases and subsequent practice have eroded this conception. Unable to find a satisfactory theme in our precedents for analyzing these cases, the dissent rejects all of them, as well as the historical understanding upon which they were based, in favor of an ad hoc balancing approach in which Congress can essentially determine for itself whether Art. III courts are required. See *post*, at 105–116. But even the dissent recognizes that the notion that Congress rather than the Constitution should determine whether there is a need for independent federal courts cannot be what the Framers had in mind. See *post*, at 113.

individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S., at 51.[26]

Recognizing that the present cases may not fall within the scope of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy-related controversies." Brief for United States 14. In support of this argument, appellants rely primarily upon a quotation from the opinion in *Palmore* v. *United States*, 411 U. S. 389 (1973), in which we stated that

> "both Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, 407–408.

Appellants cite this language to support their proposition that a bankruptcy court created by Congress under its Art. I

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[26] This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization. See *Williams* v. *Austrian*, 331 U. S. 642 (1947); *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 611–613 (1949) (Rutledge, J., concurring); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 472 (1957) (Frankfurter, J., dissenting). Cf. *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824). But this relationship does not transform the state-created right into a matter between the Government and the petitioner for reorganization. Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.

powers is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment." Brief for United States 20–33.

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 450, n. 7; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955). Although the cases relied upon by appellants demonstrate that independent courts are not required for *all* federal adjudications, those cases also make it clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it. See, *e. g.*, *Ex parte Bakelite Corp.*, 279 U. S., at 449; *United States ex rel. Toth* v. *Quarles*, *supra*; *American Ins. Co.* v. *Canter*, 1 Pet., at 546; *Murray's Lessee*, 18 How., at 284. Cf. *Crowell* v. *Benson*, *supra*, at 51.

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts. True, appellants argue that under their analysis Congress could create legislative courts pursuant only to some "specific" Art. I power, and "only when there is a particularized need for distinctive treatment." Brief for United States 22–23. They therefore assert that their analysis would not permit Congress to replace the independent Art. III Judiciary through a "wholesale assignment of federal judicial business to legislative courts." *Ibid.* But these "limitations" are wholly illusory. For example, Art. I, § 8, empowers Congress to enact laws, *inter alia*, regulating interstate commerce and punishing certain crimes. Art. I, § 8, cls. 3, 6. On appellants' reasoning Congress could provide for the adjudication of these and "related" matters by judges and

courts within Congress' exclusive control.[27] The potential for encroachment upon powers reserved to the Judicial Branch through the device of "specialized" legislative courts is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us. The broad range of questions that can be brought into a bankruptcy court because they are "related to cases under title 11," 28 U. S. C. § 1471(b) (1976 ed., Supp. IV), see *supra*, at 54, is the clearest proof that even when Congress acts through a "specialized" court, and pursuant to only one of its many Art. I powers, appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political Branches. In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.[28]

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[27] Nor can appellants' analysis logically be limited to Congress' Art. I powers. For example, appellants' reasoning relies in part upon analogy to our approval of territorial courts in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), and of the use of an administrative agency in *Crowell* v. *Benson*, 285 U. S. 22 (1932). Brief for United States 15; Brief for Northern Pipeline Construction Co. 10. In those cases the Court recognized the right of Congress to create territorial courts pursuant to the authority granted under Art. IV, § 3, cl. 2, and to create administrative tribunals to adjudicate rights in admiralty pursuant to the federal authority in Art. III, § 2, over admiralty jurisdiction. See *American Ins. Co.* v. *Canter*, *supra*, at 546; *Crowell* v. *Benson*, *supra*, at 39. This reliance underscores the fact that appellants offer no principled means of distinguishing between Congress' Art. I powers and any of Congress' other powers—including, for example, those conferred by the various amendments to the Constitution, *e. g.*, U. S. Const., Amdts. 13–16, 19, 23, 24, 26.

[28] JUSTICE WHITE's suggested "limitations" on Congress' power to create Art. I courts are even more transparent. JUSTICE WHITE's dissent suggests that Art. III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities," and that the Court retains the final word on how the balance is

Appellants' reliance upon *Palmore* for such broad legislative discretion is misplaced. In the context of the issue decided in that case, the language quoted from the *Palmore* opinion, *supra*, at 72, offers no substantial support for appellants' argument. *Palmore* was concerned with the courts of the District of Columbia, a unique federal enclave over which "Congress has . . . entire control . . . for every purpose of government." *Kendall* v. *United States*, 12 Pet., at 619.

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to be struck. *Post*, at 113–114. The dissent would find the Art. III "value" accommodated where appellate review to Art. III courts is provided and where the Art. I courts are "designed to deal with issues likely to be of little interest to the political branches." *Post*, at 115–116. But the dissent's view that appellate review is sufficient to satisfy either the command or the purpose of Art. III is incorrect. See n. 39, *infra*. And the suggestion that we should consider whether the Art. I courts are designed to deal with issues likely to be of interest to the political Branches would undermine the validity of the adjudications performed by most of the administrative agencies, on which validity the dissent so heavily relies.

In applying its ad hoc balancing approach to the facts of this case, the dissent rests on the justification that these courts differ from standard Art. III courts because of their "extreme specialization." As noted above, "extreme specialization" is hardly an accurate description of bankruptcy courts designed to adjudicate the entire range of federal and state controversies. See *infra*, at 84–85. Moreover, the special nature of bankruptcy adjudications is in no sense incompatible with performance of such functions in a tribunal afforded the protection of Art. III. As one witness pointed out to Congress:

"Relevant to that question of need, it seems worth noting that Article III itself permits much flexibility; so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be permissible to provide that when a judge of that court retired pursuant to statute, a vacancy for a new appointment would not automatically be created. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals." Hearings on H. R. 31 and H. R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2697 (1976) (letter of Paul Mishkin).

The "plenary authority" under the District of Columbia Clause, Art. I, § 8, cl. 17, was the subject of the quoted passage and the powers granted under that Clause are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative. This is a power that is clearly possessed by Congress only in limited geographic areas. *Palmore* itself makes this limitation clear. The quoted passage distinguishes the congressional powers at issue in *Palmore* from those in which the Art. III command of an independent Judiciary must be honored: where "laws of national applicability and affairs of national concern are at stake." 411 U. S., at 408. Laws respecting bankruptcy, like most laws enacted pursuant to the national powers cataloged in Art. I, § 8, are clearly laws of national applicability and affairs of national concern. Thus our reference in *Palmore* to "specialized areas having particularized needs" referred only to *geographic* areas, such as the District of Columbia or territories outside the States of the Federal Union. In light of the clear commands of Art. III, nothing held or said in *Palmore* can be taken to mean that in every area in which Congress may legislate, it may also create non-Art. III courts with Art. III powers.

In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

IV

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire ju-

dicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. See Brief for United States 11–13, 37–45. As support for their argument, appellants rely principally upon *Crowell* v. *Benson*, 285 U. S. 22 (1932), and *United States* v. *Raddatz*, 447 U. S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts. Brief for United States 40–42. The question to which we turn, therefore, is whether the Act has retained "the essential attributes of the judicial power," *Crowell* v. *Benson*, *supra*, at 51, in Art. III tribunals.[29]

The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the power to adjudicate "private rights" must be vested in an Art. III court, see Part III, *supra*,

> "this Court has accepted factfinding by an administrative agency, . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master. *Crowell* v. *Benson*, 285 U. S. 22, 51–

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[29] JUSTICE WHITE's dissent fails to distinguish between Congress' power to create adjuncts to Art. III courts, and Congress' power to create Art. I courts in limited circumstances. See *post*, at 103–104. Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an "exception" to Art. III. Rather, such an assignment is consistent with Art. III, so long as "the essential attributes of the judicial power" are retained in the Art. III court, *Crowell* v. *Benson*, 285 U. S., at 51, and so long as Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights, see *infra*, at 83–84. Cf. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 450, n. 7.

65 (1932)." *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 450, n. 7.

The use of administrative agencies as adjuncts was first upheld in *Crowell* v. *Benson, supra.* The congressional scheme challenged in *Crowell* empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Court began its analysis by noting that the federal statute administered by the Compensation Commission provided for compensation of injured employees "irrespective of fault," and that the statute also prescribed a fixed and mandatory schedule of compensation. *Id.*, at 38. The agency was thus left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." *Id.*, at 54. The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record. *Id.*, at 44–45, 48. The Court found that in view of these limitations upon the Compensation Commission's functions and powers, its determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." *Id.*, at 54. Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," *id.*, at 51, the Court held that Art. III imposed no bar to the scheme enacted by Congress, *id.*, at 54.

Crowell involved the adjudication of congressionally created rights. But this Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights—

so long as those adjuncts were subject to sufficient control by an Art. III district court. In *United States* v. *Raddatz*, *supra*, the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence. *Id.*, at 676–677, 681–683. Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. *Id.*, at 685 (BLACKMUN, J., concurring).[30] In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. *Id.*, at 682. Under these circumstances, the Court held that the Act did not violate the constraints of Art. III. *Id.*, at 683–684.[31]

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[30] Thus in *Raddatz* there was no serious threat that the exercise of the judicial power would be subject to incursion by other branches. "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without the judicial department." 447 U. S., at 685 (BLACKMUN, J., concurring).

[31] Appellants and JUSTICE WHITE's dissent also rely on the broad powers exercised by the bankruptcy referees immediately before the Bankruptcy Act of 1978. See *post*, at 98–103. But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, see 1 Collier, *supra* n. 3, at ¶ 1.02, have never been explicitly endorsed by this Court. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), on which the dissent relies, there was no discussion of the Art. III issue. Moreover, when *Katchen* was decided the 1973 Bankruptcy Rules had not yet been adopted, and the District Judge, after hearing the report of the referee, was free to "modify it or . . . reject it in whole or in part or . . . receive further evidence or . . . recommit it with instructions." General Order in Bankruptcy No. 47, 305 U. S. 702 (1939).

We note, moreover, that the 1978 Act made at least three significant changes from the bankruptcy practice that immediately preceded it. First, of course, the jurisdiction of the bankruptcy courts was "substan-

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Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers. First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.[32] Thus *Crowell* rec-

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tially expanded" by the Act. H. R. Rep. No. 95-595, p. 13 (1977). Before the Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. 11 U. S. C. § 46(b) (repealed). See *MacDonald* v. *Plymouth Trust Co.*, 286 U. S. 263, 266 (1932). It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization. Second, the bankruptcy judges have broader powers than those exercised by the referees. See *infra*, at 84–86; H. R. Rep. No. 95-595, *supra*, at 12, and nn. 63–68. Finally, and perhaps most significantly, the relationship between the district court and the bankruptcy court was changed under the 1978 Act. Before the Act, bankruptcy referees were "subordinate adjuncts of the district courts." *Id.*, at 7. In contrast, the new bankruptcy courts are "independent of the United States district courts." *Ibid.*; 1 Collier *supra* n. 3, ¶ 1.03, p. 1-9. Before the Act, bankruptcy referees were appointed and removable only by the district court. 11 U. S. C. § 62 (repealed). And the district court retained control over the reference by his power to withdraw the case from the referee. Bkrtcy. Rule 102. Thus even at the trial stage, the parties had access to an independent judicial officer. Although Congress could still lower the salary of referees, they were not dependent on the political branches of government for their appointment. To paraphrase JUSTICE BLACKMUN's observation in *Raddatz*, *supra*, the primary "danger of a 'threat' to the 'independence' of the [adjunct came] from within, rather than without, the judicial department." 447 U. S., at 685 (concurring opinion).

[32] Contrary to JUSTICE WHITE's suggestion, we do not concede that "Congress may provide for initial adjudications by Art. I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." See *post*, at 94. Rather we simply reaffirm the holding of *Crowell*—that Congress may assign to non-Art. III bodies some adjudica-

ognized that Art. III does not require "all determinations of fact [to] be made by judges," 285 U. S., at 51; with respect to congressionally created rights, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar, *id.*, at 54. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme challenged in *Crowell*, the Court emphasized that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Ibid.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz*, the Court stressed that under the congressional scheme "'[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge,'" 447 U. S., at 682, quoting *Mathews* v. *Weber*, 423 U. S. 261, 271 (1976); the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U. S., at 683.

These two principles assist us in evaluating the "adjunct" scheme presented in these cases. Appellants assume that Congress' power to create "adjuncts" to consider all cases related to those arising under Title 11 is as great as it was in the circumstances of *Crowell*. But while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants' argument—that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not*

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tory functions. *Crowell* itself spoke of "specialized" functions. These cases do not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.

created by Congress. Indeed, the validity of this proposition was expressly denied in *Crowell*, when the Court rejected "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved," 285 U. S., at 60–61 (emphasis added),[33] and stated that

> "the essential independence of the exercise of the judicial power of the United States in the enforcement of *constitutional* rights requires that the Federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it." *Id.*, at 64 (emphasis added).[34]

Appellants' proposition was also implicitly rejected in *Raddatz*. Congress' assignment of adjunct functions under the Federal Magistrates Act was substantially narrower than under the statute challenged in *Crowell*. Yet the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a

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[33] The Court in *Crowell* found that the requirement of *de novo* review as to certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate maintenance of the Federal judicial power." 285 U. S., at 56. The dissent agreed that some factual findings cannot be made by adjuncts, on the ground that "under certain circumstances, the constitutional requirement of due process is a requirement of [Art. III] judicial process." *Id.*, at 87 (Brandeis, J., dissenting).

[34] *Crowell*'s precise holding, with respect to the review of "jurisdictional" and "constitutional" facts that arise within ordinary administrative proceedings, has been undermined by later cases. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53 (1936). See generally 4 K. Davis, Administrative Law Treatise §§ 29.08, 29.09 (1st ed. 1958). But the general principle of *Crowell*—distinguishing between congressionally created rights and constitutionally recognized rights—remains valid, as evidenced by the Court's recent approval of *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), on which *Crowell* relied. See *Agosto* v. *INS*, 436 U. S. 748, 753 (1978) (*de novo* judicial determination required for claims of American citizenship in deportation proceedings). See also *United States* v. *Raddatz*, 447 U. S., at 682–684; *id.*, at 707–712 (MARSHALL, J., dissenting).

role in the adjudication of *constitutional* rights—was far stricter than it had been in *Crowell*. Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. 447 U. S., at 683.

Although *Crowell* and *Raddatz* do not explicitly distinguish between rights created by Congress and other rights, such a distinction underlies in part *Crowell*'s and *Raddatz*' recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution. Moreover, such a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. *Buckley* v. *Valeo*, 424 U. S., at 122. But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.[35] Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No

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[35] Drawing the line between permissible extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the Judicial and Legislative Branches are often overlapping. As Justice Frankfurter noted in a similar context: "To be sure the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (concurring opinion). The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.

comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, like the rights implicated in *Raddatz*, are not of Congress' creation. Indeed, the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court.* Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over appellant's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial

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* Of course, bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law. Appellant Northern's state-law contract claim is now in federal court because of its relationship to appellant's reorganization petition. See n. 26, *supra*. But Congress has not purported to prescribe a rule of decision for the resolution of appellant's contractual claims.

power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. IV) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts, § 1471(c) (emphasis added). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U. S. C. § 1480 (1976 ed., Supp. IV), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. IV).[37] Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. See n. 5, *supra*. Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are bind-

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[37] The limitations that the judges "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment," 28 U. S. C. § 1481 (1976 ed., Supp. IV), are also denied to Art. III judges under certain circumstances. See 18 U. S. C. §§ 401, 402, 3691; 28 U. S. C. § 2283.

ing and enforceable even in the absence of an appeal.[38] In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.[39]

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[38] Although the entry of an enforcement order is in some respects merely formal, it has long been recognized that

"'[t]he award of execution . . . is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term, without it.'" *ICC* v. *Brimson*, 154 U. S. 447, 484 (1894), quoting Chief Justice Taney's memorandum in *Gordon* v. *United States*, 117 U. S. 697, 702 (1864).

[39] Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution: "The Judges, *both* of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall . . . receive [undiminished] Compensation." Art. III, § 1 (emphasis added). Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime,

"would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." 285 U. S., at 57.

Cf. *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61–62 (1972); *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 883 (1824).

JUSTICE WHITE's dissent views the function of the Third Branch as interpreting the Constitution in order to keep the other two Branches in check, and would accordingly find the purpose, if not the language, of Art. III satisfied where there is an appeal to an Art. III court. See *post*, at 115. But in the Framers' view, Art. III courts would do a great deal more than, in an abstract way, announce guidelines for the other two Branches. While "expounding" the Constitution was surely one vital function of the Art. III courts in the Framers' view, the tasks of those courts, for which independence was an important safeguard, included the mundane as well

We conclude that 28 U. S. C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

V

Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in 28 U. S. C. § 1471 (1976 ed., Supp. IV) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act.[40] Our decision in *Chevron*

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as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law. As Hamilton noted, "it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, p. 488 (H. Lodge ed. 1888). In order to promote the independence and improve the quality of federal judicial decisionmaking in all of these areas, the Framers created a system of independent federal courts. See The Federalist Nos. 78–82.

[40] It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H. R. Rep. No. 95–595, pp. 43–48 (1977); S. Rep. No. 95–989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*,

Oil Co. v. *Huson*, 404 U. S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, *id.*, at 106; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.*, at 107; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid.* In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively.[41]

The judgment of the District Court is affirmed. However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws. See *Buckley* v. *Valeo*, 424 U. S., at 143;

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at 92, that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.

[41] See also *Buckley* v. *Valeo*, 424 U. S. 1, 142 (1976); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 376–377 (1940); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702, n. 9 (1982).

cf. *Georgia* v. *United States*, 411 U. S. 526, 541 (1973); *Fortson* v. *Morris*, 385 U. S. 231, 235 (1966); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656, 675–676 (1964).

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

Were I to agree with the plurality that the question presented by this case is "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U. S. C. § 1471 (1976 ed., Supp IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution," *ante*, at 52, I would with considerable reluctance embark on the duty of deciding this broad question. But appellee Marathon Pipe Line Co. has not been subjected to the full range of authority granted Bankruptcy Courts by § 1471. It was named as a defendant in a suit brought by appellant Northern Pipeline Construction Co. in a United States Bankruptcy Court. The suit sought damages for, *inter alia*, breaches of contract and warranty. Marathon moved to dismiss the action on the grounds that the Bankruptcy Act of 1978, which authorized the suit, violated Art. III of the Constitution insofar as it established bankruptcy judges whose tenure and salary protection do not conform to the requirements of Art. III.

With the case in this posture, Marathon has simply been named defendant in a lawsuit about a contract, a lawsuit initiated by appellant Northern after having previously filed a petition for reorganization under the Bankruptcy Act. Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises "[t]he judicial power of the United States" described by Art. III of the Constitution. But resolution of

any objections it may make on this ground to the exercise of a different authority conferred on bankruptcy courts by the 1978 Act, see *ante*, at 54–55, should await the exercise of such authority.

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S, 33, 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Particularly in an area of constitutional law such as that of "Art. III Courts," with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.

From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common-law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court.

The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), and *Palmore* v. *United States*, 411 U. S. 389 (1973), the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell* v. *Benson*, 285 U. S. 22 (1932). All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an "adjunct" of either the District Court or the Court of Appeals.

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to

bankruptcy courts under § 1471, see *ante*, at 87–88, n. 40, I concur in the judgment. I also agree with the discussion in Part V of the plurality opinion respecting retroactivity and the staying of the judgment of this Court.

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE WHITE's dissenting opinion, but I write separately to emphasize that, notwithstanding the plurality opinion, the Court does *not* hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III of the Constitution. Rather, the Court's holding is limited to the proposition stated by JUSTICE REHNQUIST in his concurrence in the judgment—that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States. This limited holding, of course, does not suggest that there is something inherently unconstitutional about the new bankruptcy courts; nor does it preclude such courts from adjudicating all but a relatively narrow category of claims "arising under" or "arising in or related to cases under" the Bankruptcy Act.

It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court of which the bankruptcy court is an adjunct.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Article III, § 1, of the Constitution is straightforward and uncomplicated on its face:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial Power of the United States" and so must be manned by judges possessing both life-tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the plurality shows, is well founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure. *Ante*, at 57–60.

If this simple reading were correct and we were free to disregard 150 years of history, these would be easy cases and the plurality opinion could end with its observation that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." *Ante*, at 60. The fact that the plurality must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law[1] itself indicates the gross oversimplification implicit in the plurality's claim that "our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence." *Ibid.* While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

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[1] *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 534 (1962) (plurality opinion of Harlan, J.).

That question is what limits Art. III places on Congress' ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered. In its attempt to pigeonhole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.

I

There are, I believe, two separate grounds for today's decision. First, non-Art. III judges, regardless of whether they are labelled "adjuncts" to Art. III courts or "Art. I judges," may consider only controversies arising out of federal law. Because the immediate controversy in these cases—Northern Pipeline's claim against Marathon—arises out of state law, it may only be adjudicated, within the federal system, by an Art. III court.[2] Second, regardless of the source of law that governs the controversy, Congress is prohibited by Art. III from establishing Art. I courts, with three narrow exceptions. Adjudication of bankruptcy proceedings does not fall within any of these exceptions. I shall deal with the first of these contentions in this section.

The plurality concedes that Congress may provide for initial adjudications by Art. I courts or administrative judges of all rights and duties arising under otherwise valid federal laws. *Ante*, at 80. There is no apparent reason why this principle should not extend to matters arising in federal bankruptcy proceedings. The plurality attempts to escape the reach of prior decisions by contending that the bankrupt's claim against Marathon arose under state law. Non-Article III

[2] Because this is the sole ground relied upon by the Justices concurring in the judgment this is the effective basis for today's decision.

judges, in its view, cannot be vested with authority to adjudicate such issues. It then proceeds to strike down 28 U. S. C. § 1471 (1976 ed., Supp. IV) on this ground. For several reasons, the Court's judgment is unsupportable.

First, clearly this ground alone cannot support the Court's invalidation of § 1471 on its face. The plurality concedes that in adjudications and discharges in bankruptcy, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," *ante*, at 71, and "the manner in which the rights of debtors and creditors are adjusted," *ante*, at 84, n. 36, are matters of federal law. Under the plurality's own interpretation of the cases, therefore, these matters could be heard and decided by Art. I judges. But because the bankruptcy judge is also given authority to hear a case like that of appellant Northern against Marathon, which the Court says is founded on state law, the Court holds that the section must be stricken down on its face. This is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state-law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as these would have to be heard by Art. III judges or by state courts—unless the defendant consents to suit before the bankruptcy judge—just as they were before the 1978 Act was adopted. But this would remove from the jurisdiction of the bankruptcy judge only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction.[3]

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[3] The plurality attempts to justify its sweeping invalidation of § 1471, because of its inclusion of state-law claims, by suggesting that this statutory provision is nonseverable. *Ante*, at 87–88, n. 40. The concurring Justices specifically adopt this argument as the reason for their decision to join the judgment of the Court. The basis for the conclusion of nonseverability, however, is nothing more than a presumption: "Congress has vested juris-

Second, the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings. The routine in ordinary bankruptcy cases now, as it was before 1978, is to stay actions against the bankrupt, collect the bankrupt's assets, require creditors to file claims or be forever barred, allow or disallow claims that are filed, adjudicate preferences and fraudulent transfers, and make pro rata distributions to creditors, who will be barred by the discharge from taking further actions against the bankrupt. The crucial point to be made is that in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy—claims for goods sold, wages, rent, utilities, and the like. "[T]he word debt as used by the Act is not confined to its technical common law meaning but . . . extends to liabilities arising out of breach of contract . . . to torts . . . and to taxes owing to the United States or state or local governments." 1 W. Collier, Bankruptcy ¶1.14, p. 88 (14th ed. 1976). Every such claim must be filed and its validity is sub-

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diction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters." *Ante*, at 87, n. 40. Although it is possible, as a historical matter, to find cases of this Court supporting this presumption, see, *e. g.*, *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242 (1929), I had not thought this to be the contemporary approach to the problem of severability, particularly when dealing with federal statutes. I would follow the approach taken by the Court in *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976): "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" Quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U. S. 210, 234 (1932). This presumption seems particularly strong when Congress has already "enacted those provisions which are within its power, independently of that which is not"—*i. e.*, in the old Bankruptcy Act.

ject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depend on state law. Hence, the bankruptcy judge is constantly enmeshed in state-law issues.

The new aspect of the Bankruptcy Act of 1978, in this regard, therefore, is not the extension of federal jurisdiction to state-law claims, but its extension to particular kinds of state-law claims, such as contract cases against third parties or disputes involving property in the possession of a third person.[4] Prior to 1978, a claim of a bankrupt against a third party, such as the claim against Marathon in this case, was not within the jurisdiction of the bankruptcy judge. The old limits were based, of course, on the restrictions implicit within the concept of *in rem* jurisdiction; the new extension is based on the concept of *in personam* jurisdiction. "The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H. R. Rep. No. 95–595, p. 445 (1977). The difference between the new and old Act, therefore, is not to be found in a distinction between state-law and federal-law matters; rather, it is in a distinction between *in rem* and *in personam* jurisdiction. The majority at no place explains why this distinction should have constitutional implications.

Third, all that can be left of the majority's argument in this regard is that state-law claims adjudicated within the federal system must be heard in the first instance by Art. III judges. I shall argue below that any such attempt to distinguish Art. I from Art. III courts by the character of the controversies they may adjudicate fundamentally misunderstands the his-

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[4] Even this is not entirely new. Under the old Act, in certain circumstances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), for example, we recognized that when a creditor files a claim, the referee is empowered to hear and decide a counterclaim against that creditor arising out of the same transaction. A similar situation could arise in adjudicating setoffs under former § 68 of the Bankruptcy Act.

torical and constitutional significance of Art. I courts. Initially, however, the majority's proposal seems to turn the separation-of-powers doctrine, upon which the majority relies, on its head: Since state-law claims would ordinarily not be heard by Art. III judges—*i. e.*, they would be heard by state judges—one would think that there is little danger of a diminution of, or intrusion upon, the power of Art. III courts, when such claims are assigned to a non-Art. III court. The plurality misses this obvious point because it concentrates on explaining how it is that federally created rights can ever be adjudicated in Art. I courts—a far more difficult problem under the separation-of-powers doctrine. The plurality fumbles when it assumes that the rationale it develops to deal with the latter problem must also govern the former problem. In fact, the two are simply unrelated and the majority never really explains the separation-of-powers problem that would be created by assigning state-law questions to legislative courts or to adjuncts of Art. III courts.

One need not contemplate the intricacies of the separation-of-powers doctrine, however, to realize that the majority's position on adjudication of state-law claims is based on an abstract theory that has little to do with the reality of bankruptcy proceedings. Even prior to the present Act, bankruptcy cases were generally referred to bankruptcy judges, previously called referees. Bkrtcy. Rule 102(a). Title 11 U. S. C. § 66 described the jurisdiction of the referees. Their powers included the authority to

> "consider all petitions referred to them and make the adjudications or dismiss the petitions . . . grant, deny or revoke discharges, determine the dischargeability of debts, and render judgments thereon [and] perform such of the duties as are by this title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

The bankruptcy judge possessed "complete jurisdiction of the proceedings." 1 W. Collier, Bankruptcy ¶1.09, p. 65 (14th ed. 1976). The referee would initially hear and decide practically all matters arising in the proceedings, including the allowance and disallowance of the claims of creditors.[5] If a claim was disallowed by the bankruptcy judge and the decision was not reversed on appeal, the creditor was forever barred from further action against the bankrupt. As pointed out above, all of these matters could and usually did involve state-law issues. Initial adjudication of state-law issues by non-Art. III judges is, then, hardly a new aspect of the 1978 Act.

Furthermore, I take it that the Court does not condemn as inconsistent with Art. III the assignment of these functions—*i. e.*, those within the summary jurisdiction of the old bankruptcy courts—to a non-Art. III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power. *Ante*, at 71. They also happen to be functions that have been performed by referees or bankruptcy judges for a very long time and without constitutional objection. Indeed, we approved the authority of the referee to allow or disallow claims in *Katchen* v. *Landy*, 382 U. S. 323 (1966). There, the referee held that a creditor had received a preference and that his claim could therefore not be allowed. We agreed that the referee had the authority not only to adjudicate the existence of the preference, but also to order that the preference be disgorged. We also recognized that the referee could adjudicate counterclaims against a creditor who files his claim against the estate. The 1973 Bankruptcy Rules make similar provision. See Rule 306(c), Rule 701, and Advisory Committee Note to Rule 701, 11 U. S. C., p. 1340. Hence, if Marathon had filed a claim against the bankrupt in this case, the trustee could have filed and the bankruptcy judge

[5] "The judicial act of allowance or disallowance is one, of course, that is performed by the referee where the proceedings have been generally referred." 3 W. Collier, Bankruptcy ¶57.14, p. 229, n. 3 (14th ed. 1977).

could have adjudicated a counterclaim seeking the relief that is involved in this case.

Of course, all such adjudications by a bankruptcy judge or referee were subject to review in the district court, on the record. See 11 U. S. C. § 67(c). Bankruptcy Rule 810, transmitted to Congress by this Court, provided that the district court "shall accept the referee's findings of fact unless they are clearly erroneous." As the plurality recognizes, *ante*, at 55, the 1978 Act provides for appellate review in Art. III courts and presumably under the same "clearly erroneous standard." In other words, under both the old and new Acts, initial determinations of state-law questions were to be made by non-Art. III judges, subject to review by Art. III judges. Why the differences in the provisions for appeal in the two Acts are of unconstitutional dimension remains entirely unclear.

In theory and fact, therefore, I can find no basis for that part of the majority's argument that rests on the state-law character of the claim involved here. Even if prior to 1978, the referee could not generally participate in cases aimed at collecting the assets of a bankrupt estate, he nevertheless repeatedly adjudicated issues controlled by state law. There is very little reason to strike down § 1471 on its face on the ground that it extends, in a comparatively minimal way, the referees' authority to deal with state-law questions. To do so is to lose all sense of proportion.

II

The plurality unpersuasively attempts to bolster its case for facial invalidity by asserting that the bankruptcy courts are now "exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*." *Ante*, at 86. In support of this proposition it makes five arguments in addition to the "state-law" issue. Preliminarily, I see no basis for according standing to Marathon to raise any of these additional points. The state-law objection applies to

the Marathon case. Only that objection should now be adjudicated.[6]

I also believe that the major premise of the plurality's argument is wholly unsupported: There is no explanation of why *Crowell* v. *Benson*, 285 U. S. 22 (1932), and *United States* v. *Raddatz*, 447 U. S. 667 (1980), define the outer limits of constitutional authority. Much more relevant to today's decision are first, the practice in bankruptcy prior to 1978, which neither the majority nor any authoritative case has questioned, and second, the practice of today's administrative agencies. Considered from this perspective, all of the plurality's arguments are unsupportable abstractions, divorced from the realities of modern practice.

The first three arguments offered by the plurality, *ante*, at 85, focus on the narrowly defined task and authority of the agency considered in *Crowell:* The agency made only "specialized, narrowly confined factual determinations" and could issue only a narrow class of orders. Regardless of whether this was true of the Compensation Board at issue in *Crowell*, it certainly was not true of the old bankruptcy courts, nor does it even vaguely resemble current administrative practice. As I have already said, general references to bankruptcy judges, which was the usual practice prior to 1978, permitted bankruptcy judges to perform almost all of the functions of a bankruptcy court. Referees or bankruptcy judges not only exercised summary jurisdiction but could also conduct adversary proceedings to

> "(1) recover money or property . . . . (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to make a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay . . . (7) determine the dischargeability of a debt." Bkrtcy. Rule 701.

[6] On this point I am in agreement with the concurring Justices.

Although there were some exceptions to the referees' authority, which have been removed by the 1978 Act, the additions to the jurisdiction of the bankruptcy judges were of marginal significance when examined in the light of the overall functions of those judges before and after 1978. In my view, those changes are not sufficient to work a qualitative change in the character of the bankruptcy judge.

The plurality's fourth argument fails to point to any difference between the new and old Bankruptcy Acts. While the administrative orders in *Crowell* may have been set aside by a court if "not supported by the evidence," under both the new and old Acts at issue here, orders of the bankruptcy judge are reviewed under the "clearly erroneous standard." See Bkrtcy. Rule 810. Indeed, judicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies. Generally courts are not free to set aside the findings of administrative agencies, if supported by substantial evidence. But more importantly, courts are also admonished to give substantial deference to the agency's interpretation of the statute it is enforcing. No such deference is required with respect to decisions on the law made by bankruptcy judges.

Finally, the plurality suggests that, unlike the agency considered in *Crowell*, the orders of a post-1978 bankruptcy judge are final and binding even though not appealed. *Ante*, at 85–86. To attribute any constitutional significance to this, unless the plurality intends to throw into question a large body of administrative law, is strange. More directly, this simply does not represent any change in bankruptcy practice. It was hornbook law prior to 1978 that the authorized judgments and orders of referees, including turnover orders, were final and binding and res judicata unless appealed and overturned:

> "The practice before the referee should not differ from that before the judge of the court of bankruptcy and, apart from direct review within the limitation of § 39(c),

the orders of the referee are entitled to the same presumption of validity, conclusiveness and recognition in the court of bankruptcy or other courts." 1 W. Collier, Bankruptcy ¶ 1.09, pp. 65–66 (14th ed. 1976).

Even if there are specific powers now vested in bankruptcy judges that should be performed by Art. III judges, the great bulk of their functions are unexceptionable and should be left intact. Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can account for the majority's inexplicably heavy hand in this case only by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult problem of the nature and role of Art. I courts. To that question I now turn.

III

A

The plurality contends that the precedents upholding Art. I courts can be reduced to three categories. First, there are territorial courts, which need not satisfy Art. III constraints because "the Framers intended that as to certain geographical areas . . . Congress was to exercise the general powers of government."[7] *Ante*, at 64. Second, there are courts-martial, which are exempt from Art. III limits because of a constitutional grant of power that has been "historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue." *Ante*, at 66. Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights—controversies between the government and private parties—which are not covered by Art. III because the controversy could have been resolved by the ex-

[7] The majority does not explain why the constitutional grant of power over the Territories to Congress is sufficient to overcome the strictures of Art. III, but presumably not sufficient to overcome the strictures of the Presentment Clause or other executive limits on congressional authority.

ecutive alone without judicial review. See *ante*, at 68. Despite the plurality's attempt to cabin the domain of Art. I courts, it is quite unrealistic to consider these to be only three "narrow," *ante*, at 64, limitations on or exceptions to the reach of Art. III. In fact, the plurality itself breaks the mold in its discussion of "adjuncts" in Part IV, when it announces that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." *Ante*, at 80. Adjudications of federal rights may, according to the plurality, be committed to administrative agencies, as long as provision is made for judicial review.

The first principle introduced by the plurality is geographical: Art. I courts presumably are not permitted within the States.[8] The problem, of course, is that both of the other exceptions recognize that Art. I courts can indeed operate within the States. The second category relies upon a new principle: Art. I courts are permissible in areas in which the Constitution grants Congress "extraordinary control over the precise subject matter." *Ante*, at 66. Preliminarily, I do not know how we are to distinguish those areas in which Congress' control is "extraordinary" from those in which it is not. Congress' power over the Armed Forces is established in Art. I, § 8, cls. 13, 14. There is nothing in those Clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy. But more importantly, in its third category, and in its treatment of "adjuncts," the plurality itself recognizes that Congress can create Art. I courts in virtually all the areas in which Congress is authorized to act, regardless of the quality of the constitutional grant of authority. At the same time,

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[8] Had the plurality cited only the territorial courts, the principle relied on perhaps could have been the fact that power over the Territories is provided Congress in Art. IV. However, Congress' power over the District of Columbia is an Art. I power. As such, it does not seem to have any greater status than any of the other powers enumerated in Art. I, § 8.

territorial courts or the courts of the District of Columbia, which are Art. I courts, adjudicate private, just as much as public or federal, rights.

Instead of telling us what it is Art. I courts can and cannot do, the plurality presents us with a list of Art. I courts. When we try to distinguish those courts from their Art. III counterparts, we find—apart from the obvious lack of Art. III judges—a series of non-distinctions. By the plurality's own admission, Art. I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions in those areas in which congressional control is "extraordinary." I cannot distinguish this last category from the general "arising under" jurisdiction of Art. III courts.

The plurality opinion has the appearance of limiting Art. I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Art. I courts or adjuncts to Art. III courts. But we need to know why bankruptcy courts can not qualify as Art. I courts in their own right.

B

The plurality opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Art. I from Art. III courts. The concept of a legislative, or Art. I, court was introduced by an opinion authored by Chief Justice Marshall. Not only did he create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept:

> "The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred

> by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828).

The proposition was simple enough: Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot.

There were only two problems with this proposition. First, *Canter* itself involved a case in admiralty jurisdiction, which is specifically included within the "judicial power of the United States" delineated in Art. III. How, then, could the territorial court not be exercising Art. III judicial power? Second, and no less troubling, if the territorial courts could not exercise Art. III power, how could their decisions be subject to appellate review in Art. III courts, including this one, that can exercise only Art. III "judicial" power? Yet from early on this Court has exercised such appellate jurisdiction. *Benner* v. *Porter*, 9 How. 235, 243 (1850); *Clinton* v. *Englebrecht*, 13 Wall. 434 (1872); *Reynolds* v. *United States*, 98 U. S. 145, 154 (1879); *United States* v. *Coe*, 155 U. S. 76, 86 (1894); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922). The attempt to understand the seemingly unexplainable was bound to generate "confusion and controversy." This analytic framework, however—the search for a principled distinction—has continued to burden the Court.

The first major elaboration on the *Canter* principle was in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18

How. 272 (1856). The plaintiff in that case argued that a proceeding against a customs collector for the collection of moneys claimed to be due to the United States was an exercise of "judicial power" and therefore had to be carried out by Art. III judges. The Court accepted this premise: "It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power." *Id.*, at 275. Having accepted this premise, the Court went on to delineate those matters which could be determined only by an Art. III court, *i. e.*, those matters that fall within the nondelegable "judicial power" of the United States. The Court's response to this was twofold. First, it suggested that there are certain matters which are inherently "judicial": "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.*, at 284. Second, it suggested that there is another class of issues that, depending upon the form in which Congress structures the decisionmaking process, may or may not fall within "the cognizance of the courts of the United States." *Ibid.* This latter category consisted of the so-called "public rights." Apparently, the idea was that Congress was free to structure the adjudication of "public rights" without regard to Art. III.

Having accepted the plaintiff's premise, it is hard to see how the Court could have taken too seriously its first contention. The Court presented no examples of such issues that are judicial "by nature" and simply failed to acknowledge that Art. I courts already sanctioned by the Court—*e. g.*, territorial courts—were deciding such issues all the time. The second point, however, contains implicitly a critical insight; one that if openly acknowledged would have undermined the entire structure. That insight follows from the Court's earlier

recognition that the term "judicial act" is broad enough to encompass all administrative action involving inquiry into facts and the application of law to those facts. *Id.*, at 280. If administrative action can be characterized as "judicial" in nature, then obviously the Court's subsequent attempt to distinguish administrative from judicial action on the basis of the manner in which Congress structures the decision cannot succeed. There need be no Art. III court involvement in any adjudication of a "public right," which the majority now interprets as any civil matter arising between the Federal Government and a citizen. In that area, whether an issue is to be decided by an Art. III court depends, finally, on congressional intent.

Although *Murray's Lessee* implicitly undermined Chief Justice Marshall's suggestion that there is a difference in kind between the work of Art. I and that of Art. III courts, it did not contend that the Court must always defer to congressional desire in this regard. The Court considered the plaintiff's contention that removal of the issue from an Art. III court must be justified by "necessity." Although not entirely clear, the Court seems to have accepted this proposition: "[I]t seems to us that the just inference from the entire law is, that there was such a necessity for the warrant." *Id.*, at 285.[9]

The Court in *Murray's Lessee* was precisely right: Whether an issue can be decided by a non-Art. III court does not depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Art. III court. This insight, however, was completely disavowed in the next major case to consider

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[9] By stating that "of this necessity congress alone is the judge," 18 How., at 285, the Court added some serious ambiguity to the standard it applied. Because this statement ends the Court's analysis of the merits of the claim, it does not seem to mean that the Court will simply defer to congressional judgment. Rather, it appears to mean that the Court will review the legislative record to determine whether there appeared to Congress to be compelling reasons for not establishing an Art. III court.

the distinction between Art. I and Art. III courts, *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), in which the Court concluded that the Court of Customs Appeals was a legislative court. The Court there directly embraced the principle also articulated in *Murray's Lessee* that Art. I courts may not consider any matter "which inherently or necessarily requires judicial determination," but only such matters as are "susceptible of legislative or executive determination." 279 U. S., at 453. It then went on effectively to bury the critical insight of *Murray's Lessee*, labeling as "fallacious" any argument that "assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S., at 459.[10]

The distinction between public and private rights as the principle delineating the proper domains of legislative and constitutional courts respectively received its death blow, I had believed, in *Crowell* v. *Benson*, 285 U. S. 22 (1932). In that case, the Court approved an administrative scheme for the determination, in the first instance, of maritime employee compensation claims. Although acknowledging the framework set out in *Murray's Lessee* and *Ex parte Bakelite Corp.*, the Court specifically distinguished the case before it: "The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."[11] 285 U. S., at 51. Nevertheless, the Court approved of the use of an Art. I adjudication mechanism on the new theory that "there is no requirement that, in order to maintain the essen-

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[10] The Court did not, however, entirely follow this principle, for it stated elsewhere that "there is propriety in mentioning the fact that Congress always has treated [the Court of Claims as an Art. I court]." 279 U. S., at 454.

[11] The plurality is clearly wrong in citing *Crowell* in support of the proposition that matters involving private, as opposed to public, rights may not be considered in a non-Art. III court. *Ante*, at 70.

tial attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Ibid.* Article I courts could deal not only with public rights, but also, to an extent, with private rights. The Court now established a distinction between questions of fact and law: "[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."[12] *Id.*, at 54.

Whatever sense *Crowell* may have seemed to give to this subject was exceedingly short-lived. One year later, the Court returned to this subject, abandoning both the public/private and the fact/law distinction and replacing both with a simple literalism. In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), considering the courts of the District of Columbia, and in *Williams* v. *United States*, 289 U. S. 553 (1933), considering the Court of Claims, the Court adopted the principle that if a federal court exercises jurisdiction over cases of the type listed in Art. III, § 2, as falling within the "judicial power of the United States," then that court must be an Art. III court:

> "The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is *ipso facto*, vested in such courts as inferior courts of the United States." *O'Donoghue*, *supra*, at 545.[13]

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[12] *Crowell* also suggests that certain facts—constitutional or jurisdictional—must also be subject to *de novo* review in an Art. III court. I agree with the plurality that this aspect of *Crowell* has been "undermined by later cases," *ante*, at 82, n. 34. As a matter of historical interest, however, I would contend that *Crowell*'s holding with respect to these "facts" turned more on the questions of law that were inseparably tied to them, than on some notion of the inadequacy of a non-Art. III factfinder.

[13] *O'Donoghue* does not apply this principle wholly consistently: It still recognizes a territorial court exception to Art. III's requirements. It now

In order to apply this same principle and yet hold the Court of Claims to be a legislative court, the Court found it necessary in *Williams, supra*, to conclude that the phrase "Controversies to which the United States shall be a party" in Art. III must be read as if it said "Controversies to which the United States shall be a party plaintiff or petitioner."[14]

By the time of the *Williams* decision, this area of the law was mystifying to say the least. What followed helped very little, if at all. In the next two major cases the Court could not agree internally on a majority position. In *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582 (1949), the Court upheld a statute giving federal district courts jurisdiction over suits between citizens of the District of Columbia and citizens of a State. A majority of the Court, however, rejected the plurality position that Congress had the authority to assign Art. I powers to Art. III courts, at least outside of the District of Columbia. Only Chief Justice Vinson in dissent reflected on the other side of this problem: whether Art. I courts could be assigned Art. III powers. He entirely disagreed with the conceptual basis for *Williams* and *O'Donoghue*, noting that to the extent that Art. I courts consider non-Art. III matters, appellate review by an Art. III court would be precluded. Or conversely, since appellate review is exercised by this Court over Art. I courts, Art. I courts must "exercise federal question jurisdiction." 337 U. S., at 643. Having gone this far, the Chief Justice was confronted with the obvious question of whether in fact "the distinction between constitutional and legislative courts is meaningless." *Id.*, at 644. Although suggesting that out-

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bases this exception, however, not on any theoretical difference in principle, but simply on the "transitory character of the territorial governments." 289 U. S., at 536.

[14] See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 399 (2d ed. 1973) (reviewing the problems of the *Williams* case and characterizing it as an "intellectual disaster").

side of the territories or the District of Columbia there may be some limits on assignment to Art. I courts of matters that fall within Art. III jurisdiction—apart from federal question jurisdiction—for the most part the Chief Justice ends up relying on the good will of Congress: "[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Ibid.*

Another chapter in this somewhat dense history of a constitutional quandary was provided by Justice Harlan's plurality opinion in *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962), in which the Court, despite *Bakelite* and *Williams*—and relying on an Act of Congress enacted since those decisions—held the Court of Claims and the Court of Customs and Patent Appeals to be Art. III courts. Justice Harlan continued the process of intellectual repudiation begun by Chief Justice Vinson in *Tidewater*. First, it was clear to him that Chief Justice Marshall could not have meant what he said in *Canter* on the inability of Art. I courts to consider issues within the jursidiction of Art. III courts: "Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so." 370 U. S., at 545, n. 13. Second, exceptions to the requirements of Art. III, he thought, have not been founded on any principled distinction between Art. I issues and Art. III issues; rather, a "confluence of practical considerations," *id.*, at 547, accounts for this Court's sanctioning of Art. I courts:

> "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Id.*, at 547–548.

Finally, recognizing that there is frequently no way to distinguish between Art. I and Art. III courts on the basis of the work they do, Justice Harlan suggested that the only way to tell them apart is to examine the "establishing legislation" to see if it complies with the requirements of Art. III. This, however, comes dangerously close to saying that Art. III courts are those with Art. III judges; Art. I courts are those without such judges. One hundred and fifty years of constitutional history, in other words, had led to a simple tautology.

IV

The complicated and contradictory history of the issue before us leads me to conclude that Chief Justice Vinson and Justice Harlan reached the correct conclusion: There is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of our precedents upholding a variety of Art. I courts—not to speak of those Art. I courts that go by the contemporary name of "administrative agencies"—this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in The Federalist Nos. 78–82.

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Art. I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Art. I, rather than Art. III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

Despite the principled, although largely mistaken, rhetoric expanded by the Court in this area over the years, such a balancing approach stands behind many of the decisions up-

holding Art. I courts. Justice Harlan suggested as much in *Glidden*, although he needlessly limited his consideration to the "temporary" courts that Congress has had to set up on a variety of occasions. In each of these instances, this Court has implicitly concluded that the legislative interest in creating an adjudicative institution of temporary duration outweighed the values furthered by a strict adherence to Art. III. Besides the territorial courts approved in *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), these courts have included the Court of Private Land Claims, *United States* v. *Coe*, 155 U. S. 76 (1894), the Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); and consular courts established in foreign countries, *In re Ross*, 140 U. S. 453 (1891). This same sort of "practical" judgment was voiced, even if not relied upon, in *Crowell* with respect to the Employees' Compensation Claims Commission, which was not meant to be of limited duration: "[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved." 285 U. S., at 54. And even in *Murray's Lessee*, there was a discussion of the "necessity" of Congress' adopting an approach that avoided adjudication in an Art. III court. 18 How., at 285.

This was precisely the approach taken to this problem in *Palmore* v. *United States*, 411 U. S. 389 (1973), which, contrary to the suggestion of the plurality, did not rest on any theory of territorial or geographical control. *Ante*, at 75–76. Rather, it rested on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities. Thus, *Palmore* referred to the wide variety of Art. I courts, not just territorial courts. It is in this light that the critical statement of the case must be understood:

> "[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." 411 U. S., at 407–408.

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.

To be more concrete: *Crowell, supra,* suggests that the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state-court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Similarly, as long as the proposed Art. I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction

. . . for the purpose of emasculating" constitutional courts. *National Insurance Co.* v. *Tidewater Co.*, 337 U. S., at 644.

V

I believe that the new bankruptcy courts established by the Bankruptcy Act of 1978, 28 U. S. C. § 1471 (1976 ed., Supp. IV), satisfy this standard.

First, ample provision is made for appellate review by Art. III courts. Appeals may in some circumstances be brought directly to the district courts. 28 U. S. C. § 1334 (1976 ed., Supp. IV). Decisions of the district courts are further appealable to the court of appeals. § 1293. In other circumstances, appeals go first to a panel of bankruptcy judges, § 1482, and then to the court of appeals. § 1293. In still other circumstances—when the parties agree—appeals may go directly to the court of appeals. In sum, there is in every instance a right of appeal to at least one Art. III court. Had Congress decided to assign all bankruptcy matters to the state courts, a power it clearly possesses, no greater review in an Art. III court would exist. Although I do not suggest that this analogy means that Congress may establish an Art. I court wherever it could have chosen to rely upon the state courts, it does suggest that the critical function of judicial review is being met in a manner that the Constitution suggests is sufficient.

Second, no one seriously argues that the Bankruptcy Act of 1978 represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner. H. R. Rep. No. 95-595, p. 14 (1977). Bankruptcy matters are, for the most part, private adjudications of little political significance.

Although some bankruptcies may indeed present politically controversial circumstances or issues, Congress has far more direct ways to involve itself in such matters than through some sort of subtle, or not so subtle, influence on bankruptcy judges. Furthermore, were such circumstances to arise, the Due Process Clause might very well require that the matter be considered by an Art. III judge: Bankruptcy proceedings remain, after all, subject to all of the strictures of that constitutional provision.[15]

Finally, I have no doubt that the ends that Congress sought to accomplish by creating a system of non-Art. III bankruptcy courts were at least as compelling as the ends found to be satisfactory in *Palmore* v. *United States*, 411 U. S. 389 (1973), or the ends that have traditionally justified the creation of legislative courts. The stresses placed upon the old bankruptcy system by the tremendous increase in bankruptcy cases were well documented and were clearly a matter to which Congress could respond.[16] I do not believe it is possible to challenge Congress' further determination that it was necessary to create a specialized court to deal with bankruptcy matters. This was the nearly uniform conclusion of all those that testified before Congress on the question of reform of the bankruptcy system, as well as the conclusion of the Commission on Bankruptcy Laws established by Congress in 1970 to explore possible improvements in the system.[17]

The real question is not whether Congress was justified

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[15] See *Crowell* v. *Benson*, 285 U. S. 22, 87 (1932) (Brandeis, J., dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process").

[16] "During the past 30 years, the number of bankruptcy cases filed annually has increased steadily from 10,000 to over 254,000." H. R. Rep. No. 95–595, p. 21 (1977).

[17] See H. R. Doc. No. 93–137, pt. 1, pp. 85–96 (1973).

in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Art. III bankruptcy court. My own view is that the very fact of extreme specialization may be enough, and certainly has been enough in the past,[18] to justify the creation of a legislative court. Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges: We are, on the whole, a body of generalists.[19] The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life tenure would have severely limited Congress' future options. Furthermore, the number of bankruptcies may fluctuate producing a substantially reduced need for bankruptcy judges. Congress may have thought that, in that event, a bankruptcy specialist should not as a general matter serve as a judge in the countless nonspecialized cases that come before the federal district courts. It would then face the prospect of large numbers of idle federal judges. Finally, Congress may have believed that the change from bankruptcy referees to Art. I judges was far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Art. III judges.

For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

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[18] Consider, for example, the Court of Customs Appeals involved in *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), or the variety of specialized administrative agencies that engage in some form of adjudication.

[19] In 1977, there were approximately 190 full-time and 30 part-time bankruptcy judges throughout the country. H. R. Rep. No. 95-595, at 9.

UNION LABOR LIFE INSURANCE CO. v. PIRENO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-389. Argued April 27, 1982—Decided June 28, 1982*

As required by New York law, petitioner Union Labor Life Insurance Co. (ULL) issues health insurance policies covering certain policyholder claims for chiropractic treatments. Some ULL policies limit the company's liability to "reasonable" charges for "necessary" medical care and services. In order to determine whether particular chiropractors' treatments and fees were necessary and reasonable, ULL arranged with petitioner New York State Chiropractic Association (NYSCA), a professional association of chiropractors, to use the advice of its Peer Review Committee, which was established primarily to aid insurers in evaluating claims for chiropractic treatments, and which is composed of 10 practicing New York chiropractors. Respondent is a licensed chiropractor practicing in New York. On a number of occasions ULL referred his treatments of ULL policyholders, and his charges for those treatments, to the Committee for review. The Committee sometimes concluded that respondent's treatments were unnecessary or his charges unreasonable. Respondent brought suit in Federal District Court, alleging that petitioners' peer review practices violated § 1 of the Sherman Act because petitioners had used the Committee as the vehicle for their conspiracy to fix the prices that chiropractors would be permitted to charge for their services. The District Court granted petitioners' motion for summary judgment, dismissing respondent's complaint on the ground that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by § 2(b) of the McCarran-Ferguson Act, which applies to the "business of insurance." The Court of Appeals reversed and remanded the action for further proceedings.

Held: ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act, and thus is not exempt from antitrust scrutiny. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, controlling. Pp. 126-134.

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*Together with No. 81-390, *New York State Chiropractic Assn.* v. *Pireno*, also on certiorari to the same court.

(a) There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Royal Drug Co., supra.* Pp. 126–129.

(b) With regard to the first criterion, petitioners' arrangement plays no part in the spreading and underwriting of a policyholder's risk, because it is logically and temporally unconnected to the contract entered by the policyholder and ULL, which was the actual risk-transferring event. As to the second criterion, ULL's use of NYSCA's Peer Review Committee is distinct from ULL's contracts with its policyholders, and constitutes a separate arrangement between the insurer and third parties not engaged in the business of insurance. Nor does the challenged arrangement satisfy this criterion on the asserted ground that it directly involves the "interpretation" and "enforcement" of the insurance contract, because ULL's procedure for deciding whether claims are covered is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As respects the third criterion, it may be assumed that the challenged arrangement need not be denied the § 2(b) exemption *solely* because it involves parties outside the insurance industry—namely, practicing chiropractors serving on the Peer Review Committee. But such arrangements can hardly be said to lie at the center of the legislative concern underlying § 2(b), which was with the protection of *intra*-industry cooperation in the underwriting of risks. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Pp. 130–134.

650 F. 2d 387, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 134.

T. Richard Kennedy argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 81–389 were *Edward Thompson* and *Philip R. Kastellec*. *Robert P. Borsody* filed a brief for petitioner in No. 81–390.

Susan M. Jenkins argued the cause for respondent in both cases. With her on the brief was *Ralph C. Wiegandt*.

Barry Grossman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Shapiro, Jerrold J. Ganzfried,* and *Nancy C. Garrison.*†

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†Briefs of *amici curiae* urging reversal were filed by *Richard A. Whiting* for the American Insurance Association et al.; by *Sidney S. Rosdeitcher* and *Richard D. Friedman* for the Health Insurance Association of America et al.; and by *David Crump* for the Legal Foundation of America.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, and *Kenneth R. Reed*, Special Assistant Attorney General, *Steve Clark*, Attorney General of Arkansas, and *David L. Williams*, Deputy Attorney General, *J. D. MacFarlane*, Attorney General of Colorado, and *Thomas P. McMahon*, *Carl R. Ajello*, Attorney General of Connecticut, and *Robert M. Langer* and *John R. Lacey*, Assistant Attorneys General, *Richard S. Gebelein*, Attorney General of Delaware, and *Vincent M. Amberly*, Deputy Attorney General, *Tany S. Hong*, Attorney General of Hawaii, and *Sonia Faust*, Deputy Attorney General, *Tyrone C. Fahner*, Attorney General of Illinois, and *Thomas M. Genovese*, Assistant Attorney General, *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *John R. Flowers, Jr.*, Assistant Attorney General, *Stephen H. Sachs*, Attorney General of Maryland, and *Charles O. Monk II*, Assistant Attorney General, *Frank J. Kelley*, Attorney General of Michigan, and *Edwin M. Bladen*, Assistant Attorney General, *Bill Allain*, Attorney General of Mississippi, and *Robert E. Sanders*, Special Assistant Attorney General, *John Ashcroft*, Attorney General of Missouri, and *William L. Newcomb, Jr.*, and *Robert E. Dolan, Jr.*, Assistant Attorneys General, *Michael T. Greely*, Attorney General of Montana, and *Jerome J. Cate*, Assistant Attorney General, *Paul L. Douglas*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General, *Jeff Bingaman*, Attorney General of New Mexico, and *James J. Wechsler* and *Richard H. Levin*, Assistant Attorneys General, *Rufus L. Edmisten*, Attorney General of North Carolina, *H. A. Cole, Jr.*, Special Deputy Attorney General, and *John R. Corne*, Associate Attorney General, *William J. Brown*, Attorney General of Ohio, and *Eugene F. McShane*, *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Assistant Attorney General, *Mark White*, Attorney General of Texas, and *James V. Sylvester*, Assistant Attorney General, *David L. Wilkinson*, Attorney

JUSTICE BRENNAN delivered the opinion of the Court.

In these cases we consider an alleged conspiracy to eliminate price competition among chiropractors, by means of a "peer review committee" that advised an insurance company whether particular chiropractors' treatments and fees were "necessary" and "reasonable." The question presented is whether the alleged conspiracy is exempt from federal antitrust laws as part of the "business of insurance," within the meaning of the McCarran-Ferguson Act.[1]

I

Petitioners are the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, and the Union Labor Life Insurance Co. (ULL), a Maryland insurer doing business in New York. As required by New York law, ULL's health insurance policies cover certain policyholder claims for chiropractic treatments. But certain ULL policies limit the company's liability to "the *reasonable* charges" for "*necessary* medical care and services."

General of Utah, *John J. Easton, Jr.*, Attorney General of Vermont, and *Glenn A. Jarrett*, Assistant Attorney General, and *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; for the Association of American Physicians & Surgeons, Inc., by *Kent Masterson Brown;* and for Automotive Service Councils, Inc., by *Donald A. Randall* and *Jonathan T. Howe.*

David J. Brummond filed a brief for the National Association of Insurance Commissioners as *amicus curiae.*

[1] 59 Stat. 33, as amended, 15 U. S. C. §§ 1011–1015. The Act provides in relevant part:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . ." § 2, 15 U. S. C. §§ 1012(a), (b).

"(b) Nothing contained in this Act shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." § 3, 15 U. S. C. § 1013(b).

App. 19a, 22a (emphasis added). Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, ULL must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations, ULL has arranged with NYSCA to use the advice of NYSCA's Peer Review Committee.

The Committee was established by NYSCA in 1971, primarily to aid insurers in evaluating claims for chiropractic treatments.[2] It is composed of 10 practicing New York chiropractors, who serve on a voluntary basis. At the request of an insurer, the Committee will examine a chiropractor's treatments and charges in a particular case, and will render an opinion on the necessity for the treatments and the reasonableness of the charges made for them. The opinion will be based upon such considerations as the treating chiropractor's experience and specialty degrees; the location of his office; the number of visits and time spent with the patient; the patient's age, occupation, general physical condition, and history of previous treatment; and X-ray findings.

Respondent is a chiropractor licensed and practicing in the State of New York. On a number of occasions his treatments of ULL policyholders, and his charges for those treatments, have been referred by ULL to the Committee, which has sometimes concluded that his treatments were unnecessary or his charges unreasonable. Petitioners assert that respondent has treated his patients "in a manner calculated to maximize the number of treatments for a particular condition, and that his fees for these treatments are unusually high." 650 F. 2d 387, 389 (CA2 1981). Respondent, for his part, contends that the members of the Committee "practice 'antiquated' techniques that they seek to impose on their more innovative competitors." *Ibid.*

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[2] The Committee's advice is also available to patients, governmental agencies, and chiropractors themselves, but insurers are the principal users. 650 F. 2d 387, 388 (CA2 1981).

This dispute resulted in the present suit, brought by respondent in the United States District Court for the Southern District of New York. Respondent alleged that the peer review practices of petitioners violated § 1 of the Sherman Act.[3] In particular, he claimed that petitioners and others had used the Committee as the vehicle for a conspiracy to fix the prices that chiropractors, including respondent, would be permitted to charge for their services. He concluded that he had been restrained from providing his chiropractic services to the public freely and fully, and that would-be recipients of chiropractic services had been deprived of the benefits of competition. Respondent requested, *inter alia*, declaratory and injunctive relief against ULL's continued use of NYSCA's Peer Review Committee in evaluating policyholders' claims.

After extensive discovery, the District Court granted petitioners' motion for summary judgment dismissing respondent's complaint, concluding that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by the McCarran-Ferguson Act. App. to Pet. for Cert. in No. 81–389, pp. 20a–37a. The court noted that three requirements must be met in order to obtain the McCarran-Ferguson exemption: The challenged practices (1) must constitute the "business of insurance," (2) must be regulated by state law, and (3) must not amount to a "boycott, coercion, or intimidation." *Id.*, at 27a–28a. In the court's view, all three of these requirements were satisfied in the present case. In particular, the court held that petitioners' peer review practices constituted the "business of insurance" because they served "to define the precise extent of ULL's

[3] 15 U. S. C. § 1, which provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

contractual obligations . . . under [its] policies." *Id.*, at 29a–30a. Moreover, the court determined that the peer review practices "involve[d] the spreading of risk, an indispensable element of the 'business of insurance.'" *Id.*, at 30a.[4] Respondents' Sherman Act claim was accordingly dismissed with prejudice.

The Court of Appeals for the Second Circuit reversed. 650 F. 2d 387 (1981). Relying upon this Court's recent opinion in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), the Court of Appeals concluded that the District Court had erred in holding that ULL's use of NYSCA's Peer Review Committee constituted the "business of insurance."[5] Accordingly, the Court of Appeals remanded the action for further proceedings. We granted certiorari to resolve a conflict among the Courts of Appeals on the question presented.[6] 454 U. S. 1052 (1981).

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[4] The court then turned to the Act's second requirement, that the challenged practices be "regulated by state law." The court held that that requirement had been met, as well, observing that New York had "enacted a pervasive scheme of regulation and supervision of insurance," had prohibited "the unfair settlement of claims," and had proscribed "the conduct alleged in the complaint" in its state antitrust law, the Donnelly Act, which by its terms applied to insurers. App. to Pet. for Cert. in No. 81–389. pp. 31a–32a. Finally, the court determined that respondent had neither alleged a "boycott" on petitioners' part, nor offered evidentiary support for such a claim. *Id.*, at 33a–35a. The court thus concluded that the Act's third requirement was satisfied in the present case, and that petitioners' actions were consequently "exempt from application of the antitrust laws." *Id.*, at 36a.

[5] Since it reached this conclusion, the Court of Appeals did not definitively address the other holdings of the District Court. See n. 4, *supra*. The court did note, however, that petitioner NYSCA did not itself "appear to be regulated by state law in the manner § 2(b) requires." 650 F. 2d, at 390, n. 5.

[6] As noted by the Court of Appeals, *id.*, at 395, n. 13, the decision below is contrary to that of the Court of Appeals for the Fourth Circuit "in a factually identical case." See *Bartholomew* v. *Virginia Chiropractors Assn.*, 612 F. 2d 812 (1979).

II

The only issue before us is whether petitioners' peer review practices are exempt from antitrust scrutiny as part of the "business of insurance." "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra*, at 210, n. 5. Thus in deciding these cases we have no occasion to address the merits of respondent's Sherman Act claims. However, the Sherman Act does express a "longstanding congressional commitment to the policy of free markets and open competition." *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 56 (1982); see also *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). Accordingly, our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly. *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973). This principle applies not only to implicit exemptions, see *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra*, at 231, but also to express statutory exemptions, see *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 316 (1956). In *Royal Drug, supra*, this Court had occasion to reexamine the scope of the express antitrust exemption provided for the "business of insurance" by § 2(b) of the McCarran-Ferguson Act. We hold that decision of the question before us is controlled by *Royal Drug*.

The principal petitioner in *Royal Drug* was a Texas insurance company, Blue Shield, that offered policies entitling insured persons to purchase prescription drugs for $2 each from any pharmacy participating in a "Pharmacy Agreement" with Blue Shield; policyholders were also allowed to purchase prescription drugs from a nonparticipating pharmacy, but in that event they would have to pay full price for the drugs and would be reimbursed by Blue Shield for only a part of that price. Blue Shield offered Pharmacy Agreements to all licensed pharmacies in Texas, but participating pharmacies were required to sell prescription drugs to Blue

Shield's policyholders for $2 each, and were reimbursed only for their cost in acquiring the drugs thus sold. "Thus, only pharmacies that [could] afford to distribute prescription drugs for less than this $2 markup [could] profitably participate in the plan." 440 U. S., at 209 (footnote omitted).

Respondents in *Royal Drug* were the owners of nonparticipating pharmacies. They sued Blue Shield and several participating pharmacies under § 1 of the Sherman Act, alleging that the Pharmacy Agreements were the instrument by which Blue Shield had conspired with participating pharmacies to fix the retail prices of prescription drugs. Respondents also alleged that the Agreements encouraged Blue Shield's policyholders to avoid nonparticipating pharmacies, thus constituting an unlawful group boycott. The District Court granted summary judgment to Blue Shield and the other petitioners, holding that the challenged Agreements were exempt under § 2(b) of the McCarran-Ferguson Act. But the Court of Appeals disagreed, holding that the Agreements were not the "business of insurance" within the meaning of that Act, and reversed. 440 U. S., at 210. This Court affirmed. Looking to "the structure of the Act and its legislative history," *id.*, at 211, the Court discussed three characteristics of the business of insurance that Congress had intended to exempt through § 2(b).

First, after noting that one "indispensable characteristic of insurance" is the "spreading and underwriting of a policyholder's risk," *id.*, at 211–212,[7] the Court observed that parts

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[7] As the Court explained:

"'It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.' 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959). See also R. Keeton, Insurance Law § 1.2(a) (1971) ('Insurance is an arrangement for transferring and distributing risk'); 1 G. Richards, The Law of Insurance § 2 (W. Freedman 5th ed. 1952)." 440 U. S., at 211 (footnote omitted).

of the legislative history of the McCarran-Ferguson Act "strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk," *id.*, at 220–221. The Court then dismissed Blue Shield's contention that its Pharmacy Agreements involved such activities.

> "The Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.'" *Id.*, at 214 (footnote omitted).

Second, the Court identified "the contract between the insurer and the insured" as "[a]nother commonly understood aspect of the business of insurance." *Id.*, at 215. The Court noted that, in enacting the McCarran-Ferguson Act, Congress had been concerned with the "'relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance."'" *Id.*, at 215–216, quoting *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969). The Court then rejected Blue Shield's argument that its Pharmacy Agreements were so closely related to the "reliability, interpretation, and enforcement" of its policies as to fall within the intended scope of § 2(b): "This argument . . . proves too much." 440 U. S., at 216.

> "At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its rate-

making, and its status as a reliable insurer . . . [and thus] could be included in the 'business of insurance.' Such a result would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.*, at 216–217.

Finally, the Court noted that in enacting the McCarran-Ferguson Act, "the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.*, at 221. This was so because of "the widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Ibid.* The Court was thus reluctant to extend the § 2(b) exemption to the case before it, "because the Pharmacy Agreements involve parties wholly outside the insurance industry." *Id.*, at 231.

> "There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the 'business of insurance.'" *Id.*, at 224 (footnote omitted).

In sum, *Royal Drug* identified three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself, but examining the arrangement between petitioners NYSCA and ULL with respect to all three criteria, we do not hesitate to conclude that it is not a part of the "business of insurance."

Plainly, ULL's use of NYSCA's Peer Review Committee plays no part in the "spreading and underwriting of a policyholder's risk." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 211. Both the "spreading" and the "underwriting" of risk refer in this context to the transfer of risk characteristic of insurance. See n. 7, *supra*. And as the Court of Appeals below observed:

> "The risk that an insured will require chiropractic treatment has been transferred from the insured to [ULL] by the very purchase of insurance. Peer review takes place only after the risk has been transferred by means of the policy, and then it functions only to determine whether the risk of the entire loss (the insured's cost of treatment) has been transferred to [ULL]—that is, whether the insured's loss falls within the policy limits." 650 F. 2d, at 393.

Petitioner ULL argues that the Court of Appeals' analysis is "semantic and unrealistic." Brief for Petitioner ULL 17. Petitioner reasons that "[i]t is inconceivable that Congress would have included risk transfer within the 'business of insurance' but excluded a device that helps 'determine whether the risk . . . has been transferred' and acts as 'an aid in determining the scope of the transfer.'" *Ibid.* We find no merit in this argument, because the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies. The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered. See 9 G. Couch, Cyclopedia of Insurance Law §§ 39:53, 39:63 (2d ed. 1962). If the policy limits coverage to "necessary" treatments and "reasonable" charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer: To the extent that

the insured pays unreasonable charges for unnecessary treatments, he will not be reimbursed, because the risk of incurring such treatments and charges was never transferred to the insurer, but was instead always retained by the insured. Petitioner's argument contains the unspoken premise that the transfer of risk from an insured to his insurer actually takes place not when the contract between those parties is completed, but rather only when the insured's claim is settled. This premise is contrary to the fundamental principle of insurance that the insurance policy defines the scope of risk assumed by the insurer from the insured. See *id.*, § 39:3; R. Keeton, Insurance Law § 5.1(a) (1971).

Turning to the second *Royal Drug* criterion, it is clear that ULL's use of NYSCA's Peer Review Committee is not an integral part of the policy relationship between insurer and insured. In the first place, the challenged arrangement between ULL and NYSCA is obviously distinct from ULL's contracts with its policyholders. In this sense the challenged arrangement resembles the Pharmacy Agreements in *Royal Drug*. There the Court rejected the proposition that the Agreements were "'between insurer and insured.'" *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, *supra*, at 215, quoting *SEC* v. *National Securities, Inc.*, 393 U. S., at 460. Rather, it recognized those Agreements as "separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance." 440 U. S., at 216. Similarly, ULL's use of NYSCA's Peer Review Committee is a separate arrangement between the insurer and third parties not engaged in the business of insurance.

Petitioner ULL argues that the challenged peer review practices satisfy this criterion because peer review "directly involves the 'interpretation' and 'enforcement' of the insurance contract." Brief for Petitioner ULL 16. But this argument is essentially identical to one made and rejected in

Royal Drug. Blue Shield there contended that its Pharmacy Agreements "so closely affect[ed] the 'reliability, interpretation, and enforcement' of the insurance contract . . . as to fall within the exempted area." 440 U. S., at 216 (footnote omitted). This Court noted, however:

> "The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies." *Id.*, at 213–214 (footnotes omitted).

Similarly, when presented with policyholder claims for reimbursement, ULL must decide whether the claims are covered by its policies. But these decisions are entirely ULL's, and its use of NYSCA's Peer Review Committee as an aid in its decisionmaking process is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As in *Royal Drug*, petitioners have shown, at the most, that the challenged peer review practices result in "cost savings to [ULL] which may be reflected in lower premiums if the cost savings are passed on to policyholders." *Id.*, at 216. To grant the practices a § 2(b) exemption on such a showing "would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.*, at 217.

Finally, as respects the third *Royal Drug* criterion, it is plain that the challenged peer review practices are not limited to entities within the insurance industry. On the contrary, ULL's use of NYSCA's Peer Review Committee inevitably involves third parties wholly outside the insurance industry—namely, practicing chiropractors. Petitioners do not dispute this fact, but instead deprecate its importance. They argue that we should not conclude "that ULL's use of the peer review process is outside the scope of the 'business

of insurance' simply because NYSCA is not an insurance company." Brief for Petitioner ULL 25. In petitioners' view,

> "There is nothing in the McCarran-Ferguson Act that limits the 'business of insurance' to the business of insurance companies. As this Court has stated, '[the Act's] language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance."' *National Securities*, 393 U. S. at 459." *Ibid.* (emphasis in original of quoted opinion).

Asserting that "the [New York] Superintendent of Insurance effectively can regulate the peer review process through his authority over the claims adjustment procedures of ULL," *id.*, at 26, petitioners conclude that the process is part of the "business of insurance" despite the necessary involvement of third parties outside the insurance industry.

We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) was intended primarily to protect "*intra*-industry cooperation" in the underwriting of risks. 440 U. S., at 221 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Indeed, the peer review practices challenged in the present cases assertedly realize precisely this potential: Respondent's claim is that the practices restrain competition in a provider market—the market for chiropractic services—rather than in an insurance market. App. 8a. Thus we cannot join petitioners in depreciating the

fact that parties outside the insurance industry are intimately involved in the peer review practices at issue in these cases.[8]

III

In sum, we conclude that ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act.[9] The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Purporting to rely upon our recent decision in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979),

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[8] The premise of the dissent is that NYSCA's Peer Review Committee actually constitutes "the claims adjustor" in this case. See *post*, at 137. From this premise the dissent reasons that since "claims adjustment is part and parcel of the 'business of insurance' protected by the McCarran-Ferguson Act," *post*, at 138, it necessarily follows that the peer review practices at issue in this case must enjoy the Act's exemption. The fatal flaw in this syllogism is that NYSCA's Peer Review Committee is *not* the claims adjustor. As the Court of Appeals noted: "Opinions of the committee are not binding unless the parties agree beforehand that they will be." 650 F. 2d, at 388. Thus in a case such as the present ones, ULL is perfectly free to disregard the Committee's evaluation. Even if ULL were to act upon the Committee's opinion, the nonbinding nature of the Committee's evaluation means that, at most, peer review is merely ancillary to the claims adjustment process. We see no reason that such ancillary activities must necessarily enjoy the McCarran-Ferguson exemption from the antitrust laws. Unlike activities that occur wholly within the insurance industry—such as the claims adjustment process itself—the ancillary peer review practices at issue in this case "involve parties wholly outside the insurance industry." See *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 231. Thus peer review falls afoul of the third *Royal Drug* criterion in a way in which pure claims adjustment activities cannot.

[9] This conclusion renders it unnecessary for us to address the questions whether the conduct challenged in respondent's complaint was "regulated by state law" or constituted a "boycott, coercion, or intimidation." See n. 5, *supra*.

the Court today exposes to antitrust liability an aspect of the business of insurance designed to promote fair and efficient claims settlement. The Court reaches this conclusion by determining that the peer review process does not spread risk, is not an integral part of the insurance relationship, and is not limited to entities within the insurance industry. Because I find the claims adjustment function of the Peer Review Committee to be at the heart of the relationship between insurance companies and their policyholders, I conclude that such committees are clearly within the sphere of insurance activity which the McCarran-Ferguson Act intended to protect from the effect of the antitrust laws.[1] This conclusion finds support in the legislative history of the Act and in *Royal Drug* and its predecessors.

For many years statutes such as the Sherman Act were thought not applicable to the business of insurance, this Court having held in *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869), that "[i]ssuing a policy of insurance is not a transaction of commerce." When this Court held in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), that the business of insurance was a part of interstate commerce subject to the Sherman Act, Congress responded quickly to reestablish the preeminence of States in regulating such business. Congress' response—the McCarran-Ferguson Act—sought primarily to protect the contractual relationship between the insurer and the insured:

> "Under the regime of *Paul* v. *Virginia*, *supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The

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[1] Since the Court declines to reach the question of whether petitioners' Committee is regulated by state law as required by the McCarran-Ferguson Act, I likewise do not discuss it. I note, however, that the District Court found petitioners' Committee to be so regulated. App. to Pet. for Cert. in No. 81-389, pp. 31a-32a.

> *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 459 (1969).

We recognized this congressional purpose in *Royal Drug:*

> "'The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.'" *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* at 215–216 (quoting *SEC* v. *National Securities, Inc., supra,* at 460).

Thus, whatever else was said in *Royal Drug* about the indispensable characteristic of risk-spreading, the Court found the contractual relationship between the insurer and the insured to be the essence of the "business of insurance."

Central to this contractual relationship is the process of claims adjustment—the determination of the actual payments to be made to the insured for losses covered by the insurance contract. The key representation of the insurance company and the principal expectation of the policyholder is that prompt payment will be made when the event insured against actually occurs. As one commentator has stated:

> "Up until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance

is the claims proceeds. Selection of the prospect, qualifying him for coverage that suits his needs, delivery of a policy, collecting premiums for perhaps years, making changes in coverage to meet changing situations, all of these are but preambles to the one purpose for which the insurance was secured, namely to collect dollars if and when an unforeseen event takes place." J. Wickman, Evaluating the Health Insurance Risk 57 (1965).[2]

It is the claims adjustor—in this case petitioners' Peer Review Committee—which determines whether and to what extent an insured's losses will be covered. The Court thus plainly errs when it concludes that the role of petitioners' Peer Review Committee "is not an integral part of the policy relationship between insurer and insured," *ante*, at 131, and "is a matter of indifference to the policyholder." *Ante*, at 132. Few insurance matters could be of greater importance to policyholders than whether their claims will be paid, and it is the Peer Review Committee which in effect makes that determination. Being a critical component of the relation-

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[2] Other commentators agree with this assessment of the importance of claims settlement:

"The adjustment (including payment) of claims represents the final act in the insurance process. The payment of a claim by an insurance company brings the insurance contract 'to life' in a fashion far more vivid than does any other single act in connection with the purchase, issuance, and maintenance of the contract." Butler, Loss Adjustment in Fire Insurance, in Property and Liability Insurance Handbook 219 (J. Long & D. Gregg eds. 1965).

"Claim administration is the last link in the process of insurance—a process that begins with actuarial analysis and continues through sales, underwriting, investment, and policy service. . . . [T]he expectation of the policyowner that an insurer is willing to meet its obligations, through claims administration, is an important part in the decision to purchase insurance. Indeed, it is the claim administration function that delivers on the product sold to the policyowner." C. Cissley, Claim Administration: Principles and Practices iii (1980).

ship between an insurer and an insured, claims adjustment is part and parcel of the "business of insurance" protected by the McCarran-Ferguson Act.[3]

This conclusion finds support in a source of guidance completely disregarded by the Court—the legislative history of McCarran-Ferguson. The passage of the Act was preceded by the introduction in the Senate Committee of a report and a bill prepared by the National Association of Insurance Commissioners. "The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 221 (footnote omitted). Included in that bill were seven specific insurance practices to which the Sherman Act was not to apply, and to which the Court in *Royal Drug* looked for guidance as to the meaning of the phrase "business of insurance." See *id.*, at 222. Among those seven protected practices was the process of claims adjustment: "the said Sherman Act shall not apply . . . to any cooperative or joint service, *adjustment, investigation, or inspection agreement* relating to insurance." 90 Cong. Rec. A4406 (1944) (emphasis added). Other statements in the legislative history support the conclusion that claims adjustment was to be protected:

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[3] Apparently unable to discern the difference between a mere method of paying a claim and the more fundamental process of determining whether a claim is covered by the insurance agreement, the Court finds that petitioners' peer review procedure "resembles the Pharmacy Agreements in *Royal Drug*." *Ante*, at 131. But the Pharmacy Agreement at issue in *Royal Drug* was simply a *method* of reimbursing policyowners for medication expenses. The policyowners could obtain medication from participating pharmacies simply by paying the amount that otherwise would not be covered by the insurance plan. The pharmacies thus constituted nothing more than in-kind dispensers of insurance payments; they played no role whatsoever in the more fundamental process of assessing the validity of a claim and determining the amount to be paid. Peer review committees, which fulfill such a fundamental role, are thus quite unlike the arrangements considered by the Court in *Royal Drug*.

> "[W]e come squarely to the question of whether State regulation is adequate to handle insurance, or whether that business should be subject to the provisions of the antitrust laws. . . . A great number of fire-insurance companies have cooperated in mutual agreement—and of necessity—through the Southeastern Underwriters Association and rating bureaus, adjusting policy rates to risks, classifying insurable property either in co-insurance or in re-insurance, *making appraisals of losses*, and working out systems of inspection to improve protection against fires. All of this has been done with splendid success. It would be a pity indeed, after all these years, to have the government intervene. The business of insurance involves long contracts. The fidelity of performance of those contracts will not brook intervention." *Id.*, at 6530 (remarks of Rep. Satterfield) (emphasis added).

See also *id.*, at 6543 (remarks of Rep. Jennings); *id.*, at 6550–6551 (remarks of Rep. Ploeser).

The role of claims adjustment in the insurance relationship and the legislative history of the Act thus unmistakably demonstrate that claims settlement procedures such as petitioners' Peer Review Committee were to be accorded protection from the antitrust laws as the "business of insurance." Few practices followed by insurance companies today present a fairer or more efficient means of claims resolution than professional peer review committees. Insurance claimants seek reimbursement for virtually every form of medical treatment and care, and determining the reasonableness and necessity of such expenses requires the expertise of a practicing physician. Because the entire spectrum of human ailments are involved, the views of one physician are seldom sufficient; specialists from many fields of medicine must be consulted. Few if any insurance companies can afford to staff their claims settlement departments with such a broad range of physicians. The companies thus must either make less than

satisfactory claims determinations, or must turn to an outside group of experts such as petitioners' Committee.

Although the Court protests that its decision says nothing about petitioners' antitrust liability, there can be little doubt that today's decision will vastly curtail the peer review process. Few professionals or companies will be willing to expose themselves to possible antitrust liability through such activity. The Court thus not only misreads the McCarran-Ferguson Act and our prior precedents, but also eliminates an aspect of the American insurance industry which has long redounded to the benefit of insurance companies and policyholders alike.

FIDELITY FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. v. DE LA CUESTA ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 81-750. Argued April 28, 1982—Decided June 28, 1982

Section 5(a) of the Home Owners' Loan Act of 1933 (HOLA) empowers the Federal Home Loan Bank Board (Board), under such regulations as it may prescribe, to provide for the organization, operation, and regulation of federal savings and loan associations. Pursuant to this authorization, the Board issued a regulation providing that a federal savings and loan association "continues to have the power to include . . . in its loan instrument" a "due-on-sale" clause, *i. e.*, a provision that permits the association to declare the entire balance of the loan immediately due and payable if the property securing the loan is sold or otherwise transferred without the association's prior written consent. A preamble to the regulation stated that the due-on-sale practices of federal savings and loan associations shall be governed "exclusively by Federal law" and that the association "shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." Appellees each purchased California real property from one who had borrowed money from appellant Fidelity Federal Savings and Loan Association (Fidelity). The borrowers had given Fidelity deeds of trust on the property; each deed contained a due-on-sale clause. Fidelity, not having received prior notice of the purchases, proceeded to enforce the due-on-sale clauses to accelerate payment of the loans, and when they were not paid, instituted nonjudicial foreclosure proceedings. Each appellee then filed suit against Fidelity in California Superior Court, asserting that Fidelity's exercise of the due-on-sale clauses violated the principles announced in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970, which limited a lender's right to exercise such a clause to cases where the lender can demonstrate that the transfer of the property has impaired its security. The Superior Court consolidated the actions and granted Fidelity's motion for summary judgment on the ground that the Federal Government had totally occupied the regulation of federal savings and loan associations. The California Court of Appeal reversed, holding that *Wellenkamp* was controlling and that federal law had not expressly or impliedly pre-empted state due-on-sale law.

Held: The Board's due-on-sale regulation pre-empts conflicting state limitations on the due-on-sale practices of federal savings and loan associa-

tions, and thus bars application of the *Wellenkamp* rule to such associations. Pp. 152–170.

(a) The general principles governing pre-emption of state law that conflicts with federal law are not inapplicable here simply because real property is a matter of special concern to the States. And federal regulations have no less pre-emptive effect than federal statutes. Where Congress has empowered an administrator to promulgate regulations, regulations intended to pre-empt state law have that effect unless the administrator exceeded his statutory authority or acted arbitrarily. Pp. 152–154.

(b) The language of the Board's regulation and especially the preamble thereto clearly show the Board's intent to pre-empt the *Wellenkamp* doctrine. The conflict between that doctrine and the regulation does not evaporate because the regulation simply permits, but does not compel, federal savings and loan associations to include a due-on-sale clause in their contracts and to enforce that clause when the security property is transferred. While compliance with both the regulation and the *Wellenkamp* rule may not be a physical impossibility, that rule forbids a federal savings and loan association to enforce a due-on-sale clause at its option and deprives the association of the flexibility given it by the Board. The rule therefore creates an obstacle to the accomplishment of the regulation's purpose. Pp. 154–159.

(c) The Board acted within its statutory authority in issuing the pre-emptive due-on-sale regulation. Both the language and legislative history of the HOLA indicate that the Board was authorized to regulate the lending practices of federal savings and loan associations. Congress delegated power to the Board expressly for the purpose of creating and regulating these associations so as to ensure that they would remain financially sound and able to supply financing for home construction and purchase. Consistent with that purpose, the Board reasonably exercised its authority in promulgating the due-on-sale regulation. Pp. 159–170.

121 Cal. App. 3d 328, 175 Cal. Rptr. 467, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 171. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 172. POWELL, J., took no part in the consideration or decision of the case.

Ernest Leff argued the cause for appellants. With him on the briefs was *Andrew E. Katz*.

Robert E. Boehmer argued the cause for appellees. With him on the brief was *John D. Meyer.*

Deputy Solicitor General Shapiro argued the cause for the Federal Home Loan Bank Board et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Lee, Carter G. Phillips, Maud Mater, Gary S. Smuckler,* and *Marilyn Nathanson.**

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*Briefs of *amici curiae* urging reversal were filed by *Daniel J. Goldberg* and *Matthew G. Ash* for the American Savings and Loan League; and by *Aaron M. Peck, C. Steven McMurry, Michael R. Grzanka, G. Howden Fraser, Terry O. Kelly,* and *Daniel H. Willick* for the United States League of Savings Associations.

Briefs of *amici curiae* urging affirmance were filed for the State of Michigan et al. by *Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, *Harry G. Iwasko, Jr.,* and *Robert Ianni,* Assistant Attorneys General, *John Steven Clark,* Attorney General of Arkansas, and *Frederick K. Campbell,* Assistant Attorney General, *Robert Corbin,* Attorney General of Arizona, and *Anthony B. Ching,* Solicitor General, *J. D. MacFarlane,* Attorney General of Colorado, and *Marshall A. Snider,* Assistant Attorney General, *Carl R. Ajello,* Attorney General of Connecticut, *Tyrone C. Fahner,* Attorney General of Illinois, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, and *W. Robert Alderson,* First Deputy Attorney General, *James E. Tierney,* Attorney General of Maine, *Warren R. Spannaus,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi, *Michael T. Greely,* Attorney General of Montana, *Gregory H. Smith,* Attorney General of New Hampshire, *Jeff Bingaman,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Millard Rich,* Deputy Attorney General, and *John R. B. Matthis,* Special Deputy Attorney General, *Robert O. Wefald,* Attorney General of North Dakota, *William J. Brown,* Attorney General of Ohio, *Dave Frohnmayer,* Attorney General of Oregon, *Daniel R. McLeod,* Attorney General of South Carolina, *John J. Easton, Jr.,* Attorney General of Vermont, *Kenneth O. Eikenberry,* Attorney General of Washington, and *Bronson C. La Follette,* Attorney General of Wisconsin; for the Secretary of the Business, Transportation and Housing Agency of the State of California by *George Deukmejian,* Attorney General of California, *Arthur C. De Goede,* Assistant Attorney General, *Joseph M. O'Heron,* Deputy Attorney General, and *W. Gary Kurtz;* for the California Association of Realtors et al. by *John R.*

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JUSTICE BLACKMUN delivered the opinion of the Court.

At issue in this case is the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board (Board), permitting federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts. Appellees dispute both the Board's intent and its statutory authority to displace restrictions imposed by the California Supreme Court on the exercise of these clauses.

I

A

The Board, an independent federal regulatory agency, was formed in 1932 and thereafter was vested with plenary authority to administer the Home Owners' Loan Act of 1933 (HOLA), 48 Stat. 128, as amended, 12 U. S. C. § 1461 *et seq.* (1976 ed. and Supp. IV).[1] Section 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), empowers the Board,

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Hetland and *Charles A. Hansen;* for the Consumer's Committee to Protect Mortgage Rights by *Irwin M. Alterman;* for the Georgia Assocation of Realtors, Inc., by *E. Catherine Kimmel;* for the National Association of Realtors by *William D. North* and *Robert D. Butters;* and for Charles J. Bether et al. by *Peter J. Gregora, James M. Weinberg,* and *Robert L. Winslow.*

Bruce O. Jolly, Jr., filed a brief for the Credit Union National Association, Inc., as *amicus curiae.*

[1] The Board came into being under § 17 of the earlier Federal Home Loan Bank Act, 47 Stat. 736, as amended, 12 U. S. C. § 1437, the statute which created the federal home loan bank system. The three members of the Board are appointed by the President, with the advice and consent of the Senate, for 4-year terms. See note following 12 U. S. C. § 1437. In addition to providing for the establishment of federal savings and loan associations, the HOLA, by its § 3, 48 Stat. 129, repealed § 4(d) of the Federal Home Loan Bank Act, 47 Stat. 727, which had authorized federal home loan banks to make loans directly to homeowners. The HOLA, by its § 4, 48 Stat. 129, instructed the Board to create the Home Owners' Loan Corporation; this agency was to exchange its bonds for mortgages held by financial institutions, including state-chartered savings and loans, and to provide funds to needy homeowners for accrued taxes, maintenance, and repairs.

"under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations.'" Pursuant to this authorization, the Board has promulgated regulations governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 316 (SD Cal. 1951).

In 1976, the Board became concerned about the increasing controversy as to the authority of a federal savings and loan association to exercise a "due-on-sale" clause—a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred.[2] Specifi-

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[2] The due-on-sale clause used in many loan instruments is ¶ 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. Paragraph 17 appears in two of the deeds of trust at issue in this case and reads:

"17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, *Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable.* Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17 and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

"If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such

cally, the Board felt that restrictions on a savings and loan's ability to accelerate a loan upon transfer of the security would have a number of adverse effects: (1) that "the financial security and stability of Federal associations would be endangered if . . . the security property is transferred to a person whose ability to repay the loan and properly maintain the property is inadequate"; (2) that "elimination of the due on sale clause will cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally"; and (3) that "elimination of the due on sale clause will restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, by making such loans unsalable or causing them to be sold at reduced prices, thereby reducing the flow of new funds for residential loans, which otherwise would be available." 41 Fed. Reg. 6283, 6285 (1976). The Board concluded that "elimination of the due on sale clause will benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers." *Ibid.*

Accordingly, the Board issued a regulation in 1976 governing due-on-sale clauses. The regulation, now 12 CFR § 545.8–3(f) (1982),[3] provides in relevant part:

> "[A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instru-

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notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof." App. 50–51, 85–86 (emphasis added).

[3] The due-on-sale regulation was codified initially in 12 CFR § 545.6–11(f) (1980). See 44 Fed. Reg. 39108, 39149 (1979).

ment whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as [otherwise] provided in . . . this section . . . , exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract."

In the preamble accompanying final publication of the due-on-sale regulation, the Board explained its intent that the due-on-sale practices of federal savings and loans be governed "exclusively by Federal law." 41 Fed. Reg. 18286, 18287 (1976). The Board emphasized that "[f]ederal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." *Ibid.*[4]

B

Appellant Fidelity Federal Savings and Loan Association (Fidelity) is a private mutual savings and loan association chartered by the Board pursuant to § 5(a) of the HOLA. Fidelity's principal place of business is in Glendale, Cal. Ap-

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[4] Even before adopting the due-on-sale regulation, the Board had interpreted 12 CFR § 545.8-3(a) (1982)—a regulation promulgated in 1948 that requires all loan instruments to "provide for full protection to the Federal association"—as authorizing federal savings and loans to exercise due-on-sale provisions, despite any state law to the contrary, because such clauses help ensure "full protection" to the lender. See the Board's Advisory Opinion, Resolution No. 75-647, in *Schott* v. *Mission Federal Sav. & Loan Assn.* (*Schott* Advisory Opinion), No. Civ-75-366, pp. 13-15 (CD Cal. July 30, 1975), reprinted as Exhibit A to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction.

pellees, de la Cuesta, Moore, and Whitcombe, each made a purchase of California real property from one who had borrowed money from Fidelity. As security for the loan, the borrower had given Fidelity a deed of trust on the property. Each deed of trust contained a due-on-sale clause. Two of the deeds also included a provision, identified as ¶ 15, which stated that the deed "shall be governed by the law of the jurisdiction in which the Property is located." App. 51, 86.[5]

Fidelity was not notified prior to each appellee's purchase of property; when it did learn of the transfer, it gave notice of its intent to enforce the due-on-sale clause. Fidelity expressed a willingness to consent to the transfer, however, if the appellee agreed to increase the interest rate on the loan secured by the property to the then-prevailing market rate. Each appellee refused to accept this condition; Fidelity then exercised its option to accelerate the loan. When the loan was not paid, Fidelity instituted a nonjudicial foreclosure proceeding.

In response, each appellee filed suit in the Superior Court of California for Orange County. Each asserted that, under the principles announced by the California Supreme Court in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d

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[5] Paragraph 15 is also part of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. See n. 2, *supra*. The paragraph reads in full:

"15. Uniform Deed of Trust; Governing Law; Severability. This form of deed of trust combines uniform covenants for national use and nonuniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Deed of Trust or the Note conflicts with applicable law, such conflicts shall not affect other provisions of this Deed of Trust or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Deed of Trust and the Note are declared to be severable." App. 51–52, 86–87.

970 (1978), Fidelity's exercise of the due-on-sale clause violated California's prohibition of unreasonable restraints on alienation, Cal. Civ. Code Ann. § 711 (West 1982), "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." 21 Cal. 3d, at 953, 582 P. 2d, at 977. Each complaint sought (1) a judicial declaration that the due-on-sale clause was not enforceable unless Fidelity first showed that the transfer had harmed its security interest, (2) an injunction against any foreclosure procedures based on the clause, and (3) compensatory and punitive damages. App. 5, 49, 84.[6]

The Superior Court consolidated the three actions and granted appellants' motion for summary judgment. The court explained that "the federal government has totally occupied the subject of regulation of Federal Savings and Loans," and held, therefore, that the decision in *Wellenkamp* "cannot be extended to [federal] savings and loans." App. to Juris. Statement 29a.

The Court of Appeal for the Fourth Appellate District, however, reversed that judgment. In an opinion that adopted substantial portions of a parallel ruling by the Court of Appeal for the First Appellate District, it concluded that the California Supreme Court's opinion in *Wellenkamp* was controlling. 121 Cal. App. 3d 328, 331, 175 Cal. Rptr. 467, 468 (1981), quoting *Panko* v. *Pan American Federal Sav. & Loan Assn.*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981), cert. pending, No. 81-922. The court found that Congress had neither expressed an intent to pre-empt state due-on-sale law nor fully occupied the field of federal savings and loan regulation; for example, the court pointed out, federal associations traditionally have been governed by state real prop-

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[6] Each complaint also included a slander count, alleging that Fidelity had maliciously published false charges that the appellee was in default under the deed of trust. App. 9, 54, 89.

erty and mortgage law with respect to title, conveyancing, recording, priority of liens, and foreclosure proceedings.

The Court of Appeal likewise rejected appellants' contention that the Board's 1976 regulation expressly had preempted the *Wellenkamp* doctrine. Although the court recognized that the preamble accompanying 12 CFR § 545.8-3(f) (1982) manifested the Board's intent that its due-on-sale regulation supersede conflicting state law, it refused to "equate the *Board's* expression of intent with the requisite *congressional* intent." 121 Cal. App. 3d, at 339, 175 Cal. Rptr., at 474 (emphasis in original).[7]

Finally, the Court of Appeal found no evidence that federal law impliedly had pre-empted state law, reasoning that California's due-on-sale law was not incompatible with federal law. The *Wellenkamp* doctrine, the court observed, "is a substantive rule of California property and mortgage law," and not a form of "regulation" over federal savings and loans. 121 Cal. App. 3d, at 341, 175 Cal. Rptr., at 474. Moreover, the court noted, the Board's regulation "merely authorizes and does not compel savings and loan associations to include a due-on-sale clause in their loan contracts and to exercise their rights thereunder." *Ibid.*, 175 Cal. Rptr., at 475. The Court of Appeal likewise discovered no conflict between the *Wellenkamp* doctrine and the purposes of the HOLA because both were designed to assist financially distressed homeowners.

The court derived "further support," 121 Cal. App. 3d, at 342, 175 Cal. Rptr., at 475, for its decision from ¶ 15, which was included in two of the deeds of trust and which provided that the deeds would be "governed by the law of the jurisdic-

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[7] In addition, the Court of Appeal noted that two of the three deeds of trust at issue were executed prior to the effective date of § 545.8-3(f). Therefore, the court reasoned, the Board's due-on-sale regulation was not applicable to those loan instruments and could not pre-empt state law with respect to those deeds. See 121 Cal. App. 3d, at 344, 345, 175 Cal. Rptr., at 476–477.

tion in which the Property is located." See n. 5, *supra*. That language, the court ruled, evinced an unmistakable intent that state law should govern the interpretation, validity, and enforcement of the deeds.[8]

The California Supreme Court denied appellants' petition for review. App. to Juris. Statement 28a.

Because the majority of courts to consider the question have concluded, in contrast to the decision of the Court of Appeal, that the Board's regulations, including § 545.8–3(f), do pre-empt state regulation of federal savings and loans,[9] we noted probable jurisdiction. 455 U. S. 917 (1982).

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[8] The Court of Appeal refused to ascribe any weight to the absence of ¶ 15 in the third deed of trust at issue here. The court described its earlier discussion of ¶ 15 as

"not based so much on an agreement between the parties for the application of state law as on the conclusion that the general use of a provision containing such language by federal savings and loan associations with the approval of the Board persuasively evidences a recognition by the Board and federal savings and loan associations that state law would govern the interpretation, validity and enforcement of security instruments." 121 Cal. App. 3d, at 346, 175 Cal. Rptr., at 477.

Nor did the court find significant the fact that this deed covered commercial rather than residential property.

[9] A number of Federal District Courts have concluded that the Board's due-on-sale regulation pre-empts state law. See, *e.g.*, *Price* v. *Florida Federal Sav. & Loan Assn.*, 524 F. Supp. 175, 178 (MD Fla. 1981) (§ 545.8–3(f) is pre-emptive of any state regulation); *First Federal Sav. & Loan Assn.* v. *Peterson*, 516 F. Supp. 732, 740 (ND Fla. 1981) (§ 545.8–3(f) pre-empts Florida due-on-sale restrictions similar to those imposed by California); *Dantus* v. *First Federal Sav. & Loan Assn.*, 502 F. Supp. 658, 661 (Colo. 1980) (analogous ruling with respect to Colorado law); *Bailey* v. *First Federal Sav. & Loan Assn.*, 467 F. Supp. 1139, 1141 (CD Ill. 1979), appeal dism'd, 636 F. 2d 1221 (CA7 1980) (§ 545.8–3(f) forecloses any state regulation of due-on-sale practices of federal savings and loans); *Glendale Federal Sav. & Loan Assn.* v. *Fox*, 459 F. Supp. 903, 907 (CD Cal. 1978), final summary judgment granted, 481 F. Supp. 616 (1979), order reversing and remanding, 663 F. 2d 1078 (CA9 1981), cert. pending, No. 81–1192 (same). One court appears to have agreed with the California Court of Appeal. See *Holiday Acres No. 3* v. *Midwest Federal Sav. & Loan Assn.*,

II

The pre-emption doctrine, which has its roots in the Supremacy Clause, U. S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either

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308 N. W. 2d 471 (Minn. 1981) (§ 545.8–3(f) does not pre-empt state regulation of due-on-sale clauses).

In addition, at least three Federal Courts of Appeals, several District Courts, and one State Supreme Court have ruled that various other Board regulations supersede state law. See, *e. g.*, *Conference of Federal Sav. & Loan Assns.* v. *Stein*, 604 F. 2d 1256, 1260 (CA9 1979), summarily aff'd, 445 U. S. 921 (1980) ("In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control"); *First Federal Sav. & Loan Assn.* v. *Greenwald*, 591 F. 2d 417, 425–426 (CA1 1979) (Board regulation specifying the conditions under which federal savings and loans must pay interest on escrow accounts pre-empts state law imposing greater interest requirements); *Kupiec* v. *Republic Federal Sav. & Loan Assn.*, 512 F. 2d 147, 150–152 (CA7 1975) (Board regulation supersedes any common law right to inspect savings and loan's membership list); *Meyers* v. *Beverly Hills Federal Sav. & Loan Assn.*, 499 F. 2d 1145, 1147 (CA9 1974) (Board regulation pre-empts the field of prepayments of real estate loans to federal associations); *Rettig* v. *Arlington Heights Federal Sav. & Loan Assn.*, 405 F. Supp. 819 (ND Ill. 1975) (Board regulations and policy statements pre-empt the field of fiduciary duties of federal savings and loan officers); *Lyons Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 377 F. Supp. 11 (ND Ill. 1974) (Board regulation displaces state law regarding branching of federal savings and loans); *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 318 (SD Cal. 1951) (federal regulation of savings and loans pre-empts the field); *Kaski* v. *First Federal Sav. & Loan Assn.*, 72 Wis. 2d 132, 141–142, 240 N. W. 2d 367, 373 (1976) (federal law supersedes state regulation of federal savings and loans' lending practices). But see *Derenco, Inc.* v. *Benjamin Franklin Federal Sav. & Loan Assn.*, 281 Ore. 533, 577 P. 2d 477, cert. denied, 439 U. S. 1051 (1978) (Board regulation authorizing federal savings and loans to maintain reserve accounts for tax and insurance payments does not occupy the field of reserve accounts or pre-empt state law requiring payment of interest on such accounts). Cf. *Gulf Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981), cert. pending, No. 81–1744 (Board has authority only over internal management of federal savings and loans, and not over disputed loan agreement provisions).

express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See also *Jones* v. *Rath Packing Co.*, 430 U. S., at 526; *Bethlehem Steel Co.* v. *New York Labor Relations Bd.*, 330 U. S. 767, 773 (1947). These principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U. S. 663, 666 (1962); see also *Ridgway* v. *Ridgway*, 454 U. S. 46, 54–55 (1981).

Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to

judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. *United States* v. *Shimer*, 367 U. S. 374, 381–382 (1961). When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited:

> "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.*, at 383.

See also *Blum* v. *Bacon*, 457 U. S. 132, 145–146 (1982); *Ridgway* v. *Ridgway*, 454 U. S., at 57 (regulations must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute); *Free* v. *Bland*, 369 U. S., at 668.

A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive. See *United States* v. *Shimer*, 367 U. S., at 381–383. Thus, the Court of Appeal's narrow focus on Congress' intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

III

As even the Court of Appeal recognized, the Board's intent to pre-empt the *Wellenkamp* doctrine is unambiguous. The due-on-sale regulation plainly provides that a federal savings and loan "continues to have the power" to include a due-on-sale clause in a loan instrument and to enforce that clause "at its option." 12 CFR § 545.8-3(f) (1982). The California courts, in contrast, have limited a federal association's right

to exercise a due-on-sale provision to those cases where the lender can demonstrate that the transfer has impaired its security.

The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances." 12 CFR §556.9(f)(1) (1982).[10] Although compliance with both §545.8–3(f) and the *Wellenkamp* rule may not be "a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142–143, the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.

Moreover, the Board recently has "reiterat[ed] its longstanding policy" of authorizing federal savings and loan associations to enforce due-on-sale clauses "subject only to express limitations imposed by the Board." 46 Fed. Reg. 39123, 39124 (1981). The only restrictions specified in the Board's regulation are contained in 12 CFR §545.8–3(g) (1982).[11] That provision, unlike the *Wellenkamp* doctrine,

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[10] As a practical matter, however, few mortgage instruments are written without due-on-sale clauses. The Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which purchase the bulk of mortgages sold in the secondary mortgage market, both require, in the mortgages they buy, either a due-on-sale clause or a provision enabling the lender to demand payment of the loan in seven years. The marketability of a mortgage in the secondary market is critical to a savings and loan, for it thereby can sell mortgages to obtain funds to make additional home loans. See *Schott* Advisory Opinion, at 28–34; Kinzler, Due-on-Sale Clauses: The Economic and Legal Issues, 43 U. Pitt. L. Rev. 441, 452–453 (1982); Comment, 9 Fla. State L. Rev. 645, 646, 650 (1981).

[11] Title 12 CFR § 545.8–3(g) (1982), which applies to loans made after July 31, 1976, and secured by a home occupied or to be occupied by the borrower, prohibits the exercise of a due-on-sale clause in the same four

does not confine a federal association's right to accelerate a loan to cases where the lender's security is impaired. In addition, *Wellenkamp* explicitly bars a federal savings and loan from exercising a due-on-sale clause to adjust a long-term mortgage's interest rate towards current market rates—a due-on-sale practice the Board has approved and views as critical to "the financial stability of the association." See *Schott* Advisory Opinion, at 27.

By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created "an obstacle to the accomplishment and execution of the full purposes and objectives" of the due-on-sale regulation. *Hines* v. *Davidowitz*, 312 U. S., at 67. Cf. *Franklin Nat. Bank* v. *New York*, 347 U. S. 373, 378 (1954) (finding a "clear conflict" between federal law, which authorized national banks to receive savings deposits but did not specifically permit—much less require—advertising by such banks, and New York law, which forbade them to use the word "savings" in their advertising or business).

Contending that the *Wellenkamp* doctrine is not inconsistent with the due-on-sale regulation, however, appellees point to the regulation's second sentence, which provides in pertinent part:

> "[E]xercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and rem-

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circumstances listed in ¶ 17 of the uniform mortgage instrument, see n. 2, *supra:* when a lien subordinate to the lender's security instrument is created; when a purchase money security interest for household appliances is created; when a transfer occurs by devise, descent, or operation of law on the death of a joint tenant; or when a leasehold interest of not more than three years is granted with no option to purchase. Section 545.8–3(g) also bars the association from imposing a prepayment penalty when a loan is accelerated by means of a due-on-sale clause, and provides that, under specified circumstances, the lender waives its option to exercise a due-on-sale provision.

edies of the association and borrower shall be fixed and governed by that contract." 12 CFR § 545.8–3(f) (1982).

Appellees interpret this language as incorporating state contract law—and therefore any state law restricting the exercise of a due-on-sale clause. We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein* v. *Lynham*, 100 U. S. 483, 490 (1880). See also *Testa* v. *Katt*, 330 U. S. 386, 390–392 (1947).[12] Moreover, in our view, the second sentence of § 545.8–3(f) simply makes clear that the regulation does not empower federal savings and loans to accelerate a loan upon transfer of the security property unless the parties to the particular loan instrument, as a matter of contract, have given the lender that right. Similarly, if the parties to a given contract agree somehow to limit the association's right to exercise a due-on-sale provi-

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[12] This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶ 15, see n. 5, *supra*, appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the "law of the jurisdiction" in which the property is located; but the "law of the jurisdiction" includes federal as well as state law.

Moreover, like ¶ 17—the due-on-sale clause in the uniform mortgage instrument, see n. 2, *supra*—¶ 15 typically must be included in any mortgage the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association purchases in the secondary mortgage market. See n. 10, *supra*. Paragraph 15 was added to the uniform mortgage instrument not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage. See App. to Brief for Federal Home Loan Bank Board and Federal Home Loan Mortgage Corporation as *Amici Curiae* 2a (letter from Henry L. Judy, General Counsel, Federal Home Loan Mortgage Corporation); see also S. Rep. No. 91–761, p. 25 (1970) (letter from Arthur F. Burns, Chairman of the Board of Governors, Federal Reserve System).

sion, the second sentence of § 545.8–3(f) precludes the lender from relying on the first sentence as authorizing more expansive use of the clause.

Any ambiguity in § 545.8–3(f)'s language is dispelled by the preamble accompanying and explaining the regulation. The preamble unequivocally expresses the Board's determination to displace state law:

> "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed *exclusively* by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled *solely* by [§ 545.8–3] and the Board's new Statement of Policy. *Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements,* nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in [§ 545.8–3(g)] on the ground that such . . . avoidance of limitations is permissible under State law." 41 Fed. Reg. 18286, 18287 (1976) (emphasis added).[13]

In addition, the Board recently has "confirm[ed]" that the due-on-sale practices of federal savings and loans "shall be governed exclusively by the Board's regulations in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise." 12 CFR

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[13] Citing *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 315–316 (1979), appellees characterize the preamble as an interpretative regulation that does not have the binding force of law and therefore cannot pre-empt state law. But *Chrysler Corp.* is not on point because we conclude that § 545.8–3(f) itself supersedes contrary state due-on-sale law; we look to the preamble only for the administrative construction of the regulation, to which "deference is . . . clearly in order." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). We need not consider, therefore, the pre-emptive effect of the preamble standing alone.

§ 556.9(f)(2) (1982). Thus, we conclude that the Board's due-on-sale regulation was meant to pre-empt conflicting state limitations on the due-on-sale practices of federal savings and loans, and that the California Supreme Court's decision in *Wellenkamp* creates such a conflict.[14]

IV

The question remains whether the Board acted within its statutory authority in issuing the pre-emptive due-on-sale regulation. The language and history of the HOLA convince us that Congress delegated to the Board ample authority to regulate the lending practices of federal savings and loans so as to further the Act's purposes, and that § 545.8–3(f) is consistent with those purposes.

A

The HOLA, a product of the Great Depression of the 1930's, was intended "to provide emergency relief with respect to home mortgage indebtedness" at a time when as many as half of all home loans in the country were in default. H. R. Conf. Rep. No. 210, 73d Cong., 1st Sess., 1 (1933). See 77 Cong. Rec. 2499 (1933) (remarks of Rep. Hancock); *id.*, at 2570 (remarks of Rep. Reilly); Home Owners' Loan Act: Hearings on S. 1317 Before a Subcommittee of the Senate Committee on Banking and Currency 9 (1933) (Senate Hearings) (statement of Horace Russell, one of the drafters of the bill and General Counsel, Federal Home Loan Bank Board, Atlanta, Ga.). Local institutions that had previously supplied funds to finance homes had ceased doing business or had discontinued such long-term loans, so that more than half the counties in the country, containing almost one-fifth of the

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[14] Because we find an actual conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation.

total population, were without home-financing institutions. See *id.*, at 7, 19; see also H. R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933); S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); Home Owners' Loan Act: Hearings on H. R. 4980 Before the House Committee on Banking and Currency 16–17 (April 20, 1933) (House Hearings) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board); Comment, 11 Pac. L. J. 1085, 1103 (1980) (by 1933, 1,700 state-chartered savings and loans had failed, causing losses of some $200 million, about one-third the value of savings in these associations).

In order to ameliorate these conditions, Congress enacted the HOLA, "a radical and comprehensive response to the inadequacies of the existing state systems." *Conference of Federal Sav. & Loan Assns.* v. *Stein*, 604 F. 2d 1256, 1257 (CA9 1979), summarily aff'd, 445 U. S. 921 (1980). The Act provided for the creation of a system of federal savings and loan associations, which would be regulated by the Board so as to ensure their vitality as "permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors." S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); see also H. R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933); 77 Cong. Rec. 4974 (1933) (remarks of Sen. Bulkley).

Thus, in § 5(a) of the Act, Congress gave the Board plenary authority to issue regulations governing federal savings and loans:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, *operation*, and *regulation* of associations to be known as 'Federal Savings and Loan Associations', or 'Federal mutual savings banks' . . . , and to issue charters there-

for, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U. S. C. § 1464(a)(1) (1976 ed., Supp. IV) (emphasis added).

The broad language of § 5(a) expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans. As one court put it, "[i]t would have been difficult for Congress to give the Bank Board a broader mandate." *Glendale Federal Sav. & Loan Assn.* v. *Fox*, 459 F. Supp. 903, 910 (CD Cal. 1978), final summary judgment granted, 481 F. Supp. 616 (1979), order reversing and remanding, 663 F. 2d 1078 (CA9 1981), cert. pending, No. 81-1192. And Congress' explicit delegation of jurisdiction over the "operation" of these institutions must empower the Board to issue regulations governing mortgage loan instruments, for mortgages are a central part of any savings and loan's "operation." See *Schott* Advisory Opinion, at 21; House Hearings 16 (Apr. 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board) ("We are loaning [savings associations] seven million dollars a week and they are lending it pretty largely on homes of the type contemplated in the Act"); Tr. of Oral Arg. 4 (approximately 78% of savings and loan associations' assets are invested in mortgage loan contracts).

Moreover, Congress directed that, in regulating federal savings and loans, the Board consider "the best practices of local mutual thrift and home-financing institutions in the United States," which were at that time all state-chartered. § 5(a) of the HOLA, 12 U. S. C. § 1464(a). By so stating, Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular State—deemed to be the "best practices." See also *First Federal Sav. & Loan Assn.* v. *Massachusetts Tax Comm'n*, 437 U. S. 255, 258, n. 3 (1978) (observing that the HOLA "protects federal associations from being forced into the state

regulatory mold"). Thus, the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law.

Appellees, however, point to the various sections of the HOLA explicitly pre-empting[15] and incorporating[16] state law, and contend that the Board has no additional authority to adopt regulations displacing state law. Although Congress made decisions about the applicability of certain aspects of state law to federal savings and loans, these provisions do not imply that Congress intended no further pre-emption of state law. Rather, Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law. § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV). We cannot read this broad delegation of power as confining the Board's authority to pre-empt state law to those areas "specifically described by the Act's other provisions." *United*

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[15] See § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (exempting federal mutual savings banks formerly organized under state law from "any numerical limitations of State law on the establishment of branch offices and other facilities"); and § 5(h) of the Act, § 1464(h) (pre-empting state taxes on federal savings and loans greater than those imposed on "other similar local mutual or cooperative thrift and home financing institutions"). Cf. § 13 of the Federal Home Loan Bank Act, 12 U. S. C. § 1433 (exempting Federal Home Loan Bank bonds from taxation).

[16] See § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (providing that any federal mutual savings bank which was formerly a state-chartered institution is subject to state laws pertaining to discrimination in lending based on neighborhood or geographic area, and to requirements imposed under the Consumer Credit Protection Act, 15 U. S. C. § 1601 *et seq.*); § 5(b)(3) of the Act, § 1464(b)(3) (1976 ed., Supp. IV) (authorizing federal savings and loans to borrow funds from a state mortgage finance agency "to the same extent as" state law permits state-chartered savings and loans to do so); and § 5(c)(4)(A) of the Act, § 1464(c)(4)(A) (1976 ed., Supp. IV) (permitting federal associations to invest in, or lend to, any business development credit corporation incorporated in the State "to the same extent as" state-chartered savings and loans are authorized to do so).

States v. *Southwestern Cable Co.*, 392 U. S. 157, 172 (1968); see also *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 193–194 (1941).

Furthermore, if federal savings and loans were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive. We decline to construe the Act so as to render these provisions nugatory, "thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 513 (1981). See also *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307–308 (1961); cf. *Franklin Nat. Bank* v. *New York*, 347 U. S., at 378 ("We find no indication that Congress intended to make this phase of national banking [*i. e.*, advertising] subject to local restrictions, as it has done by express language in several other instances").[17]

B

Because of the exigencies of the times, the HOLA was enacted hurriedly and its legislative history, concededly, is somewhat sparse.[18] But that history does confirm our read-

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[17] Likewise, we find nothing in § 8 of the Federal Home Loan Bank Act of 1932, 12 U. S. C. § 1428, relied on by the dissent, see *post*, at 173, that suggests any limit on the Board's authority to issue regulations pre-empting state law. That provision, which is not even part of the HOLA, speaks only to the Board's authority to examine state laws governing the operation of federal home loan banks, not federal savings and loans, for the purpose of ensuring "[a]dequate protection to a Federal Home Loan Bank in making or collecting advances under th[at] chapter . . . ." 12 U. S. C. § 1428. It does not purport to constrict the Board's power to regulate the operations of federal savings and loans and does not negate the explicit language and history of the HOLA.

[18] On April 13, 1933, President F. D. Roosevelt wrote Congress, asking for "legislation to protect small home owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power." H. R. Doc. No. 19, 73d Cong., 1st Sess., 1 (1933). Hearings were held by the House Committee on Banking and Currency on April 20

ing of the statutory language and the Board's plenary authority to regulate the operations of federal savings and loans. Attempting to provide for the "relief of the man who is about to lose his home," Congress set out the general framework and left many of the details to the Board. House Hearings 13 (Apr. 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board). Thus, references to the Board's broad discretion to regulate the newly created federal savings and loans appear throughout the legislative history. Nowhere is there a suggestion of any intent somehow to limit the Board's authority.

Chairman Stevenson's testimony during the HOLA hearings suggests that the Act contemplated that federal law would govern the terms of the loan instruments used by federal savings and loans. Discussing § 5(c) of the HOLA, as amended, 12 U. S. C. § 1464(c), Representative Hancock noted: "You are departing from uniformity with respect to loan associations throughout the United States when you say that the thrift associations cannot loan on a piece of real estate in excess of $20,000." House Hearings 14 (Apr. 21, 1933). The Chairman replied: "That may be true. We are departing in a good many ways. We have a good many [thrift associations] that are in dire straits because they have loaned on property way up yonder in value, and they have their money tied up in hotels, apartment houses and things of that kind, which puts them in a desperate situation." *Ibid.*

Similarly, in response to concern expressed during the Senate hearings that the Act did not prohibit borrowers from obtaining financing and then renting the property, Chairman Stevenson observed: "That would be a matter of regulation. That could be covered by regulation under the bill." Senate

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and 21, 1933, and by the Senate Committee on Banking and Currency on April 20 and 22. The bill was approved by the House on April 28, see 77 Cong. Rec. 2585, and passed the Senate on June 5, see *id.*, at 4995. The President signed the bill into law on June 9, 1933, see *id.*, at 6198, less than two months after he had first requested the legislation.

Hearings 14. Asked whether the Board would have authority to promulgate such a regulation, Stevenson replied:

> "If the Federal Home Loan Bank Board should choose to make that kind of a regulation it could put that in. A great many of these local private institutions would put that kind of a clause in their loans." *Ibid.*

See also House Hearings 5 (Apr. 20, 1933) (statement of Chairman Stevenson) (referring to "the regulations as to the use of the property after the loan is once obtained"); *id.*, at 9 (Apr. 21, 1933) (statement of Mr. Stevenson) ("[I]t is in the discretion of the Board when it will grant [a three-year] extension [of loan payments]"); *id.*, at 18–19 (colloquy between Mr. Stevenson and Rep. Reilly) (noting that the Board has discretion in determining whether to charter a federal association).

The subsequent debates confirm that Congress accepted Chairman Stevenson's offer and furnished the Board with broad power to regulate the federal savings and loans. Thus, Representative Luce, ranking minority member of the House Committee on Banking and Currency, observed that the federal savings and loan associations "will be formed in accordance with the best building-and-loan practice, and I feel sure we may rely upon [Chairman Stevenson] and his Board to carry out that promise." 77 Cong. Rec. 2480 (1933). "It is contemplated by the bill before us to put the machinery in the hands of the Home Loan Bank Board," and "[w]e give the board great power to administer the act," Representative Luce continued. *Id.*, at 2480, 2481. See also *id.*, at 2481 ("We leave such things [as limitations on conversion of federal home loan banks to federal savings and loans] to the judgment of the board"); *id.*, at 2501 ("The prudent course is to leave this to the judgment of the board, by imposing a maximum [rate of interest] in the bill—4 percent upon what we borrow, 5 percent upon what we lend—and trust this Board . . . to get lower rates for borrowing or make

lower rates for lending as the opportunity may come"); *id.*, at 4987 (colloquy between Sens. Hebert and Bulkley) (observing that the Board has discretion in determining when savings and loans should be chartered in areas with existing local thrift institutions).

Thus, the HOLA did not simply incorporate existing local loan practices. Rather, Congress delegated to the Board broad authority to establish and regulate "a uniform system of [savings and loan] institutions where there are not any now," and to "establish them with the force of the government behind them, with a national charter." House Hearings 15 (Apr. 21, 1933) (statement of Chairman Stevenson); *id.*, at 17 (Apr. 20, 1933).[19] And the Board has exercised

[19] The postenactment history of the HOLA corroborates the Board's broad authority to regulate the lending practices of federal savings and loans. As part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641, Congress amended § 5(a) of the HOLA to permit state mutual savings banks to obtain federal charters. During debate in the House, Representative Hanley introduced an amendment providing that those mutual savings banks opting to convert to federally chartered institutions would continue to be subject to state law pertaining to lending discrimination and to regulations imposed under the Consumer Credit Protection Act, 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*, if the Board determined that state law imposed more stringent requirements than federal law. See 124 Cong. Rec. 33847 (1978).

Representative Hanley explained: "In no way, of course, would the use of State law requirements for Federal mutual savings banks be interpreted to erode the Bank Board's long-standing plenary authority over Federal savings and loan associations; Federal law alone would continue to govern these institutions in such areas as branching, anti-discrimination, and lending authority." *Id.*, at 33848. Representative St Germain, chairman of the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the House Committee on Banking, Finance, and Urban Affairs and chief sponsor of the bill, agreed: "This restriction applies only to converted mutual savings banks, and Congress in no way intends to interfere with the longstanding, all-inclusive power of the Bank Board over the activities of Federal savings and loan associations, including branching authority." *Id.*, at 33849. The amendment was agreed to. *Ibid.*

Similar views were expressed during the Senate debate on the bill. Senator Brooke observed that "we do not intend to interfere with the Bank

that discretion, regulating comprehensively the operations of these associations, including their lending practices and, specifically, the terms of loan instruments.[20]

C

As we noted above, a savings and loan's mortgage lending practices are a critical aspect of its "operation," over which the Board unquestionably has jurisdiction. Although the Board's power to promulgate regulations exempting federal savings and loans from the requirements of state law may not be boundless, in this case we need not explore the outer limits of the Board's discretion. We have no difficulty concluding that the due-on-sale regulation is within the scope of the Board's authority under the HOLA and consistent with the Act's principal purposes.

Board's plenary authority over Federal savings and loan associations, and in this area, Federal law alone would continue to govern." *Id.*, at 36148.

Then, during debate in the House on the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96–221, 94 Stat. 132, one Congressman expressed concern that permitting federal savings and loans to make residential real estate loans to the same extent national banking associations were authorized to do so might be interpreted as making "federal savings and loans . . . subject to State requirements." 126 Cong. Rec. 6981 (1980) (remarks of Rep. Patterson). Representative St Germain responded that the Act would expand the federal associations' investment powers "[o]nly if the Federal Home Loan Bank Board permits. Under the Home Owners' Act, the Bank Board has complete authority to determine by regulation the lending practices of Federal associations." *Ibid.*

Although these postenactment events cannot be accorded the weight of contemporary history, they do provide further confirmation of Congress' intent to delegate to the Board broad discretion in regulating the lending practices of federal savings and loans. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969).

[20] The Board's extensive regulations govern, for example, fair credit requirements, the types and amount of loans, collateral required, repayment schedules, initial loan charges, assignment of rents, escrow accounts and interest paid on those accounts, late charges, servicing of loans, and loan payments and prepayments. See 12 CFR §§ 545.6, 545.8 (1982).

Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase. Thus, in testifying during the House hearings on the HOLA, the Board's Chairman observed: "The new corporations that we propose to set up, we want them set up on a sound basis as they will be of very material assistance in home financing for all time, if properly managed." House Hearings 12 (Apr. 21, 1933). And the relevant House and Senate Reports referred to the federal associations as "permanent" institutions. S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); H. R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933).

The due-on-sale regulation was promulgated with these purposes in mind. The Board has determined that due-on-sale clauses are "a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments." 12 CFR § 556.9(f)(1) (1982). Specifically, the Board has concluded that the due-on-sale clause is "an important part of the mortgage contract" and that its elimination "will have an adverse [e]ffect on the earning power and financial stability of Federal associations, will impair the ability of Federal associations to sell their loans in the secondary markets, will reduce the amount of home-financing funds available to potential home buyers, and generally will cause a rise in home loan interest rates." *Schott* Advisory Opinion, at 2, 17–18.

The Board's analysis proceeds as follows: It observes that the federal associations' practice of borrowing short and lending long—obtaining funds on a short-term basis and investing them in long-term real estate loans, which typically have a 25- to 30-year term—combined with rising interest rates, has increased the cost of funds to these institutions and reduced their income. Exercising due-on-sale clauses enables savings and loans to alleviate this problem by replacing long-

term, low-yield loans with loans at the prevailing interest rates and thereby to avoid increasing interest rates across the board. See *id.*, at 21–22. Moreover, the Board has determined that restrictions like the *Wellenkamp* doctrine lengthen the expected maturity date of a lender's mortgages, thus reducing their marketability in the secondary mortgage market. As a result, the Board fears, "the financial stability of Federal associations in California will be eroded and the flow of home loan funds into California will be reduced." *Id.*, at 34.[21]

Admittedly, the wisdom of the Board's policy decision is not uncontroverted.[22] But neither is it arbitrary or capricious. As judges, it is neither our function, nor within our

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[21] The Board's Due-on-Sale Task Force estimates that the California Supreme Court's restrictions on the exercise of due-on-sale clauses accounted for 40% of the total losses suffered in 1981 by state-chartered associations in the State—some $200 million. See Federal Home Loan Bank Board, Due-on-Sale Task Force Report 2, 15 (1982). The Task Force projects that imposition of such restrictions nationwide would create, within two years, annual losses of $600 to $800 million for federal savings and loans, and $1 to $1.3 billion for all federal and state associations. See *id.*, at 2, 18, 25.

[22] Those subscribing to the opposite view contend that the unrestricted exercise of due-on-sale clauses may preclude the assumption of mortgages at lower interest rates, thus preventing the sale of homes and transferring the burden of an inflationary market from the lender to the homeowner and prospective homeowner. See, *e. g.*, *Patton* v. *First Federal Sav. & Loan Assn.*, 118 Ariz. 473, 578 P. 2d 152 (1978); *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970 (1978); *Nichols* v. *Ann Arbor Federal Sav. & Loan Assn.*, 73 Mich. App. 163, 250 N. W. 2d 804 (1977).

A number of courts, however, have agreed with the Board's approach. See, *e. g.*, *Williams* v. *First Federal Sav. & Loan Assn.*, 651 F. 2d 910 (CA4 1981); *Tierce* v. *APS Co.*, 382 So. 2d 485 (Ala. 1979); *Malouff* v. *Midland Federal Sav. & Loan Assn.*, 181 Colo. 294, 509 P. 2d 1240 (1973); *Martin* v. *Peoples Mutual Sav. & Loan Assn.*, 319 N. W. 2d 220 (Iowa 1982); *Occidental Savings & Loan Assn.* v. *Venco Partnership*, 206 Neb. 469, 293 N. W. 2d 843 (1980); *Crockett* v. *First Federal Sav. & Loan Assn.*, 289 N. C. 620, 224 S. E. 2d 580 (1976); *Gunther* v. *White*, 489 S. W. 2d 529 (Tenn. 1973).

expertise, to evaluate the economic soundness of the Board's approach. In promulgating the due-on-sale regulation, the Board reasonably exercised the authority, given it by Congress, so as to ensure the financial stability of "local mutual thrift institutions in which people . . . invest their funds and . . . [which] provide for the financing of homes." § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV).[23] By so doing, the Board intended to pre-empt conflicting state restrictions on due-on-sale practices like the California Supreme Court's *Wellenkamp* doctrine.

Our inquiry ends there. Accordingly, we hold that the Board's due-on-sale regulation bars application of the *Wellenkamp* rule to federal savings and loan associations.[24] The judgment of the Court of Appeal is reversed.

It is so ordered.

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[23] We therefore reject appellees' contention that the Board's power to regulate federal savings and loans extends only to the associations' internal management and not to any external matters, such as their relationship with borrowers. Although one federal and one state court have drawn this distinction, see *Gulf Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981), cert. pending, No. 81-1744; *Holiday Acres No. 3* v. *Midwest Federal Sav. & Loan Assn.*, 308 N. W. 2d, at 478, we find no support in the language of the HOLA or its legislative history for such a restriction on the Board's authority.

Moreover, whatever validity the distinction has in theory, it makes little sense here. As the Wisconsin Supreme Court recognized, "[t]he regulation of loan practices directly affects the internal management and operations of federal associations and therefore requires uniform federal control." *Kaski* v. *First Federal Sav. & Loan Assn.*, 72 Wis. 2d, at 142, 240 N. W. 2d, at 373. In fact, as discussed in the text, the Board's due-on-sale policy is based on the view that due-on-sale clauses are essential to the financial soundness of federal savings and loans; preservation of the associations' very existence is obviously related to their internal management and is one of the functions delegated to the Board by Congress.

[24] Pointing out that two of the deeds of trust were executed prior to the 1976 effective date of § 545.8-3(f), appellees argue that the due-on-sale regulation may not be applied so as to destroy vested rights. Therefore, appellees reason, California law does not conflict with federal law with respect to those two deeds. Appellants respond that § 545.8-3(f) did not in-

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE O'CONNOR, concurring.

I join in the Court's opinion but write separately to emphasize that the authority of the Federal Home Loan Bank Board to pre-empt state laws is not limitless.* Although Congress delegated broad power to the Board to ensure that federally chartered savings and loan institutions "would re-

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terfere with appellees' rights because it merely codified pre-existing law. See n. 4, *supra*.

When the two deeds of trust were executed in 1971 and 1972, California law permitted the unrestricted exercise of due-on-sale clauses upon outright transfer of the security property, as occurred here. The Board's due-on-sale regulation was then issued in 1976, reinforcing Fidelity's right to enforce the due-on-sale provisions. Not until *Wellenkamp* was decided in 1978 was a lender's right under California law to accelerate a loan in response to an outright transfer limited to cases where the security was impaired. The California Supreme Court's prior cases, which forbade the automatic enforcement of due-on-sale provisions when the borrower further encumbered the property securing the loan, *La Sala* v. *American Savings & Loan Assn.*, 5 Cal. 3d 864, 489 P. 2d 1113 (1971), and when the borrower entered into an installment land contract covering all or part of the security property, *Tucker* v. *Lassen Savings & Loan Assn.*, 12 Cal. 3d 629, 526 P. 2d 1169 (1974), permitted the unrestricted exercise of due-on-sale clauses in cases of outright transfers of the security. See 5 Cal. 3d, at 880, 489 P. 2d, at 1123; 12 Cal. 3d, at 637–638, 526 P. 2d, at 1174–1175.

Because we find the *Wellenkamp* doctrine pre-empted by a previously promulgated federal regulation and therefore inapplicable to federal savings and loans, appellees are deprived of no vested rights if Fidelity is permitted to enforce the due-on-sale clauses in the two pre-1976 deeds: the savings and loan had the right to accelerate the loans, pursuant to California law, when the deeds were executed, and that power was never diminished by state law. We have no occasion, therefore, to consider whether § 545.8–3(f) may be applied so as to give a savings and loan broader authority to enforce a due-on-sale clause than it had when the deed of trust was executed, or to address appellants' contention that § 545.8–3(f) effected no change in the law.

*At one point in today's opinion, the Court states that "we need not decide whether the HOLA or the Board's regulations occupy . . . the entire field of federal savings and loan regulation." *Ante*, at 159, n. 14.

main financially sound," *ante*, at 168, it is clear that HOLA does not permit the Board to pre-empt the application of all state and local laws to such institutions. Nothing in the language of § 5(a) of HOLA, which empowers the Board to "provide for the organization, incorporation, examination, operation, and regulation" of federally chartered savings and loans, remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices. Accordingly, in my view, nothing in the Court's opinion should be read to the contrary.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, dissenting.

The Court today concludes that in § 5(a) of the Home Owners' Loan Act of 1933 (HOLA), 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), Congress authorized the Federal Home Loan Bank Board to pre-empt by administrative fiat California's limitations upon the enforceability of "due-on-sale" clauses in real estate mortgages held by federal savings and loan institutions. The Court reaches this extraordinary result by concluding that due-on-sale clauses relate to a savings and loan's mortgage lending practices which "are a critical aspect of its 'operation' over which the Board unquestionably has jurisdiction." *Ante*, at 167. Because I conclude that Congress has not authorized the Board to promulgate a regulation such as 12 CFR § 545.8–3(f) (1982), I dissent.

Section 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), unquestionably grants broad authority to the Board to regulate the mortgage lending practices of federal savings and loans. In order to perform this role, the Board may take into account state property and contract law which governs real estate transactions in general and the enforceability and interpretation of mortgage lending instruments in particular. Thus, it would be within the Board's power to determine that it constitutes an unsafe lending practice for a

federal savings and loan to conclude a real property mortgage without a fully enforceable due-on-sale clause. It would be within the authority delegated to it by Congress for the Board to conclude that a due-on-sale clause must be included in a mortgage instrument as a means of enabling a federal savings and loan to remove unprofitable loans from its portfolio.

Such a regulation would be entirely consistent with the approach taken by Congress in regulating the savings and loan industry. In § 8 of the Federal Home Loan Bank Act of 1932 (FHLBA), 12 U. S. C. § 1428, the precursor to HOLA, Congress has required the Board to examine state law "relating to the conveying or recording of land titles, or to homestead and other rights, or to *the enforcement of the rights of holders of mortgages on lands securing loans.*" (Emphasis added.) Section 8 provides further:

> "If any such examination shall indicate, in the opinion of the board, that under the laws of any such State . . . there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this chapter, the *board may withhold or limit the operation* of any Federal Home Loan Bank in such State until satisfactory conditions of law . . . shall be established." 12 U. S. C. § 1428 (emphasis added).

Thus, there is no indication in the FHLBA that the Board may, by promulgating regulations, pre-empt those state laws that are deemed to be economically unsound. Instead, if the Board concludes that California's limitations upon the enforceability of due-on-sale clauses endangers the soundness of the system established by the HOLA and the FHLBA, then the response contemplated by Congress is for the Board to "withhold or limit the operation" of the system in California.

In declaring the due-on-sale clause enforceable as a matter of federal law, however, the Board has departed from the ap-

proach contemplated by Congress. Although Congress has authorized the Board to regulate the lending activities of federal savings and loan associations, there is no indication in the HOLA itself, or in its legislative history, that Congress has empowered the Board to determine whether and when federal law shall govern the enforceability of particular provisions contained in mortgages concluded by federal savings and loan associations. If anything, § 8 of the FHLBA indicates that it was Congress' understanding in 1932 that the enforceability of provisions in mortgages is a matter of state law. Contract and real property law are traditionally the domain of state law. *Aronson* v. *Quick Point Pencil Co.*, 440 U. S. 257, 262 (1979); *Butner* v. *United States*, 440 U. S. 48, 55 (1979). In the HOLA, Congress did not intend to create a federal common law of mortgages. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981).*

The Board's attempt to enforce due-on-sale clauses as a matter of federal law cannot be upheld as a regulation of mortgage lending practices of federal savings and loan associations. In § 545.8–3(f), the Board has gone beyond regulating how, when, and in what manner a federal savings and loan may lend mortgage money. Instead, as the Court recognizes, *ante*, at 146–147, the Board's regulation purports to create a rule of law which will govern the rights and obligations of the parties to the mortgage instrument. This regulation does not simply delineate those provisions a federal savings and loan must or must not include in a mortgage instrument. Section 545.8–3(f) purports to guarantee the enforceability of a contractual provision notwithstanding state law to the contrary. In this case, the Board is not regulating the operation of federal savings and loan associa-

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*The Board, however, has argued that federal common law does govern the contractual relationship between federal savings and loan institutions and their mortgagors. See *Gulf Federal Sav. & Loan* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981), cert. pending, No. 81–1744; Brief for Federal Home Loan Bank Board et al. as *Amici Curiae* 26, n. 21.

tions, but the operation of due-on-sale clauses. Without a congressional authorization more explicit than that relied upon by the Court, I conclude that the Board has entered a domain in which it is not authorized to override state laws.

The limitations the California courts have placed upon the enforceability of due-on-sale clauses do not impair the ability of the Board to regulate the manner in which federal savings and loan associations engage in mortgage lending. California has not interfered with the Board's determination that it constitutes an unsafe lending practice for a federal savings and loan to enter a loan agreement without a fully enforceable due-on-sale clause. California's rule regarding due-on-sale clauses is not invalid pursuant to the Supremacy Clause simply because it makes it difficult for lenders to eliminate unprofitable mortgage loans from their portfolios.

Although the Board has concluded that the California courts' limitations upon the enforceability of due-on-sale clauses is economically unsound, I cannot agree that Congress has enabled the Board to insulate federal savings and loans from California mortgage law merely by promulgating a regulation that declares these clauses to be enforceable. Discharge of its mission to ensure the soundness of federal savings and loans does not authorize the Federal Home Loan Bank Board to intrude into the domain of state property and contract law that Congress has left to the States.

379-676 O—83——7 : QL 3

BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY HER PARENTS, ROWLEY ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1002. Argued March 23, 1982—Decided June 28, 1982

The Education of the Handicapped Act (Act) provides federal money to assist state and local agencies in educating handicapped children. To qualify for federal assistance, a State must demonstrate, through a detailed plan submitted for federal approval, that it has in effect a policy that assures all handicapped children the right to a "free appropriate public education," which policy must be tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). The IEP must be prepared (and reviewed at least annually) by school officials with participation by the child's parents or guardian. The Act also requires that a participating State provide specified administrative procedures by which the child's parents or guardian may challenge any change in the evaluation and education of the child. Any party aggrieved by the state administrative decisions is authorized to bring a civil action in either a state court or a federal district court. Respondents—a child with only minimal residual hearing who had been furnished by school authorities with a special hearing aid for use in the classroom and who was to receive additional instruction from tutors, and the child's parents—filed suit in Federal District Court to review New York administrative proceedings that had upheld the school administrators' denial of the parents' request that the child also be provided a qualified sign-language interpreter in all of her academic classes. Entering judgment for respondents, the District Court found that although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as well academically as she would without her handicap. Because of this disparity between the child's achievement and her potential, the court held that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." The Court of Appeals affirmed.

Held:

1. The Act's requirement of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Pp. 187–204.

(a) This interpretation is supported by the definitions contained in the Act, as well as by other provisions imposing procedural requirements and setting forth statutory findings and priorities for States to follow in extending educational services to handicapped children. The Act's language contains no express substantive standard prescribing the level of education to be accorded handicapped children. Pp. 187–190.

(b) The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any greater substantive educational standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside. Pp. 191–197.

(c) While Congress sought to provide assistance to the States in carrying out their constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity or services for handicapped and nonhandicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Pp. 198–200.

2. In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Pp. 204–208.

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(a) Although the judicial-review provisions do not limit courts to ensuring that States have complied with the Act's procedural requirements, the Act's emphasis on procedural safeguards demonstrates the legislative conviction that adequate compliance with prescribed procedures will in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP. Pp. 204–207.

(b) The courts must be careful to avoid imposing their view of preferable educational methods upon the States. Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States. Pp. 207–208.

3. Entrusting a child's education to state and local agencies does not leave the child without protection. As demonstrated by this case, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act. Pp. 208–209.

4. The Act does not require the provision of a sign-language interpreter here. Neither of the courts below found that there had been a failure to comply with the Act's procedures, and the findings of neither court will support a conclusion that the child's educational program failed to comply with the substantive requirements of the Act. Pp. 209–210.

632 F. 2d 945, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 210. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 212.

Raymond G. Kuntz argued the cause for petitioners. With him on the briefs were *Robert D. Stone*, *Jean M. Coon*, *Paul E. Sherman, Jr.*, and *Donald O. Meserve*.

Michael A. Chatoff argued the cause and filed a brief for respondents.

Elliott Schulder argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Walter W. Barnett*, and *Louise A. Lerner*.*

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*Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* for the American Civil Liberties Union; by *Jane Bloom Yohalem*, *Norman S. Rosenberg*, *Daniel Yohalem*, and *Marian Wright Edelman* for the

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals.

I

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. IV), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H. R. Rep. No. 94-332, p. 2 (1975) (H. R. Rep.). The Act's evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case.

Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and

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Association for Retarded Citizens of the United States et al.; by *Ralph J. Moore, Jr.*, and *Franklin D. Kramer* for the Maryland Advocacy Unit for the Developmentally Disabled, Inc., et al.; by *Marc Charmatz, Janet Stotland*, and *Joseph Blum* for the National Association of the Deaf et al; by *Minna J. Kotkin* and *Barry Felder* for the New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System; and by *Michael A. Rebell* for the United Cerebral Palsy Associations, Inc., et al.

Norman H. Gross, Gwendolyn H. Gregory, Thomas A. Shannon, and *August W. Steinhilber* filed a brief for the National School Boards Association et al. as *amici curiae*.

Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." Pub. L. 89–750, § 161, 80 Stat. 1204. That program was repealed in 1970 by the Education of the Handicapped Act, Pub. L. 91–230, 84 Stat. 175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor the 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.[1]

Dissatisfied with the progress being made under these earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education,[2] Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt "a goal of providing full educational opportunities to all handicapped children." Pub. L. 93–380, 88 Stat. 579, 583 (1974 statute). The 1974 statute was recognized as an interim measure only, adopted "in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children." H. R. Rep., at 4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it "has in effect a policy

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[1] See S. Rep. No. 94–168, p. 5 (1975) (S. Rep.); H. R. Rep., at 2–3.

[2] Two cases, *Mills* v *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), and *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972), were later identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it. H. R. Rep., at 3–4. Both decisions are discussed in Part III of this opinion, *infra*.

that assures all handicapped children the right to a free appropriate public education." 20 U. S. C. § 1412(1). That policy must be reflected in a state plan submitted to and approved by the Secretary of Education,[3] § 1413, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. §§ 1412, 1413. States receiving money under the Act must provide education to the handicapped by priority, first "to handicapped children who are not receiving an education" and second "to handicapped children . . . with the most severe handicaps who are receiving an inadequate education," § 1412(3), and "to the maximum extent appropriate" must educate handicapped children "with children who are not handicapped." § 1412(5).[4] The Act broadly defines "handicapped children" to include "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities." § 1401(1).[5]

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP).

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[3] All functions of the Commissioner of Education, formerly an officer in the Department of Health, Education, and Welfare, were transferred to the Secretary of Education in 1979 when Congress passed the Department of Education Organization Act, 20 U. S. C. § 3401 *et seq.* (1976 ed., Supp. IV). See 20 U. S. C. § 3441(a)(1) (1976 ed., Supp. IV).

[4] Despite this preference for "mainstreaming" handicapped children—educating them with nonhandicapped children—Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." § 1412(5). The Act thus provides for the education of some handicapped children in separate classes or institutional settings. See *ibid.;* § 1413(a)(4).

[5] In addition to covering a wide variety of handicapping conditions, the Act requires special educational services for children "regardless of the severity of their handicap." §§ 1412(2)(C), 1414(a)(1)(A).

§ 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing

> "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." § 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. § 1414(a)(5). See also § 1413(a)(11).

In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon States receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child," and must be permitted to bring a complaint about "any matter relating to" such evaluation and education. §§ 1415(b)(1)(D) and (E).[6]

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[6] The requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize parental involvement in the education of each handicapped child. In addition, the Act requires that parents be permitted "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and . . . to obtain an independent educational evaluation of the child." § 1415(b)(1)(A). See also §§ 1412(4), 1414(a)(4). State educa-

Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the State educational agency must be provided if the initial hearing is held at the local or regional level. §§ 1415(b)(2) and (c).[7] Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing has "the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2).

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, §§ 1414(b)(2)(A), 1416, and by the provision for judicial review. At present, all States except New

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tional policies and the state plan submitted to the Secretary of Education must be formulated in "consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children." § 1412(7). See also § 1412(2)(E). Local agencies, which receive funds under the Act by applying to the state agency, must submit applications which assure that they have developed procedures for "the participation and consultation of the parents or guardians[s] of [handicapped] children" in local educational programs, § 1414(a)(1)(C)(iii), and the application itself, along with "all pertinent documents related to such application," must be made "available to parents, guardians, and other members of the general public." § 1414(a)(4).

[7] "Any party" to a state or local administrative hearing must "be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions." § 1415(d).

Mexico receive federal funds under the portions of the Act at issue today. Brief for United States as *Amicus Curiae* 2, n. 2.

II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N. Y. Amy has minimal residual hearing and is an excellent lip-reader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administra-

tors likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. App. to Pet. for Cert. F–22. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. *Id.*, at E–4. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. 483 F. Supp. 528, 531 (1980). It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," *id.*, at 534, but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap," *id.*, at 532. This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate pub-

lic education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Id.*, at 534. According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." *Ibid.* The District Court's definition arose from its assumption that the responsibility for "giv[ing] content to the requirement of an 'appropriate education'" had "been left entirely to the [federal] courts and the hearing officers." *Id.*, at 533.[8]

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]ourt's conclusions of law," and held that its "findings of fact [were] not clearly erroneous." 632 F. 2d 945, 947 (1980).

We granted certiorari to review the lower courts' interpretation of the Act. 454 U. S. 961 (1981). Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by 20 U. S. C. § 1415? We consider these questions separately.[9]

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[8] For reasons that are not revealed in the record, the District Court concluded that "[t]he Act itself does not define 'appropriate education.'" 483 F. Supp., at 533. In fact, the Act expressly defines the phrase "free appropriate public education," see § 1401(18), to which the District Court was referring. See 483 F. Supp., at 533. After overlooking the statutory definition, the District Court sought guidance not from regulations interpreting the Act, but from regulations promulgated under § 504 of the Rehabilitation Act. See 483 F. Supp., at 533, citing 45 CFR § 84.33(b).

[9] The IEP which respondents challenged in the District Court was created for the 1978–1979 school year. Petitioners contend that the District Court erred in reviewing that IEP after the school year had ended and before the school administrators were able to develop another IEP for subsequent years. We disagree. Judicial review invariably takes more than

III

A

This is the first case in which this Court has been called upon to interpret any provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that "[t]he Act itself does not define 'appropriate education,'" 483 F. Supp., at 533, but leaves "to the courts and the hearing officers" the responsibility of "giv[ing] content to the requirement of an 'appropriate education.'" *Ibid.* See also 632 F. 2d, at 947. Petitioners contend that the definition of the phrase "free appropriate public education" used by the courts below overlooks the definition of that phrase actually found in the Act. Respondents agree that the Act defines "free appropriate public education," but contend that the statutory definition is not "functional" and thus "offers judges no guidance in their consideration of controversies involving 'the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.'" Brief for Respondents 28. The United States, appearing as *amicus curiae* on behalf of respondents, states that "[a]lthough the Act includes definitions of a 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate.'" Brief for United States as *Amicus Curiae* 13.

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":

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nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review. 483 F. Supp. 536, 538 (1980). See *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982); *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975).

> "The term 'free appropriate public education' means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." § 1401(18) (emphasis added).

"Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." § 1401(16). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17).[10]

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition is a "functional" one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act. We think more must be made of it than either respondents or the United States seems willing to admit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handi-

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[10] Examples of "related services" identified in the Act are "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only." § 1401(17).

capped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. 89 Stat. 774, note following § 1401. In addition, as mentioned in Part I, the Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an "inadequate education." § 1412(3). When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity

provided to other children." 483 F. Supp., at 534. That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of "free appropriate public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history.[11]

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[11] The dissent, finding that "the standard of the courts below seems . . . to reflect the congressional purpose" of the Act, *post*, at 218, concludes that our answer to this question "is not a satisfactory one." *Post*, at 216. Presumably, the dissent also agrees with the District Court's conclusion that "it has been left entirely to the courts and the hearing officers to give content to the requirement of an 'appropriate education.'" 483 F. Supp., at 533. It thus seems that the dissent would give the courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed. Indeed, the dissent clearly characterizes the requirement of an "appropriate education" as open-ended, noting that "if there are limits not evident from the face of the statute on what may be considered an 'appropriate education,' they must be found in the purpose of the statute or its legislative history." *Post*, at 213. Not only are we unable to find any suggestion from the face of the statute that the requirement of an "appropriate education" was to be limitless, but we also view the dissent's approach as contrary to the fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously. See *infra*, at 204, n. 26.

No one can doubt that this would have been an easier case if Congress had seen fit to provide a more comprehensive statutory definition of the phrase "free appropriate public education." But Congress did not do so, and "our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596 (1951). We would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts.

B

(i)

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children,[12] but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. The House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H. R. Rep., at 2. See also S. Rep., at 8. One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

> "While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that . . . 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education." 121 Cong. Rec. 19486 (1975) (remarks of Sen. Williams).

This concern, stressed repeatedly throughout the legislative history,[13] confirms the impression conveyed by the lan-

[12] See H. R. Rep., at 10; Note, The Education of All Handicapped Children Act of 1975, 10 U. Mich. J. L. Ref. 110, 119 (1976).

[13] See, *e. g.*, 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits) ("all too often, our handicapped citizens have been denied the opportunity to receive an adequate education"); *id.*, at 19502 (remarks of Sen. Cranston) (millions of handicapped "children . . . are largely excluded from the educational opportunities that we give to our other children"); *id.*, at 23708 (remarks of Rep. Mink) ("handicapped children . . . are denied access to public schools because of a lack of trained personnel").

guage of the statute: By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep., at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. Rep., at 6.[14] The first case, *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972) *(PARC)*, was a suit on behalf of retarded children challenging the constitutionality of a Pennsylvania statute which acted to exclude them from public education and training. The case ended in a consent decree which enjoined the State from "deny[ing] to any mentally retarded child *access* to a free public program of education and training." 334 F. Supp., at 1258 (emphasis added).

PARC was followed by *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), a case in which the plaintiff handicapped children had been excluded

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[14] Similarly, the Senate Report states that it was an "[i]ncreased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children [that] pointed to the necessity of an expanded federal fiscal role." S. Rep., at 5. See also H. R. Rep., at 2–3.

from the District of Columbia public schools. The court's judgment, quoted in S. Rep., at 6, provided that

> "no [handicapped] child eligible for a publicly supported education in the District of Columbia public schools shall be *excluded* from a regular school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) *adequate* alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the *adequacy* of any educational alternative." 348 F. Supp., at 878 (emphasis added).

Mills and *PARC* both held that handicapped children must be given *access* to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education.[15] Rather, like the language of the Act,

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[15] The only substantive standard which can be implied from these cases comports with the standard implicit in the Act. *PARC* states that each child must receive "access to a free public program of education and training *appropriate to his learning capacities*," 334 F. Supp., at 1258 (emphasis added), and that further state action is required when it appears that "the needs of the mentally retarded child are not being *adequately* served," *id.*, at 1266. (Emphasis added.) *Mills* also speaks in terms of "adequate" educational services, 348 F. Supp., at 878, and sets a realistic standard of providing *some* educational services to each child when every need cannot be met.

"If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Id.*, at 876.

the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See 348 F. Supp., at 878–883; 334 F. Supp., at 1258–1267.[16] The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports[17] suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having "incorporated the major principles of the right to education cases." S. Rep., at 8. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. H. R. Rep., at 5.[18]

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[16] Like the Act, *PARC* required the State to "identify, locate, [and] evaluate" handicapped children, 334 F. Supp., at 1267, to create for each child an individual educational program, *id.*, at 1265, and to hold a hearing "on any change in educational assignment," *id.*, at 1266. *Mills* also required the preparation of an individual educational program for each child. In addition, *Mills* permitted the child's parents to inspect records relevant to the child's education, to obtain an independent educational evaluation of the child, to object to the IEP and receive a hearing before an independent hearing officer, to be represented by counsel at the hearing, and to have the right to confront and cross-examine adverse witnesses, all of which are also permitted by the Act. 348 F. Supp., at 879–881. Like the Act, *Mills* also required that the education of handicapped children be conducted pursuant to an overall plan prepared by the District of Columbia, and established a policy of educating handicapped children with nonhandicapped children whenever possible. *Ibid.*

[17] See S. Rep., at 6–7; H. R. Rep., at 3–4.

[18] The 1974 statute "incorporated the major principles of the right to education cases," by "add[ing] important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped; . . . and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification

That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an "appropriate education" to the receipt of some specialized educational services. The Senate Report states: "[T]he most recent statistics provided by the Bureau of Education for the Handicapped estimate that of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education." S. Rep., at 8.[19] This statement, which reveals Congress' view that 3.9 million handicapped children were "receiving an appropriate education" in 1975, is followed immediately in the Senate Report by a table showing that 3.9 million handicapped children were "served" in 1975 and a slightly larger number were "unserved." A similar statement and table appear in the House Report. H. R. Rep., at 11–12.

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and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory." S. Rep., at 8.

The House Report explains that the Act simply incorporated these purposes of the 1974 statute: the Act was intended "primarily to amend . . . the Education of the Handicapped Act in order to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress [the 1974 statute] will result in maximum benefits for handicapped children and their families." H. R. Rep., at 5. Thus, the 1974 statute's purpose of providing handicapped children *access* to a public education became the purpose of the Act.

[19] These statistics appear repeatedly throughout the legislative history of the Act, demonstrating a virtual consensus among legislators that 3.9 million handicapped children were receiving an appropriate education in 1975. See, *e. g.*, 121 Cong. Rec. 19486 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Schweicker); *id.*, at 23702 (remarks of Rep. Madden); *ibid.* (remarks of Rep. Brademas); *id.*, at 23709 (remarks of Rep. Minish); *id.*, at 37024 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37417 (remarks of Sen. Javits); *id.*, at 37420 (remarks of Sen. Hathaway).

It is evident from the legislative history that the characterization of handicapped children as "served" referred to children who were receiving some form of specialized educational services from the States, and that the characterization of children as "unserved" referred to those who were receiving no specialized educational services. For example, a letter sent to the United States Commissioner of Education by the House Committee on Education and Labor, signed by two key sponsors of the Act in the House, asked the Commissioner to identify the number of handicapped "children served" in each State. The letter asked for statistics on the number of children "being served" in various types of "special education program[s]" and the number of children who were not "receiving educational services." Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 205–207 (1975). Similarly, Senator Randolph, one of the Act's principal sponsors in the Senate, noted that roughly one-half of the handicapped children in the United States "are receiving special educational services." *Id.*, at 1.[29] By

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[29] Senator Randolph stated: "[O]nly 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children are receiving special educational services." Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 (1975). Although the figures differ slightly in various parts of the legislative history, the general thrust of congressional calculations was that roughly one-half of the handicapped children in the United States were not receiving specialized educational services, and thus were not "served." See, *e. g.*, 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits) ("only 50 percent of the Nation's handicapped children received proper education services"); *id.*, at 19504 (remarks of Sen. Humphrey) ("[a]lmost 3 million handicapped children, while in school, receive none of the special services that they require in order to make education a meaningful experience"); *id.*, at 23706 (remarks of Rep. Quie) ("only 55 percent [of handicapped children] were receiving a public education"); *id.*, at 23709 (remarks of Rep. Biaggi) ("[o]ver 3 million [handi-

characterizing the 3.9 million handicapped children who were "served" as children who were "receiving an appropriate education," the Senate and House Reports unmistakably disclose Congress' perception of the type of education required by the Act: an "appropriate education" is provided when personalized educational services are provided.[21]

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capped] children in this country are receiving either below par education or none at all").

Statements similar to those appearing in the text, which equate "served" as it appears in the Senate Report to "receiving special educational services," appear throughout the legislative history. See, *e. g.*, *id.*, at 19492 (remarks of Sen. Williams); *id.*, at 19494 (remarks of Sen. Javits); *id.*, at 19496 (remarks of Sen. Stone); *id.*, at 19504–19505 (remarks of Sen. Humphrey); *id.*, at 23703 (remarks of Rep. Brademas); Hearings on H. R. 7217 before the Subcommittee on Select Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 91, 150, 153 (1975); Hearings on H. R. 4199 before the Select Subcommittee on Education of the House Committee on Education and Labor, 93d Cong., 1st Sess., 130, 139 (1973). See also 34 CFR § 300.343 (1981).

[21] In seeking to read more into the Act than its language or legislative history will permit, the United States focuses upon the word "appropriate," arguing that "the statutory definitions do not adequately explain what [it means]." Brief for United States as *Amicus Curiae* 13. Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.

The term as used in reference to educating the handicapped appears to have originated in the *PARC* decision, where the District Court required that handicapped children be provided with "education and training appropriate to [their] learning capacities." 334 F. Supp., at 1258. The word appears again in the *Mills* decision, the District Court at one point referring to the need for "an appropriate educational program," 348 F. Supp., at 879, and at another point speaking of a "suitable publicly-supported education," *id.*, at 878. Both cases also refer to the need for an "adequate" education. See 334 F. Supp., at 1266; 348 F. Supp., at 878.

The use of "appropriate" in the language of the Act, although by no means definitive, suggests that Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education. For example, § 1412(5) requires that handicapped children be educated in classrooms with nonhandicapped children "to the maximum extent appro-

(ii)

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." Brief for Respondents 35. We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." Respondents and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." S. Rep., at 13.[22] But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandi-

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priate." Similarly, § 1401(19) provides that, "whenever appropriate," handicapped children should attend and participate in the meeting at which their IEP is drafted. In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "appropriate preschool, elementary, or secondary school" level. § 1401(18)(C). The Act's use of the word "appropriate" thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children. At the very least, these statutory uses of the word refute the contention that Congress used "appropriate" as a term of art which concisely expresses the standard found by the lower courts.

[22] See also 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Humphrey).

capped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from public education. In *Mills*, the District Court said:

> "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." 348 F. Supp., at 876.

The *PARC* court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . . ." 334 F. Supp., at 1260. The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth

Amendment does not require States to expend equal financial resources on the education of each child. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973); *McInnis* v. *Shapiro*, 293 F. Supp. 327 (ND Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322 (1969).

In explaining the need for federal legislation, the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i. e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." H. R. Rep., at 14. Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a "basic floor of opportunity" consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

(iii)

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the

handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.[23]

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[23] This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:

"The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep., at 9. See also H. R. Rep., at 11. Similarly, one of the principal Senate sponsors of the Act stated that "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams). See also *id.*, at 25541 (remarks of Rep. Harkin); *id.*, at 37024–37025 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37410 (remarks of Sen. Randolph); *id.*, at 37416 (remarks of Sen. Williams).

The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degree of self-sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.

Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive stand-

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.[24] When that "mainstreaming" preference of the Act

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ard which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

[24] Title 20 U. S. C. § 1412(5) requires that participating States establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the

has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.[25]

C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of

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nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

[25] We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.[26]

IV

A

As mentioned in Part I, the Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2). The complaint, and therefore the civil action, may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provi-

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[26] In defending the decisions of the District Court and the Court of Appeals, respondents and the United States rely upon isolated statements in the legislative history concerning the achievement of maximum potential, see H. R. Rep., at 13, as support for their contention that Congress intended to impose greater substantive requirements than we have found. These statements, however, are too thin a reed on which to base an interpretation of the Act which disregards both its language and the balance of its legislative history. "Passing references and isolated phrases are not controlling when analyzing a legislative history." *Department of State* v. *Washington Post Co.*, 456 U. S. 595, 600 (1982).

Moreover, even were we to agree that these statements evince a congressional intent to maximize each child's potential, we could not hold that Congress had successfully imposed that burden upon the States.

"[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 17 (1981) (footnote omitted).

As already demonstrated, the Act and its history impose no requirements on the States like those imposed by the District Court and the Court of Appeals. *A fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

sion of a free appropriate public education to such child." § 1415(b)(1)(E). In reviewing the complaint, the Act provides that a court "shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2).

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program, and respondents contending that the Act requires courts to exercise *de novo* review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent decision[s] based on a preponderance of the evidence." S. Conf. Rep. No. 94–455, p. 50 (1975). See also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams).

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in § 1415, which is entitled "Procedural safeguards," is not without significance. When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e. g.*, §§ 1415(a)–(d), as it did upon the measurement of the result-

ing IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act?[27] And second, is the

[27] This inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act,

individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?[28] If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

B

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States.[29] The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress in-

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but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19).

[28] When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. See Part III, *supra*.

[29] In this case, for example, both the state hearing officer and the District Court were presented with evidence as to the best method for educating the deaf, a question long debated among scholars. See Large, Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975, 58 Wash. U. L. Q. 213, 229 (1980). The District Court accepted the testimony of respondents' experts that there was "a trend supported by 'studies showing the greater degree of success of students brought up in deaf households using [the method of communication used by the Rowleys].'" 483 F. Supp., at 535.

379-676 O—83——8 : QL 3

tended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).[30]

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 42. We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, *supra*, at 182–183, and n. 6, and in the formulation of the child's individual educational program. As the Senate Report states:

> "The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child

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[30] It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level." 121 Cong. Rec. 19498 (1975) (remarks of Sen. Dole). See also *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").

involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child." S. Rep., at 11–12.

See also S. Conf. Rep. No. 94–445, p. 30 (1975); 34 CFR § 300.345 (1981).

As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act.[31]

VI

Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an

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[31] In addition to providing for extensive parental involvement in the formulation of state and local policies, as well as the preparation of individual educational programs, the Act ensures that States will receive the advice of experts in the field of educating handicapped children. As a condition for receiving federal funds under the Act, States must create "an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, [and] (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children." § 1413(a)(12).

'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." 483 F. Supp., at 534. In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.*

So ordered.

JUSTICE BLACKMUN, concurring in the judgment.

Although I reach the same result as the Court does today, I read the legislative history and goals of the Education of the Handicapped Act differently. Congress unambiguously stated that it intended to "take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity*." S. Rep. No. 94–168, p. 9 (1975) (emphasis added). See also 20 U. S. C. § 1412(2)(A)(i) (requiring States to establish plans with the "goal of providing full educational opportunity to all handicapped children").

As I have observed before, "[i]t seems plain to me that Congress, in enacting [this statute], intended to do more than merely set out politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of state . . . authorities." *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 32 (1981) (opinion concurring in part and concurring in judgment). The clarity of the legislative

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* Because the District Court declined to reach respondents' contention that petitioners had failed to comply with the Act's procedural requirements in developing Amy's IEP, 483 F. Supp., at 533, n. 8, the case must be remanded for further proceedings consistent with this opinion.

intent convinces me that the relevant question here is not, as the Court says, whether Amy Rowley's individualized education program was "reasonably calculated to enable [her] to receive educational benefits," *ante*, at 207, measured in part by whether or not she "achieve[s] passing marks and advance[s] from grade to grade," *ante*, at 204. Rather, the question is whether Amy's program, *viewed as a whole*, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome.

In answering this question, I believe that the District Court and the Court of Appeals should have given greater deference than they did to the findings of the School District's impartial hearing officer and the State's Commissioner of Education, both of whom sustained petitioners' refusal to add a sign-language interpreter to Amy's individualized education program. Cf. 20 U. S. C. § 1415(e)(2) (requiring reviewing court to "receive the records of the administrative proceedings" before granting relief). I would suggest further that those courts focused too narrowly on the presence or absence of a particular service—a sign-language interpreter—rather than on the total package of services furnished to Amy by the School Board.

As the Court demonstrates, *ante*, at 184–185, petitioner Board has provided Amy Rowley considerably more than "a teacher with a loud voice." See *post*, at 215 (dissenting opinion). By concentrating on whether Amy was "learning as much, or performing as well academically, as she would without her handicap," 483 F. Supp. 528, 532 (SDNY 1980), the District Court and the Court of Appeals paid too little attention to whether, on the entire record, respondent's individualized education program offered her an educational op-

portunity substantially equal to that provided her nonhandicapped classmates. Because I believe that standard has been satisfied here, I agree that the judgment of the Court of Appeals should be reversed.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In order to reach its result in this case, the majority opinion contradicts itself, the language of the statute, and the legislative history. Both the majority's standard for a "free appropriate education" and its standard for judicial review disregard congressional intent.

I

The majority first turns its attention to the meaning of a "free appropriate public education." The Act provides:

> "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U. S. C. § 1401(18).

The majority reads this statutory language as establishing a congressional intent limited to bringing "previously excluded handicapped children into the public education systems of the States and [requiring] the States to adopt *procedures* which would result in individualized consideration of and instruction for each child." *Ante*, at 189. In its attempt to constrict the definition of "appropriate" and the thrust of the Act, the majority opinion states: "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly

the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" *Ante*, at 189–190, quoting 483 F. Supp. 528, 534 (SDNY 1980).

I agree that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be "appropriate." However, if there are limits not evident from the face of the statute on what may be considered an "appropriate education," they must be found in the purpose of the statute or its legislative history. The Act itself announces it will provide a "*full* educational opportunity to all handicapped children." 20 U. S. C. § 1412(2)(A) (emphasis added). This goal is repeated throughout the legislative history, in statements too frequent to be "'passing references and isolated phrases.'"[1] *Ante*, at 204, n. 26, quoting *Department of State* v. *Washington Post Co.*, 456 U. S. 595, 600 (1982). These statements elucidate the meaning of "appropriate." According to the Senate Report, for example, the Act does "guarantee that handicapped children are provided *equal* educational opportunity." S. Rep. No. 94–168, p. 9 (1975) (emphasis added). This promise appears throughout the legislative history. See 121 Cong. Rec. 19482–19483 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen. Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at

[1] The Court's opinion relies heavily on the statement, which occurs throughout the legislative history, that, at the time of enactment, one million of the roughly eight million handicapped children in the United States were excluded entirely from the public school system and more than half were receiving an inappropriate education. See, *e. g.*, *ante*, at 189, 195, 196–197, n. 20. But this statement was often linked to statements urging equal educational opportunity. See, *e. g.*, 121 Cong. Rec. 19502 (1975) (remarks of Sen. Cranston); *id.*, at 23702 (remarks of Rep. Brademas). That is, Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered.

37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418–37419 (Sen. Cranston); *id.*, at 37419–37420 (Sen. Beall). Indeed, at times the purpose of the Act was described as tailoring each handicapped child's educational plan to enable the child "to achieve his or her maximum potential." H. R. Rep. No. 94–332, pp. 13, 19 (1975); see 121 Cong. Rec. 23709 (1975). Senator Stafford, one of the sponsors of the Act, declared, "We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive." *Id.*, at 19483. The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

The majority opinion announces a different substantive standard, that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Ante*, at 192. While "meaningful" is no more enlightening than "appropriate," the Court purports to clarify itself. Because Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.[2]

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[2] As further support for its conclusion, the majority opinion turns to *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971), 343 F. Supp. 279 (1972) *(PARC)*, and *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972). That these decisions served as an impetus for the Act does not, however, establish them as the limits of the Act. In any case, the very language that the majority quotes from *Mills*, *ante*, at 193, 199, sets a standard not of *some* education, but of educational opportunity equal to that of nonhandicapped children.

Indeed, *Mills*, relying on decisions since called into question by this Court's opinion in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973), states,

"In Hobson v. Hansen [269 F. Supp. 401 (DC 1967),] Judge Wright found that denying poor public school children educational opportunity equal to

This falls far short of what the Act intended. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. It would apparently satisfy the Court's standard of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child," *ante*, at 201, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service. The Act requires more. It defines "special education" to mean "specifically designed instruction, at no cost to parents or guardians, to *meet the unique needs* of a handicapped child . . . ." § 1401(16) (emphasis added).[3] Providing a teacher with a loud voice would not meet Amy's needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom—less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.

Despite its reliance on the use of "appropriate" in the definition of the Act, the majority opinion speculates that "Congress used the word as much to describe the settings in which

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that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. *A fortiori*, the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause." 348 F. Supp., at 875.

Whatever the effect of *Rodriguez* on the validity of this reasoning, the statement exposes the majority's mischaracterization of the opinion and thus of the assumptions of the legislature that passed the Act.

[3] "Related services" are "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17).

handicapped children should be educated as to prescribe the substantive content or supportive services of their education." *Ante*, at 197, n. 21. Of course, the word "appropriate" can be applied in many ways; at times in the Act, Congress used it to recommend mainstreaming handicapped children; at other points, it used the word to refer to the content of the individualized education. The issue before us is what standard the word "appropriate" incorporates when it is used to modify "education." The answer given by the Court is not a satisfactory one.

II

The Court's discussion of the standard for judicial review is as flawed as its discussion of a "free appropriate public education." According to the Court, a court can ask only whether the State has "complied with the procedures set forth in the Act" and whether the individualized education program is "reasonably calculated to enable the child to receive educational benefits." *Ante*, at 206, 207. Both the language of the Act and the legislative history, however, demonstrate that Congress intended the courts to conduct a far more searching inquiry.

The majority assigns major significance to the review provision's being found in a section entitled "Procedural safeguards." But where else would a provision for judicial review belong? The majority does acknowledge that the current language, specifying that a court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate," § 1415(e)(2), was substituted at Conference for language that would have restricted the role of the reviewing court much more sharply. It is clear enough to me that Congress decided to reduce substantially judicial deference to state administrative decisions.

The legislative history shows that judicial review is not limited to procedural matters and that the state educational agencies are given first, but not final, responsibility for the

content of a handicapped child's education. The Conference Committee directs courts to make an "independent decision." S. Conf. Rep. No. 94-455, p. 50 (1975). The deliberate change in the review provision is an unusually clear indication that Congress intended courts to undertake substantive review instead of relying on the conclusions of the state agency.

On the floor of the Senate, Senator Williams, the chief sponsor of the bill, Committee Chairman, and floor manager responsible for the legislation in the Senate, emphasized the breadth of the review provisions at both the administrative and judicial levels:

> "Any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. In this regard, Mr. President, I would like to stress that the language referring to 'free appropriate education' has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education program, questions of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether the services provided a child meet the standards of the State education agency, or *any other question* within the scope of the definition of 'free appropriate public education.' In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local education agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child as a handicapped child when, in fact, that child is not a handicapped child." 121 Cong. Rec. 37415 (1975) (emphasis added).

There is no doubt that the state agency itself must make substantive decisions. The legislative history reveals that the

courts are to consider, *de novo*, the same issues. Senator Williams explicitly stated that the civil action permitted under the Act encompasses all matters related to the original complaint. *Id.*, at 37416.

Thus, the Court's limitations on judicial review have no support in either the language of the Act or the legislative history. Congress did not envision that inquiry would end if a showing is made that the child is receiving passing marks and is advancing from grade to grade. Instead, it intended to permit a full and searching inquiry into any aspect of a handicapped child's education. The Court's standard, for example, would not permit a challenge to part of the IEP; the legislative history demonstrates beyond doubt that Congress intended such challenges to be possible, even if the plan as developed is reasonably calculated to give the child some benefits.

Parents can challenge the IEP for failing to supply the special education and related services needed by the individual handicapped child. That is what the Rowleys did. As the Government observes, "courts called upon to review the content of an IEP, in accordance with 20 U. S. C. [§] 1415(e) inevitably are required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are 'appropriate' for the handicapped child involved." Brief for United States as *Amicus Curiae* 13. The courts below, as they were required by the Act, did precisely that.

Under the judicial review provisions of the Act, neither the District Court nor the Court of Appeals was bound by the State's construction of what an "appropriate" education means in general or by what the state authorities considered to be an appropriate education for Amy Rowley. Because the standard of the courts below seems to me to reflect the congressional purpose and because their factual findings are not clearly erroneous, I respectfully dissent.

FORD MOTOR CO. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-300. Argued April 20, 1982—Decided June 28, 1982

Held: An employer charged with discrimination in hiring under Title VII of the Civil Rights Act of 1964 can toll the continuing accrual of backpay liability under § 706(g) of Title VII by unconditionally offering the claimant the job previously denied, and is not required to offer seniority retroactive to the date of the alleged discrimination. Thus, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. Pp. 225–241.

(a) This rule serves Title VII's objective of ending discrimination through voluntary compliance, for it gives the employer a strong incentive to hire the claimant. To require a retroactive seniority offer in addition to the unconditional job offer fails to provide the same incentive, because it makes hiring the claimant more costly than hiring another applicant for the same job. Pp. 228–230.

(b) An unemployed or underemployed claimant's statutory obligation to minimize damages under § 706(g) requires him to accept an unconditional job offer, even without retroactive seniority. The rule announced here merely embodies such requirement of minimizing damages, without affecting the claimant's right to compensation. Pp. 230–234.

(c) The rule announced here also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than that offered by the employer charged with discrimination, because the availability of the better job terminates the ongoing ill effect of the latter's refusal to hire the claimant. Pp. 234–236.

(d) Since the rule announced here rests both on the statutory requirement that a claimant minimize damages and on the fact that he no longer incurs additional injury if he has been able to find other work at least as attractive as the charged employer's, the rule in almost all circumstances is consistent with Title VII's object of making injured claimants whole. Pp. 236–239.

(e) To require a retroactive seniority offer in addition to the unconditional job offer would threaten the interests of innocent incumbent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee would be unfairly laid off or

disadvantaged because a Title VII claimant has been granted seniority. Pp. 239–240.

645 F. 2d 183, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 241.

John R. Wester argued the cause for petitioner. With him on the briefs were *Robert L. Stern*, *H. R. Nolte, Jr.*, and *Stephen D. Bolerjack*.

David A. Strauss argued the cause *pro hac vice* for respondent. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*. *Michael J. Connolly*, *Philip B. Sklover*, and *Vella M. Fink*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability under § 706(g) of Title VII, 42 U. S. C. § 2000e–5(g), simply by unconditionally offering the claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination.[1]

**Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

[1] The dissent asserts that by so "fram[ing] the question presented" we have "simply and completely misstate[d] the issue." *Post*, at 242. Apparently, neither party agrees with the dissent. The petitioner summarizes the question presented as "whether back pay due an employment discrimination claimant continues to accrue after the claimant has rejected an unconditional job offer that does not include retroactive seniority or back pay." Brief for Petitioner i. The respondent sums up the question presented as "[w]hether an employer who unlawfully refused to hire job applicants because they were women can terminate its liability for back pay by

The question has considerable practical significance because of the lengthy delays that too often attend Title VII litigation.[2] The extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment before being awarded the job the claimant deserves. Court delays, of course, affect all litigants. But for the victim of job discrimination, delay is especially unfortunate. The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect. A job is needed—now. In this case, therefore, we must determine how best to fashion the remedies available under Title VII to fulfill this basic need.

I

A

In June and July 1971, Judy Gaddis, Rebecca Starr, and Zettie Smith applied at a Ford Motor Co. (Ford) parts warehouse located in Charlotte, N. C., for jobs as "picker-packers," "picking" ordered parts from storage, and "packing" them for shipment. At the time, no woman had ever worked in that capacity at the Ford warehouse. All three women

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subsequently offering the applicants positions without seniority at a time when they had obtained, and accumulated seniority in, other jobs." Brief for Respondent i.

To buttress the assertion that the Court has addressed a question not presented, the dissent claims that we have "misrea[d]" the Court of Appeals' decision, "transform[ing] a narrow Court of Appeals ruling into a broad one, just so [we could] reverse and install a broad new rule of [our] own choosing," *post*, at 249, n. 8, rather than attempt, as best we are able, to decide the particular case actually before us. Because we believe we have correctly and fairly framed the question, we decline the opportunity to address further this *ad hominem* argument.

[2] The discriminatory refusals to hire involved in this case occurred 11 years ago.

were qualified for the positions: Gaddis and Starr recently had been laid off from equivalent jobs at a nearby General Motors (GM) warehouse, and Smith had comparable prior experience. Smith applied before any of the openings were filled, and Gaddis and Starr applied while at least two positions remained available.[3] Ford, however, filled the three vacant positions with men, and Gaddis filed a charge with the federal Equal Employment Opportunity Commission (EEOC), claiming that Ford had discriminated against her because of her sex.[4]

In January 1973, GM recalled Gaddis and Starr to their former positions at its warehouse. The following July, while they were still working at GM, a single vacancy opened up at Ford. Ford offered the job to Gaddis, without seniority retroactive to her 1971 application. Ford's offer, however, did not require Gaddis to abandon or compromise her Title VII claim against Ford. Gaddis did not accept the job, in part because she did not want to be the only woman working at the warehouse, and in part because she did not want to lose the seniority she had earned at GM. Ford then made the same unconditional offer to Starr, who declined for the same reasons. Gaddis and Starr continued to work at the GM warehouse, but in 1974 the warehouse was closed and they were laid off. They then unsuccessfully sought new employment until September 1975, when they entered a Government training program for the unemployed.

Smith applied again for work at Ford in 1973, but was never hired. She worked elsewhere, though at lower wages

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[3] When this case came to trial, Ford claimed that Gaddis and Starr applied after men had already been hired and that Smith had not applied at all. The District Court found to the contrary, however, and the Court of Appeals upheld the findings.

[4] After Gaddis had filed her complaint, she and Starr continued to seek work at the Ford warehouse. In November 1972, Ford hired them and four other workers for six weeks to fill temporary jobs at the warehouse.

than she would have earned at Ford, during much of the time between 1971 and the District Court's decision in 1977.

In contrast to Gaddis', Starr's, and Smith's difficulties, at least two of the three men hired by Ford in 1971 were still working at the warehouse at the time of the trial in 1977.

B

In July 1975, the EEOC sued Ford in the United States District Court for the Western District of North Carolina, alleging that Ford had violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), by refusing to hire women at the Charlotte warehouse. The Commission sought injunctive relief and backpay for the victims.[5]

After trial, the District Court found that Ford had discriminated against the three women on the basis of their sex and awarded them backpay in an amount equal to "the difference between the amount they would have earned had they been hired in August 1971, and the amounts actually earned or reasonably earnable by them" between that date and the date of the court's order. App. to Pet. for Cert. A–170. The District Court rejected Ford's contention that Gaddis and Starr were not entitled to backpay accruing after the dates on which they declined Ford's offer of employment. *Id.*, at A–170 to A–171.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's finding of unlawful discrimination, as well as the court's award to Gaddis and Starr of backpay that had accrued after July 1973, when the women rejected Ford's unconditional job offer. 645 F. 2d 183 (1981). The court suggested that, had Ford promised retroactive seniority with its job offer, the offer would have cut off

[5] Although the EEOC suit involved additional issues and claimants, we are concerned here with only the part of the suit that involved Gaddis, Starr, and Smith.

Ford's backpay liability. The court concluded, however, that without the promise of retroactive seniority, Ford's 1973 offer was "incomplete and unacceptable." *Id.*, at 193.[6]

Ford then petitioned this Court for a writ of certiorari, contending, *inter alia*, that its unconditional job offer to Gaddis and Starr should have cut off the further accrual of backpay liability.[7] We granted the writ. 454 U. S. 1030 (1981).

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[6] Senior District Judge Walter E. Hoffman, sitting by designation, dissented from this portion of the Court of Appeals' decision.

[7] In its petition Ford raised two other issues. First, Ford read the opinion of the Court of Appeals as suggesting that to toll backpay liability an employer must include with his job offer, not just retroactive seniority, but also an offer of already-accrued backpay. The Court of Appeals' opinion did not expressly so hold, however, and before this Court the EEOC concedes that under Title VII such an offer of a lump-sum payment of backpay is not required to toll the continuing accrual of backpay liability. This issue thus is no longer contested by the parties.

The second issue is the only one involving Smith. Ford disputed the District Court's finding that Ford discriminated against the three women, claiming that the court reached its conclusion because it erroneously allocated the burden of proof. We are persuaded, however, that the District Court's findings were consistent with *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981).

In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567 (1978), and *Board of Trustees* v. *Sweeney*, 439 U. S. 24 (1978). Despite these decisions, some confusion continued to exist. In *Burdine* we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" 450 U. S., at 253 (citation omitted). The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Ibid.* (citation omitted). It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence

II

Section 706(g) of the Civil Rights Act of 1964, 78 Stat. 261, as amended, 42 U. S. C. § 2000e–5(g), governs the award of backpay in Title VII cases. In pertinent part, § 706(g) provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the

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raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.*, at 254–255 (footnote omitted).

As neither the District Court nor the Court of Appeals cited *Burdine* (apparently because it had only recently been decided), we restate the foregoing principles. We conclude, however, on the basis of the specific findings of fact by the District Court, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.

As *Burdine* commands, the District Court did not place the burden of persuasion on Ford. Instead, it began its discussion of liability by straightforwardly declaring that the EEOC "ha[d] established that Ford discriminated against Smith, Gaddis and Starr on the basis of their sex." App. to Pet. for Cert. A–167. The court supported this conclusion by pointing, not only to the EEOC's proof of a prima facie case, but also to "its showing that Ford had never hired women into the warehouse until November, 1972, and that [its] procedures for hiring were vague and were based on highly subjective criteria." *Id.*, at A–167 to A–168. The court, moreover, entered findings of fact discrediting each of Ford's proffered justifications for refusing to hire the women. *Id.*, at A–155 to A–161. This progression of factual findings and legal conclusions indicates that the District Court found by a preponderance of the evidence that Ford's justifications were "unworthy of credence," 450 U. S., at 256, and that the company had discriminated on the basis of sex. These findings are fully consistent with *Burdine*.

As Ford points out, the Court of Appeals opinion contains some statements that are arguably inconsistent with *Burdine*. That court corrected any misimpression generated by these statements, however, with a discussion directly focusing on the burden-of-proof issue. 645 F. 2d 183, 189, n. 5 (CA4 1981). In light of this discussion, and because it is clear that the trier of fact properly allocated the burden of proof, we find no merit in Ford's burden-of-proof argument.

> court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, . . . hiring of employees, *with or without* back pay, . . . or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable" (emphasis added).[8]

Under § 706(g), then, "backpay is not an automatic or mandatory remedy[,] . . . it is one which the courts 'may' invoke" in the exercise of their sound "discretion [which] is equitable in nature." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415, 416 (1975). Nonetheless, while "the power to award backpay is a discretionary power," *id.*, at 447 (BLACKMUN, J., concurring in judgment), a "court must exercise this power 'in light of the large objectives of the Act,'" and, in doing so, must be guided by "meaningful standards" enforced by "thorough appellate review." *Id.*, at 416 (opinion of the Court) (citations omitted). Moreover, as we emphasized in *Albemarle Paper*, in Title VII cases

> "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to

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[8] Section 706(g) was "expressly modeled," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419, and n. 11 (1975), on the analogous remedial provision of the National Labor Relations Act (NLRA), § 10(c), 49 Stat. 454, as amended, 29 U. S. C. § 160(c). Section 10(c) provides that, if an unfair labor practice has been, or is being, committed, the National Labor Relations Board (NLRB) is empowered to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act.

The principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S. 324, 366–367 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976); *Albemarle Paper Co.*, *supra*, at 419, and n. 11. Therefore, throughout this opinion we refer to cases decided under the NLRA as well as under Title VII.

be guided by sound legal principles.' *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). . . .

"It is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.' *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 (1970)." *Id.*, at 416–417 (footnote omitted).

In this case, Ford and the EEOC offer competing standards to govern backpay liability. Ford argues that if an employer unconditionally offers a claimant the job for which he previously applied, the claimant's rejection of that offer should toll the continuing accrual of backpay liability.[9] The EEOC, on the other hand, defends the lower court's rule,[10]

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[9] It should be clear that the contested backpay in this suit stems from the period following Ford's offer, and during which Gaddis and Starr were unemployed, *i. e.*, after the GM warehouse closed. Our decision today does not affect their right to claim backpay for the period before they rejected Ford's offers.

[10] For reasons of its own, the dissenting opinion reads the decision below narrowly and takes us to task for discerning the outlines of a "general rule" *post*, at 248 (emphasis deleted), in the opinion of the Court of Appeals. In this regard, we note that already at least one District Court evidently not only has read the opinion below as prescribing a general rule, but in addition has interpreted that rule more broadly than we do. See *Saunders* v. *Hercules, Inc.*, 510 F. Supp. 1137, 1142 (WD Va. 1981) ("in view of the recent Fourth Circuit Court of Appeals decision in *Equal Employment Opportunity Commission* v. *Ford Motor Company*, 645 F. 2d 183 (4th Cir. 1981) . . . [i]t is clear . . . that a person who has been discriminated against does not have to accept an offer of reemployment where back pay has not been offered").

contending that backpay liability should be tolled only by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred. Our task is to determine which of these standards better coincides with the "large objectives" of Title VII.

III

The "primary objective" of Title VII is to bring employment discrimination to an end, *Albemarle Paper*, *supra*, at 417, by "'achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group . . . over other employees.'" *Ibid.* (quoting *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971)). See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). "[T]he preferred means for achieving" this goal is through "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974).

To accomplish this objective, the legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them. In a better world, perhaps, lawsuits brought under Title VII would speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of litigation would not be as important a consideration. We do not now live in such a world, however, as this case illustrates.

The rule tolling the further accrual of backpay liability if the defendant offers the claimant the job originally sought

well serves the objective of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant. While the claimant may be no more attractive than the other job applicants, a job offer to the claimant will free the employer of the threat of liability for further backpay damages. Since paying backpay damages is like paying an extra worker who never came to work, Ford's proposed rule gives the Title VII claimant a decided edge over other competitors for the job he seeks.

The rule adopted by the court below, on the other hand, fails to provide the same incentive, because it makes hiring the Title VII claimant more costly than hiring one of the other applicants for the same job. To give the claimant retroactive seniority before an adjudication of liability, the employer must be willing to pay the additional costs of the fringe benefits that come with the seniority that newly hired workers usually do not receive. More important, the employer must also be prepared to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents who have earned their places through their work on the job. In many cases, moreover, disruption of the existing seniority system will violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations.[11] Under the rule adopted by the court below, the employer must be willing to accept all these additional costs if he hopes to toll his backpay liability by offering the job to the claimant. As a result, the employer will be less, rather than more, likely to hire the claimant.

In sum, the Court of Appeals' rule provides no incentive to employers to hire Title VII claimants. The rule advocated

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[11] See *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 76 (1982) ("Seniority provisions are of 'overriding importance' in collective bargaining, . . . and they 'are universally included in these contracts'") (quoting *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964), and *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 79 (1977)).

by Ford, by contrast, powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible.[12]

IV

Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits.[13] But when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries. To this end, § 706(g) aims "'to make the victims of unlawful discrimination whole'" by restoring them, "'so far as possible . . . to a position where they would have been were it not for the unlawful discrimination.'" *Albemarle Paper*, 422 U. S., at 421 (quoting 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams)). We now turn to consider whether the rule urged by Ford not only better serves the goal of ending discrimination, but also properly compensates injured Title VII claimants.

A

If Gaddis and Starr had rejected an unconditional offer from Ford before they were recalled to their jobs at GM, toll-

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[12] In his dissent, JUSTICE BLACKMUN suggests that it is we who speak from the "comfor[t]" of the "sidelines," *post*, at 256, somewhere outside "the real world," *ibid.*, of sex discrimination. For all the dissent's rhetoric, however, nowhere does the dissent seriously challenge our conclusion that the rule we adopt will powerfully motivate employers to offer Title VII claimants the jobs they have been denied. But Rebecca Starr's trial testimony eloquently explains what claimants need: "I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money, and I was wanting the job so bad." 4 Tr. 356. Thus, it is the rule applied by the court below which manifests a "studied indifference to the real-life concerns," *post*, at 255, of the victims of sex discrimination.

[13] See 118 Cong. Rec. 7569 (1972) (remarks of Rep. Dent during debate on 1972 amendments to Title VII) ("Most people just want to work. That is all. They want an opportunity to work. We are trying to see that all of us, no matter of what race, sex, or religious or ethnic background, will have equal opportunity in employment").

ing Ford's backpay liability from the time of Ford's offer plainly would be consistent with providing Gaddis and Starr full compensation for their injuries. An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g).[14] This duty, rooted in an ancient principle of law,[15] requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position,[16] he

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[14] The provision expressly states that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U. S. C. § 2000e-5(g).

Claimants often take other lesser or dissimilar work during the pendency of their claims, even though doing so is not mandated by the statutory requirement that a claimant minimize damages or forfeit his right to compensation. See, *e. g.*, *Merriweather* v. *Hercules, Inc.*, 631 F. 2d 1161 (CA5 1980) (voluntary minimization of damages in dissimilar work); *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416, 422 (CA6 1974) (voluntary minimization of damages by moonlighting).

[15] See generally, *e. g.*, C. McCormick, Law of Damages 127–158 (1935). McCormick summarizes "the general rule" as follows: "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Id.*, at 127.

In connection with the remedial provisions of the NLRA, we said: "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197–198 (1941).

[16] See, *e. g.*, *NLRB* v. *Madison Courier, Inc.*, 153 U. S. App. D. C. 232, 245–246, 472 F. 2d 1307, 1320–1321 (1972) (employee need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); *Wonder Markets, Inc.*, 236 N. L. R. B. 787, 787 (1978) (offer of reinstatement ineffective when discharged em-

forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.[17] Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.[18]

An employer's unconditional offer of the job originally sought to an unemployed or underemployed claimant, moreover, need not be supplemented by an offer of retroactive seniority to be effective, lest a defendant's offer be irrationally disfavored relative to other employers' offers of substantially similar jobs. The claimant, after all, plainly would be required to minimize his damages by accepting another em-

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ployee offered a different job, though former position still existed), enf'd, 598 F. 2d 666, 676 (CA1 1979), supplemental decision, 249 N. L. R. B. 294 (1980); *Good Foods Manufacturing & Processing Corp.*, 195 N. L. R. B. 418, 419 (1972) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits), supplemental decision, 200 N. L. R. B. 623 (1972), enf'd, 492 F. 2d 1302 (CA7 1974); *Harvey Carlton*, 143 N. L. R. B. 295, 304 (1963) (offer of reinstatement ineffective because employees would return on probation).

Some lower courts have indicated, however, that after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position. See, *e. g.*, *NLRB* v. *Madison Courier, Inc.*, *supra*, at 245–246, 472 F. 2d, at 1320–1321; *NLRB* v. *Southern Silk Mills, Inc.*, 242 F. 2d 697, 700 (CA6), cert. denied, 355 U. S. 821 (1957). If the claimant decides to go into a dissimilar line of work, or to accept a demotion, his earnings must be deducted from any eventual backpay award. See § 706(g); *Merriweather* v. *Hercules, Inc.*, *supra*, at 1168; *Taylor* v. *Philips Industries, Inc.*, 593 F. 2d 783, 787 (CA7 1979) *(per curiam)*.

[17] *NLRB* v. *Arduini Mfg. Corp.*, 394 F. 2d 420 (CA1 1968).

[18] The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised. See, *e. g.*, *NLRB* v. *St. Marys Sewer Pipe Co.*, 146 F. 2d 995, 996 (CA3 1945).

ployer's offer even though it failed to grant the benefits of seniority not yet earned.[19] Of course, if the claimant fulfills the requirement that he minimize damages by accepting the defendant's unconditional offer, he remains entitled to full compensation if he wins his case.[20] A court may grant him backpay accrued prior to the effective date of the offer,[21] retroactive seniority,[22] and compensation for any losses suf-

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[19] For the same reasons, a defendant's job offer is effective to force minimization of damages by an unemployed or underemployed claimant even without a supplemental offer of backpay, since the claimant would be required to accept another employer's offer of a substantially similar job without a large front-end, lump-sum bonus. See, *e. g.*, *NLRB* v. *Midwest Hanger Co.*, 550 F. 2d 1101, 1103 (CA8) ("It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated"), cert. denied, 434 U. S. 830 (1977); *Reliance Clay Products Co.*, 105 N. L. R. B. 135, 137 (1953) ("The Board has consistently held that a discriminatorily discharged employee may not refuse" an unconditioned offer of reinstatement even though unaccompanied by backpay; refusal of such an offer tolls the employer's liability for backpay).

[20] In tailoring a Title VII remedy a court "'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 418 (quoting *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965)).

[21] See, *e. g.*, *NLRB* v. *Huntington Hospital, Inc.*, 550 F. 2d 921, 924 (CA4 1977).

[22] See, *e. g.*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982); *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

Decisions construing the remedial provision of the NLRA, § 10(c), 29 U. S. C. § 160(c), are in accord. See, *e. g.*, *In re Nevada Consolidated Copper Corp.*, 26 N. L. R. B. 1182, 1235 (1940) (persons unlawfully refused jobs must be offered jobs with "any seniority or other rights and privileges they would have acquired, had the respondent not unlawfully discriminated against them") (quoted in *Franks* v. *Bowman Transportation Co.*, *supra*, at 770), enf. denied, 122 F. 2d 587 (CA10 1941), rev'd, 316 U. S. 105 (1942).

fered as a result of his lesser seniority before the court's judgment.[8]

In short, the unemployed or underemployed claimant's statutory obligation to minimize damages requires him to accept an unconditional offer of the job originally sought, even without retroactive seniority. Acceptance of the offer preserves, rather than jeopardizes, the claimant's right to be made whole; in the case of an unemployed or underemployed claimant, Ford's suggested rule merely embodies the existing requirement of § 706(g) that the claimant minimize damages, without affecting his right to compensation.

B

Ford's proposed rule also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than the defendant's, because the availability of the better job terminates the ongoing ill effects of the defendant's refusal to hire the claimant. For example, if Gaddis and Starr considered their jobs at GM to be so far superior to the jobs originally offered by Ford that, even if Ford had hired them at the outset, they would have left Ford's employ to take the new work, continuing to hold Ford responsible for backpay after Gaddis and Starr lost their GM jobs would be to require, in effect, that Ford insure them against the risks of unemployment in a new and independent undertaking. Such a rule would not merely restore Gaddis and Starr to the "'position where they would have been were it not for the unlawful discrimination,'" *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421 (citation omitted); it would catapult them into a better position than they would have enjoyed in the absence of discrimination.

Likewise, even if Gaddis and Starr considered their GM jobs only somewhat better or even substantially equivalent to the positions they would have held at Ford had Ford hired

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[8] Both Ford and the EEOC agree on this point. See Brief for Respondent 19; Reply Brief for Petitioner 9.

them initially,[24] their rejection of Ford's unconditional offer could be taken to mean that they believed that the lingering ill effects of Ford's prior refusal to hire them had been extinguished by later developments. If, for example, they thought that the Ford and GM jobs were identical in every respect, offering identical pay, identical conditions of employment, and identical risks of layoff, Gaddis and Starr would have been utterly indifferent as to which job they had—Ford's or GM's. Assuming that they could work at only one job at a time, the ongoing economic ill effects caused by Ford's prior refusal to hire them would have ceased when they found the identical jobs at GM, and they would have had no reason to accept Ford's offers. As in the case of a claimant who lands a better job, therefore, requiring a defendant to provide what amounts to a form of unemployment insurance to claimants, after they have found identical jobs and refused the defendant's unconditional job offer, would be, absent special circumstances, to grant them something more than compensation for their injuries.

In both of these situations, the claimant has the power to accept the defendant's offer and abandon the superior or substantially equivalent replacement job. As in the case of an unemployed or underemployed claimant, under the rule advocated by Ford acceptance of the defendant's unconditional offer would preserve fully the ultimately victorious claimant's right to full redress for the effects of discrimination.[25] The claimant who chooses not to follow this path does so, then, not because it provides inadequate compensation, but be-

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[24] It is possible that they did so value the GM jobs, since they applied at Ford only after being laid off at GM, and since after being recalled to the GM jobs they rejected Ford's offer. Therefore, contrary to the dissent's erroneous suggestion, *post*, at 253, the possibility that Gaddis and Starr considered their GM jobs superior to the positions they would have had at Ford had Ford hired them at the outset is not merely a "hypothetical case." We cannot infer that they so valued their GM jobs, however, solely from their rejection of Ford's offer.

[25] See discussion *supra*, at 232–234.

cause the value of the replacement job outweighs the value of the defendant's job supplemented by the prospect of full court-ordered compensation. In other words, the victim of discrimination who finds a better or substantially equivalent job no longer suffers ongoing injury stemming from the unlawful discrimination.

C

Thus, the rule advocated by Ford rests comfortably both on the statutory requirement that a Title VII claimant must minimize damages and on the fact that a claimant is no longer incurring additional injury if he has been able to find other suitable work that, all things considered, is at least as attractive as the defendant's. For this reason, in almost all circumstances the rule is fully consistent with Title VII's object of making injured claimants whole.

The sole question that can be raised regarding whether the rule adequately compensates claimants arises in that narrow category of cases in which the claimant believes his replacement job to be superior to the defendant's job without seniority, but inferior to the defendant's job with the benefits of seniority. In the present case, for example, it is possible that Gaddis and Starr considered their GM jobs more attractive than the jobs offered by Ford, but less satisfactory than the positions they would have held at Ford if Ford had hired them initially. If so, they were confronted with two options. They could have accepted Ford's unconditional offer, preserving their right to full compensation if they prevailed on their Title VII claims, but forfeiting their favorable positions at GM. Alternatively, they could have kept their jobs at GM, retaining the possibility of continued employment there, but, under the operation of the rule advocated here by Ford, losing the right to claim further backpay from Ford after the date of Ford's offer. The court below concluded that under these circumstances Ford's rule would present Gaddis and Starr with an "intolerable choice," 645 F. 2d, at 192, depriving them of the opportunity to receive full compensation.

We agree that Gaddis and Starr had to choose between two alternatives. We do not agree, however, that their opportunity to choose deprived them of compensation. After all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial, which would comport fully with Title VII's goal of making discrimination victims whole. Under the rule advocated by Ford, if Gaddis and Starr chose the option of remaining at their GM jobs rather than accept Ford's offer, it was because they thought that the GM jobs, plus their claims to backpay accrued prior to Ford's offer, were *more* valuable to them than the jobs they originally sought from Ford, plus the right to seek full compensation from the court.[26] It is hard to see how Gaddis and Starr could have been deprived of adequate compensation because they chose to venture upon a path that seemed to them more attractive than the Ford job plus the right to seek full compensation in court.

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[26] Employees value a job for many reasons besides the rate of pay, including, for example, the presence of other workers of the employee's own sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth. What makes one job better than another varies from one employee to another.

Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. In essence, the position adopted by the court below and advocated here by the EEOC turns on the fact that we cannot be sure that, had Gaddis and Starr known they were going to win their lawsuit, they still would have rejected Ford's offer. Had they known they were going to win, of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered compensation *un*discounted by the risks of litigation. To agree with the EEOC is, in effect, to contend that a claimant is not made whole for purposes of Title VII unless he decided to stay at a replacement job that was worth to him more than the sum of (1) the defendant's job, (2) the right to seek full court-ordered compensation, and, in addition, (3) a sum analogous to insurance against the risk of loss at trial. We discern, however, no reason for concluding that Title VII requires the defendant to insure the claimant against the possibility that the defendant might prevail in the lawsuit.

If the choice presented to Gaddis and Starr was difficult, it was only because it required them to assess their likelihood of prevailing at trial. But surely it cannot be contended for this reason alone that they were deprived of their right to adequate compensation. It is a fact of life that litigation is risky and that a plaintiff with a claim to compensation for his losses must consider the possibility that the claim might be lost at trial, either wrongly, because of litigation error, or rightly, because the defendant was innocent. Ford's rule merely requires the Title VII claimant to decide whether to take the job offered by the defendant, retaining his rights to an award by the court of backpay accrued prior to the effective date of the offer, and any court-ordered retroactive seniority plus compensation for any losses suffered as a result of his lesser seniority before the court's judgment, or, instead, whether to accept a more attractive job from another employer and the limitation of the claim for backpay to the damages that have already accrued. The rule urged by the EEOC and adopted by the court below, by contrast, would have the perverse result of requiring the employer in effect to insure the claimant against the risk that the employer might win at trial.

Therefore, we conclude that, when a claimant rejects the offer of the job he originally sought, as supplemented by a right to full court-ordered compensation, his choice can be taken as establishing that he considers the ongoing injury he has suffered at the hands of the defendant to have been ended by the availability of better opportunities elsewhere. For this reason, we find that, absent special circumstances,[27] the

[27] If, for example, the claimant has been forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job. In exceptional circumstances, the trial court, in the exercise of its sound discretion, could give weight to such factors when deciding whether backpay damages ac-

simple rule that the ongoing accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII's policy of making discrimination victims whole.

V

Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U. S. 702, 723 (1978). See also *Teamsters* v. *United States*, 431 U. S. 324, 371–376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proved, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees.[28] In light of the "'overriding impor-

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crued after the rejection of an employer's offer should be awarded to the claimant.

The dissent attempts to characterize "the loss of their accumulated seniority at [a] replacement jo[b]" as such a cost of relocation. *Post*, at 252–253, n. 11. By so doing, the dissent simply confuses the costs of changing from one job to another—whatever the respective advantages and disadvantages of the two jobs might be—with the differences between the two jobs.

[28] Seniority may govern, "'not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and [even] a preferred place in the punch-out line.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 766–767 (quoting Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 28 Vand. L. Rev. 487, 490 (1975)).

tance'" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 76 (1982) (quoting *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination.

The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 416 (citation omitted), require innocent employees to carry such a heavy burden.[29]

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[29] In addition to the rights of innocent employees, the rule urged by the EEOC and adopted by the court below burdens innocent employers. An innocent employer—or one who believes himself innocent—has the right to challenge in court claims he considers weak or baseless. The approach endorsed by the lower court undermines this right by requiring the employer, if he wishes to offer some relief to the claimant and toll the mounting backpay bill, to surrender his defense to the charge that the claimant is entitled to retroactive seniority. If the employer offers the claimant retroactive seniority as well as a job, and then prevails at trial, he will have no recourse against the claimant for the costs of the retroactive seniority that the claimant erroneously received. The rule urged by Ford permits the parties to stem the ongoing effects of the alleged discrimination without compelling either claimant or employer to compromise his claims or surrender his defenses. Cf. *Moro Motors Ltd.*, 216 N. L. R. B. 192, 193 (1975) ("were [an employer] required to offer to an employee, allegedly discharged for discriminatory reasons, reinstatement *with accrued back pay*, the [employer's] right to litigate the issue of whether the discharge was unlawful would for all practical purposes be nullified") (emphasis in original); *National Screen Products Co.*, 147 N. L. R. B. 746, 747–748 (1964).

VI

In conclusion, we find that the rule adopted by the court below disserves Title VII's primary goal of getting the victims of employment discrimination into the jobs they deserve as quickly as possible. The rule, moreover, threatens the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority.

On the other hand, the rule that a Title VII claimant's rejection of a defendant's job offer normally ends the defendant's ongoing responsibility for backpay suffers neither of these disadvantages, while nevertheless adequately satisfying Title VII's compensation goals. Most important, it also serves as a potent force on behalf of Title VII's objective of bringing discrimination to an end more quickly than is often possible through litigation. For these reasons we hold that, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. We reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

After finding that petitioner Ford Motor Company had discriminated unlawfully against Judy Gaddis and Rebecca Starr because of their sex, the Court of Appeals affirmed the District Court's backpay award to the two women "as a proper exercise of discretion founded on not clearly erroneous factual determinations." 645 F. 2d 183, 201 (CA4 1981). The Court today reverses this unremarkable holding with a wide-ranging advisory ruling stretching far beyond the confines of this case. The Court's rule provides employers who

have engaged in unlawful hiring practices with a unilateral device to cut off their backpay liability to the victims of their past discrimination.

To justify its new rule, the Court mischaracterizes the holding of the Court of Appeals, undertakes an intricate economic analysis of hypothetical situations not presented here, and invokes the rights of "'innocent third parties,'" *ante*, at 239, who are not before the Court. By so doing, the Court not only supplants traditional district court discretion to mold equitable relief, but also ensures that Judy Gaddis and Rebecca Starr—the only Title VII claimants whose rights are at issue in this lawsuit—will not be made whole for injury they indisputably have suffered. I find the Court's ruling both unnecessary and unfair. I dissent.

I

A

The Court frames the question presented as "whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability . . . simply by unconditionally offering the [Title VII] claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination." *Ante*, at 220. In my view, the Court simply and completely misstates the issue. The question before us is not which of two inflexible standards should govern accrual of backpay liability in *all* Title VII cases, but whether the District Court's award of backpay relief to Gaddis and Starr *in this case* constituted an abuse of discretion.

The Court makes frequent and puzzling reference to the "onerous burden[s]" and "sacrifice demanded by the lower court's rule." *Ante*, at 239, 240. See also *ante*, at 227 ("the lower court's rule"); *ante*, at 229 ("[t]he rule adopted by the court below"); *ibid.* ("the Court of Appeals' rule"); *ante*, at 230, n. 12 ("the rule applied by the court below"); *ante*, at 238 ("[t]he rule . . . adopted by the court below"); *ante*, at 241

("the rule adopted by the court below"). In fact, the Court of Appeals adopted no inflexible "rule" at all. Rather, it simply applied the well-settled and flexible principles of appellate review of Title VII remedies prescribed in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), and *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

In *Albemarle*, this Court directed that, in most Title VII matters, "the standard of [appellate] review will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case," 422 U. S., at 424 (citation omitted). With regard to Title VII backpay relief, however, the Court specified that "'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id.*, at 418, quoting *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965). To achieve this purpose, "Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.'" 422 U. S., at 418 (citation omitted).[1]

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[1] In passing the Equal Employment Opportunity Act of 1972, 86 Stat. 103, Congress specifically rejected several legislative efforts to limit the judicial power to award backpay. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 420 (1975). The Section-by-Section Analysis accompanying the Conference Committee Report reaffirmed the "make whole" purpose of § 706(g), Title VII's backpay provision:

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972), quoted in *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421.

The Court in *Albemarle* and *Franks* made clear that, in Title VII cases, the equitable discretion of district courts should be guided by a heavy presumption in favor of full backpay awards. "Rather than limiting the power of district courts to do equity, the presumption insures that complete equity normally will be accomplished." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 786 (POWELL, J., concurring in part and dissenting in part). By exercising their discretion to award full backpay relief, district courts further two broad purposes underlying Title VII. First, "the reasonably certain prospect of a backpay award . . . 'provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417–418 (citation omitted). Second, backpay awards "make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418.

Thus, the goal of appellate review is to ensure that the district courts have exercised their remedial discretion in the way that "allow[s] the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 770–771. "The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with [Title VII's] twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421–422.

B

In this case, the trial court's findings of fact were uncontroverted. In July 1971, Judy Gaddis and Rebecca Starr sought jobs at petitioner Ford's automotive parts warehouse in Charlotte, N. C. "Because of their experience, each was qualified to work at Ford as a 'picker-packer.'" App. to

Pet. for Cert. A–159 (District Court's Findings of Fact). Ford's stated hiring practice was to fill job vacancies at the warehouse by "taking the earliest filed applications first," and selecting employees by interviewing qualified candidates. *Id.*, at A–157. At the time Gaddis and Starr applied, however, Ford had never hired any woman to work at the warehouse.[2] *Id.*, at A–167—A–168. When Gaddis and Starr received their application forms, "a receptionist at Ford . . . told them in substance that Ford did not hire women to work in the warehouse." *Id.*, at A–159.

Despite Gaddis' persistent requests for job interviews, petitioner interviewed neither woman immediately, supposedly because no job vacancy existed. *Id.*, at A–160—A–161. The unit supervisor testified: "Ms. Gaddis called me on several occasions and asked if I was hiring, and I said no, . . . I just have too much work to do to sit down and interview people if I'm not hiring." App. 31. Shortly thereafter, however, in August 1971, Ford hired male applicants to fill four job openings. App. to Pet. for Cert. A–159—A–160. "At least two of the men . . . were offered their jobs *after* Gaddis and Starr applied." *Id.*, at A–160 (emphasis in original).

Gaddis filed a sex discrimination charge with respondent EEOC in September 1971. *Id.*, at A–154. In January 1973, Gaddis and Starr were recalled to jobs at a nearby General Motors warehouse. In July 1973, petitioner made a vague job offer first to Gaddis, then to Starr.[3] The District Court

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[2] The District Court found, for example, that the job application of Zettie Smith, who sought employment at Ford about a month before Gaddis and Starr, and who was the first woman to apply for a warehouse job there, "was never seriously considered because she is a woman." App. to Pet. for Cert. A–157—A–158.

[3] At trial, Gaddis was asked:

"Q. Did [the clerk to the warehouse manager] say that the job was being offered to you, or did he discuss simply with you, in the form of an interview, the possibility of hiring you into some job?

"A. It was so vague that I couldn't pinpoint anything down. They never did say what type of work it would be, whether it would be [parts]

found as a fact that "[t]he offer to the two women was made after Ford learned that a charge of sex discrimination had been filed with the Commission (and was prompted by a desire to bring some women into the warehouse in response to the charge)." *Id.*, at A-162—A-163.[4]

Gaddis, and then Starr, turned down petitioner's job offer. The District Court found that the offer was "refused by both women since they were at that time back at work in the General Motors warehouse, having been recalled to work in Janu-

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picking or whether it would be in sheet metal or whether it would be putting up stock or whether it would be on a day shift or night shift, whether it was a permanent or temporary job. At the time, I had a good seniority with General Motors and I had a secure job, and so on those grounds, I refused it." App. 43.

Similarly, Starr testified on cross-examination:

"I remember [the clerk to the warehouse manager] wasn't specific on the job about what it would be. I did have, at General Motors I had fifteen, I don't know if it was fourteen or fifteen people under me. I had seniority, and I also, this is the truth about [it,] I was scared. Whenever I had worked at Ford before, I had been badgered and I don't know, I was just, I wanted to look into the job. Yet, I had a fear to go back. I didn't know what I would be facing." *Id.*, at 54.

[4] The trial testimony of Ford's warehouse operations manager illuminates petitioner's motives:

"Q. Whose decision was it to call Ms. Gaddis and Ms. Starr?

"A. It was my decision.

"Q. Why?

"A. Well, mainly because we had a suit, EEOC suit filed against us, and we wanted to give one of them an opportunity to go to work for us, and we only had one, maybe two openings at that time.

. . . . .

"Q. Mr. Ely, you indicated in your testimony that you offered a job to one of the women, either Ms. Gaddis or Ms. Starr, in July, 1973. Is that correct?

"A. Yes, that's correct.

"Q. You also stated that you offered such job because of the EEOC charge which had been filed against Ford Motor Company. Is that correct?

"A. That's correct." *Id.*, at 17–18.

ary, 1973. Neither woman wished to lose accrued seniority at General Motors and neither wanted to be the only woman employed in the Ford warehouse." *Id.*, at A-163.

Based on its factual findings, the District Court concluded as a matter of law that "Ford discriminated against . . . Gaddis and Starr on the basis of their sex by failing to employ them in its warehouse in the positions filled in August, 1971." *Id.*, at A-167. In rulings not contested here, the District Court also found that 10 other women had established prima facie cases of unlawful sex discrimination by Ford. *Id.*, at A-168.

To determine the backpay remedy to which Gaddis and Starr were entitled, the District Court attached no legal significance to the women's decision to decline beginning employment at Ford nearly two years after they unlawfully had been denied those same jobs and six months after they had begun accumulating seniority elsewhere.[5] In the ruling which the Court today implicitly deems an abuse of discretion, the District Court held that "[b]ack pay due to Gaddis and Starr shall not be affected by their refusal to accept the single position offered them in July, 1973, inasmuch as neither would have been confronted by that decision and its implications had both been hired in August, 1971." *Id.*, at A-170—A-171.

Applying the standard of review specified in *Franks*, *supra*, and *Albemarle*, *supra*, the Court of Appeals, 645 F. 2d,

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[5] The District Court applied two equitable principles to shape relief in this case. It first concluded that an award of all backpay accruing after August 1971 would make Gaddis and Starr whole. The District Court therefore reconstructed a probable employment history at Ford for each woman, calculating what each would have received but for petitioner's unlawful discrimination. Second, the court obliged Gaddis and Starr to take all reasonable steps to mitigate damages. Accordingly, it subtracted from the backpay awards any amounts Gaddis and Starr actually earned or reasonably could have earned after August 1971. App. to Pet. for Cert. A-170.

at 200, affirmed "the district court's decision as a proper exercise of discretion founded on not clearly erroneous factual determinations." *Id.*, at 201. In particular, the Court of Appeals found no abuse of discretion in the District Court's failure to terminate the backpay awards in July 1973.[6]

The Court of Appeals rested its narrow ruling on two key facts: that "Gaddis and Starr could accept [Ford's] offer only by *forfeiting the seniority* they had accumulated at General Motors and *without a compensating offer of seniority at Ford* to alleviate the effects of the discrimination against them in 1971." *Id.*, at 192. (Emphasis added.) The court expressed no view as to whether Ford's backpay liability would have been tolled if Gaddis and Starr could have accepted Ford's job offer without forfeiting seniority accumulated elsewhere. Nor did the Court of Appeals decide whether the women would have been obliged to accept Ford's offer had it encompassed *some* compensating offer of seniority, short of full retroactive seniority.

Contrary to this Court's suggestion today, the Court of Appeals announced no general *rule* that an employer's "backpay liability should be tolled *only* by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred." *Ante*, at 228 (emphasis added). The Court of Appeals merely refused to announce a broad new rule, urged by Ford, requiring victims of Title VII discrimination to "accept job offers which include a loss of seniority in order to preserve their back pay rights." 645 F. 2d, at 192. Such an inflexible approach, the court decided, would frustrate Title VII's central purposes by permit-

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[6] "[T]he district court reached an eminently reasonable result. It did not permit Ford to cut off the back pay period by making Gaddis and Starr an incomplete and unacceptable offer, and it denied Gaddis and Starr a double recovery by deducting their General Motors wages from their back pay awards." 645 F. 2d, at 193.

ting employers to present discriminatees with an "intolerable choice."[7] *Ibid.*

II

The Court today accepts Ford's invitation, wisely declined by the Court of Appeals, and adopts its broad new rule governing awards of backpay relief in Title VII cases: henceforth, "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability."[8] *Ante*, at 241. This ruling is disturbing in four respects.

First: The Court's new rule is flatly inconsistent with *Albemarle*'s unambiguous directive "that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U. S., at 421. Applied generally, the Court's rule interferes with both objectives.

The Court's approach authorizes employers to make "cheap offers" to the victims of their past discrimination. Employ-

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[7] "[I]f Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their rights to further back pay benefits. On the other hand, if they accepted the job offered by Ford, which they had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors." 645 F. 2d, at 192.

[8] The Court's explanation for its misreading of the Court of Appeals' decision is that the United States District Court for the Western District of Virginia has interpreted that decision as stating a somewhat different proposition. See *ante*, at 227, n. 10. But if one District Court in the Fourth Circuit has misconstrued the Fourth Circuit's opinion, surely that is a matter properly to be corrected by the United States Court of Appeals for the Fourth Circuit. This Court is not entitled to transform a narrow Court of Appeals ruling into a broad one, just so that it may reverse and install a broad new rule of its own choosing.

ers may now terminate their backpay liability unilaterally by extending to their discrimination victims offers they cannot reasonably accept. Once an employer has refused to hire a job applicant, and that applicant has mitigated damages by obtaining and accumulating seniority in another job, the employer may offer the applicant the same job that she was denied unlawfully several years earlier. In this very case, for example, Ford offered Gaddis and Starr jobs only after they had obtained employment elsewhere and only because they had filed charges with the EEOC. If, as here, the applicant declines the offer to preserve existing job security, the employer has successfully cut off all future backpay liability to that applicant. By insulating a discriminating employer from proper liability for his discriminatory acts, the Court's rule reduces his "incentive to shun practices of dubious legality," *id.*, at 417, and hinders the eradication of discrimination.

The Court's rule also violates Title VII's second objective—making victims of discrimination whole. Again, the rule's anomalies are well illustrated by the facts of this case. Had petitioner not discriminated against Gaddis and Starr, both would have begun to work at Ford in August 1971. By July 1973, both would have accumulated nearly two years of seniority. Because of Ford's discrimination, however, each experienced long periods of unemployment and temporary employment before obtaining jobs elsewhere.[9] The District Court therefore determined that only full backpay awards, mitigated by wages earned or reasonably earnable elsewhere, would make Gaddis and Starr whole.

This Court now truncates those awards simply because Gaddis and Starr refused to accept Ford's offers of beginning employment in 1973. Yet even if Gaddis and Starr had ac-

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[9] Gaddis, for example, sought employment in South Carolina, "at various parts places, independent part places, car dealers, such as Chrysler-Plymouth, the Ford place which was Lewis Ford at that time, all the car dealers, . . . some of the hosiery mills, . . . [and] Radiator Specialty Company," 3 Tr. 362, before obtaining her job at General Motors.

cepted those offers, they would not have been made whole. Deprived of two years of seniority, Gaddis and Starr would have enjoyed lesser health, life, and unemployment insurance benefits, lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than persons hired after they were unlawfully refused employment. See Tr. of Oral Arg. 30; Brief for Respondent 17. Even if Gaddis and Starr had continued to litigate the question of their retroactive seniority after accepting Ford's offer, they still would have spent many years at Ford "subordinate to persons who, but for the illegal discrimination, would have been[,] in respect to entitlement to [competitive seniority] benefits[,] [their] inferiors." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 768.

The Court claims that its new rule "powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible." *Ante*, at 230. In fact, the discrimination is not ended, because a discrimination victim who accepts a "cheap offer" will be obliged to work at a seniority disadvantage, and therefore will suffer ongoing effects from the employer's discriminatory act. The Court also alleges that its rule promotes "cooperation and voluntary compliance" with Title VII by giving both employers and claimants incentives to make and accept "unconditional" job offers. *Ante*, at 228–229. If the Court's rule furthers this end, however, it does so only by weakening the bargaining position of a claimant vis-à-vis the employer. Discrimination victims will be forced to accept otherwise unacceptable offers, because they will know that rejection of those offers truncates their backpay recovery. A rule that shields discriminating employers from liability for their past discrimination and coerces bona fide Title VII claimants to accept incomplete job offers is fundamentally incompatible with the purposes of Title VII.

Second: The Court's rule unjustifiably limits a district court's discretion to make individual discrimination victims

whole through awards of backpay. The Court suggests that, "absent special circumstances," a district court abuses its discretion *per se* if it fails to terminate an employer's backpay liability at the point where that employer has extended an unconditional job offer to a discrimination claimant. Yet "[i]n *Albemarle Paper* the Court read Title VII as creating a *presumption in favor* of backpay." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 786 (POWELL, J., concurring in part and dissenting in part) (emphasis added).[10] *Franks* supplied "emphatic confirmation that federal courts are empowered to fashion such relief as the *particular circumstances of a case may require* to effect restitution, making whole insofar as possible the victims of . . . discrimination in hiring." *Id.*, at 764 (opinion of the Court) (emphasis added).

The Court recognizes that its new rule interferes with district court discretion to make complete backpay awards in individual cases. Thus, the Court expressly preserves the principle of appellate deference to the "sound discretion" of the trial court in "exceptional circumstances." *Ante*, at 238–239, n. 27. Yet, curiously, the Court offers no explanation why the facts of this very case fail to satisfy its own "exceptional circumstances" test.[11] Given the Court's conces-

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[10] The Court cites language from *Albemarle* suggesting that a district court's discretion is not limitless. See *ante*, at 226–227. But the Court conspicuously omits *Albemarle*'s clear statement that if Congress intended to limit the equitable discretion of district courts in any way, it did so only by leaving "'little room for the exercise of discretion *not* to order reimbursement.'" See *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417, quoting *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U. S. 288, 296 (1960) (emphasis added).

[11] The Court suggests, for example, that if a hypothetical Title VII "claimant has been forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job." *Ante*, at 238, n. 27. For Gaddis and Starr, however, the loss of their accumulated seniority at their replace-

sion that district courts must retain their discretion to make bona fide Title VII claimants whole in some cases, I see no advantage in prescribing a blanket rule that displaces that discretion in other cases where complete relief is equally justified.

Third: I am disturbed by the Court's efforts to justify its rule by relying on situations not presented by this case. For example, the Court partially rests its rule on an "unemployed or underemployed claimant's statutory obligation to minimize damages" by accepting an unconditional job offer without seniority. *Ante*, at 234. Because Gaddis and Starr were fully employed when Ford finally offered them jobs, however, neither the District Court nor the Court of Appeals exempted unemployed or underemployed victims of discrimination from accepting offers like Ford's.[12] Similarly, the Court analyzes the hypothetical case of a Title VII claimant who "has had the good fortune to find a more attractive job than the defendant's." *Ibid.* But, as the Court later recognizes, there is no assurance that the present case fits this category either. After speculating at length about how Gaddis and Starr may have valued the relative worth of their Ford and General Motors jobs, see *ante*, at 234–236, the Court finally acknowledges that on this paper record, "[w]e cannot infer" how much Gaddis and Starr "valued their GM jobs . . . solely from their rejection of Ford's offer." *Ante*, at 235, n. 24.

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ment jobs certainly reflected "costs of relocation" at least as substantial as high moving expenses.

I expect that federal courts will find no meaningful distinction between a worker's refusal to accept a job offer because he believes that acceptance would force him to incur costs, and a similar refusal based on the worker's judgment that changing jobs would prove costly. In either case, for purposes of awarding Title VII relief, the reasonableness of the worker's refusal should be left to the trial court's discretion.

[12] The purpose of § 706(g)'s "mitigation of damages" requirement is to encourage claimants to work while their Title VII claims are being adjudicated. The Court cannot deny that Gaddis and Starr fully mitigated damages by seeking and obtaining other employment while litigating their claims against Ford.

Equally unconvincing is the Court's repeated invocation of, and preoccupation with, "the rights of 'innocent third parties,'" *ante*, at 239, and the "disruption of the existing seniority system[s]," *ante*, at 229, that would result from adoption of the Court of Appeals' "rule." The Court nowhere demonstrates how *petitioner's* labor relations would have suffered had Ford extended offers of retroactive seniority to Gaddis and Starr. The details of Ford's collective-bargaining agreement were not litigated in either the District Court or the Court of Appeals. See Tr. of Oral Arg. 30–31. Thus, those courts never passed on petitioner's obligation to offer retroactive seniority to Gaddis and Starr if such an offer would have disrupted its labor relations or existing seniority systems.[13] Nor did the Court of Appeals decide, as a general matter, whether or not offers of retroactive seniority to discrimination claimants adversely affect the rights of incumbent employees.[14] The Court cannot justify reversal in the

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[13] The Court of Appeals did not foreclose the possibility that Ford could have terminated its backpay liability to Gaddis and Starr by offering them employment plus an award of *provisional* seniority, defeasible in the event that they lost their continuing lawsuit for backpay. Nor did the Court of Appeals deny that offering a job without seniority might terminate Ford's backpay liability, should any provision of Ford's collective-bargaining agreement preclude it from making offers of retroactive seniority. Had petitioner pointed to such a collective-bargaining agreement provision, or proved that its incumbent employees actually had objected to offers of retroactive seniority to Title VII claimants, the Court of Appeals would have considered those factors in determining whether the District Court abused its discretion in shaping Gaddis' and Starr's relief.

[14] In any event, the Court's claim that offers of retroactive seniority would injure the rights of incumbent employees is vastly overstated. If an employer sued by a Title VII claimant could toll the accrual of backpay liability by making a unilateral offer that included some form of retroactive seniority, he still would have every incentive to make such an offer as soon as possible after the discriminatory act. The amount of retroactive seniority offered would necessarily be small, and the seniority rights of relatively few incumbent employees would be affected.

Under the Court's approach, in contrast, employers will no longer have any incentive to offer retroactive seniority. Any awards of retroactive se-

case at hand by vague reference to classes of claimants and third parties who are not before the Court. To the extent that it seeks to do so, its intricate argument is both irrelevant and advisory.

Fourth and finally: I am struck by the contrast between the Court's concern for parties who are not here and its studied indifference to the real-life concerns of the parties whose interests are directly affected. When the Court finally confronts the choice that actually faced Gaddis and Starr, *ante*, at 236–239, it blithely suggests that "[a]fter all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial" in the form of retroactive seniority. *Ante*, at 237. Yet the Court earlier acknowledges that "[d]elays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Ante*, at 228.

"If the choice presented to Gaddis and Starr was difficult," the Court continues, "it was only because it required them to assess their likelihood of prevailing at trial." *Ante*, at 238. Without consulting the record, the Court then states:

> "Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. . . . Had they known they were going to win [their lawsuit], of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered

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niority to bona fide Title VII claimants will thus be court-ordered, and will be entered only after "the lengthy delays that too often attend Title VII litigation." *Ante*, at 221. By delaying awards of retroactive seniority until final judgment in a significant number of cases, the Court's approach ensures that the seniority rights of comparatively greater numbers of incumbent employees will be affected adversely.

compensation *un*discounted by the risks of litigation." *Ante*, at 237, n. 26 (emphasis in original).

This is a comfortable rationale stated from the sidelines. Unfortunately, the abstract and technical concerns that govern the Court's calculations bear little resemblance to those that actually motivated Judy Gaddis and Rebecca Starr. When asked on cross-examination why she had turned down Ford's 1973 offer, Gaddis testified: "I had seniority [at General Motors] and I knew that I wasn't in danger of any layoff, where if I had accepted the job at Ford *I might have worked a week or two weeks and been laid off because I would have been low seniority*." App. 47 (emphasis added). Similarly, Starr testified on cross-examination: "I had seniority at General Motors. I had about fifteen people working under me. *I could go to work at Ford and work a week and I knew that they could lay me off*." 4 Tr. 365–366 (emphasis added).

To a person living in the real world, the value of job security today far outstrips the value of full court-ordered compensation many years in the future. The Court's elaborate speculation about the concerns that "presumably" motivated Gaddis and Starr nowhere recognizes what a Ford job without seniority actually meant to Gaddis and Starr—a job from which they could be laid off at any moment. Unlike the Court, Gaddis and Starr recognized that if they traded their jobs with seniority for jobs without seniority, they could quickly become unemployed again, long before they had the chance to vindicate their rights at trial.

To people like Gaddis and Starr, the knowledge that they might someday establish their Title VII claims on the merits provides little solace for their immediate and pressing personal needs. Starr's trial testimony reveals just how much job security meant to her:

> "It was just a couple of days after I had [started working] there [at a temporary job] and this is, I was just wanting that job so bad because you can't, a woman,

> when you've got three children, I needed the money, and I was wanting the job so bad. I worked so hard. I'll never forget one day when [the unit supervisor] came to me. I'll never forget that, and he said, I had just been there a few days, I'll have to let you go. . . . It broke my heart because I knew I had worked so hard." 4 Tr. 356.[18]

I agree with the Court that "the victims of job discrimination want jobs, not lawsuits." *Ante*, at 230. See also, *ante*, at 221 ("The claimant needs work that will feed a family and restore self-respect. A job is needed—now"). When Ford made its 1973 offers to Gaddis and Starr, however, they *had* jobs, in which they had accumulated seniority despite Ford's discrimination. I therefore cannot accept the Court's conclusion that these women should have traded those jobs for uncertain employment in which back seniority could be won only by lawsuit. Nor can I justify penalizing Gaddis and Starr because they "discounted" the ultimate likelihood of obtaining court-ordered retroactive seniority at a different rate than the Court does today.

After hearing all the witnesses and appraising all the evidence, the District Court exercised its equitable discretion to shape complete backpay relief for Gaddis and Starr. In light of all the circumstances, the District Court refused to penalize Gaddis and Starr for declining Ford's 1973 job offer. Applying the correct standard of review over Title VII reme-

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[18] Without embarrassment, the Court cites Rebecca Starr's testimony to support its argument that the Court of Appeals' "rule," and not its own new rule, is indifferent to the real-life concerns of victims of sex discrimination. See *ante*, at 230, n. 12. Under the Court of Appeals' "rule," however, Rebecca Starr was awarded full backpay as compensation for Ford's sex discrimination. Under this Court's rule, a large portion of Starr's compensation will simply be cut off. By claiming that the Court of Appeals was somehow *more* indifferent to Starr's real-life concerns, the Court only confirms how far removed from the real world it is.

dies, the Court of Appeals concluded that the District Court had exercised its remedial discretion properly. Sitting at this remove, I cannot say that Gaddis and Starr acted unreasonably. I would affirm the judgment of the Court of Appeals and thereby, for these two victims of discrimination, fulfill, and not defeat, the promise of Title VII.

MICHIGAN v. THOMAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 81-593. Decided June 28, 1982

After the police had stopped respondent's automobile for a traffic violation, respondent, who was riding as a passenger, was arrested for possession of open intoxicants, and the driver was issued a citation for not having a driver's license. An inventory search of the car was made before it was towed, disclosing marihuana in the unlocked glove compartment and, upon a more thorough search, a loaded revolver in an air vent under the dashboard. Respondent was convicted in a Michigan state court for possession of a concealed weapon. The Michigan Court of Appeals reversed, holding that the warrantless search of respondent's automobile violated the Fourth Amendment.

Held: There was no violation of respondent's Fourth Amendment rights by the warrantless search. When police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. *Chambers* v. *Maroney*, 399 U. S. 42; *Texas* v. *White*, 423 U. S. 67. Here, once the inventory search of the glove compartment revealed contraband, the warrantless search was properly expanded to include the air vents without any showing of "exigent circumstances."

Certiorari granted; 106 Mich. App. 601, 308 N. W. 2d 170, reversed and remanded.

PER CURIAM.

While respondent was the front-seat passenger in an automobile, the car was stopped for failing to signal a left turn. As two police officers approached the vehicle, they saw respondent bend forward so that his head was at or below the level of the dashboard. The officers then observed an open bottle of malt liquor standing upright on the floorboard between respondent's feet, and placed respondent under arrest for possession of open intoxicants in a motor vehicle. The 14-year-old driver was issued a citation for not having a driver's license. Respondent claimed ownership of the car.

Respondent and the driver were taken to the patrol car, and a truck was called to tow respondent's automobile. One of the officers searched the vehicle, pursuant to a departmental policy that impounded vehicles be searched prior to being towed. The officer found two bags of marihuana in the unlocked glove compartment. The second officer then searched the car more thoroughly, checking under the front seat, under the dashboard, and inside the locked trunk. Opening the air vents under the dashboard, the officer discovered a loaded, .38-caliber revolver inside.

Respondent was convicted of possession of a concealed weapon. He moved for a new trial, contending that the revolver was taken from his car pursuant to an illegal search and seizure; the trial court denied the motion.

The Michigan Court of Appeals reversed, holding that the warrantless search of respondent's automobile violated the Fourth Amendment. 106 Mich. App. 601, 308 N. W. 2d 170 (1981). The court acknowledged that in *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), this Court upheld the validity of warrantless inventory searches of impounded motor vehicles. Moreover, the court found that, since respondent had been placed under arrest and the other occupant of the car was too young to legally drive, it was proper for the officers to impound the vehicle and to conduct an inventory search prior to its being towed. However, in the view of the Court of Appeals, the search conducted in this case was "unreasonable in scope," because it extended to the air vents which, unlike the glove compartment or the trunk, were not a likely place for the storage of valuables or personal possessions. 106 Mich. App., at 606, 308 N. W. 2d, at 172.

The Court of Appeals also rejected the State's contention that the scope of the inventory search was properly expanded when the officers discovered contraband in the glove compartment. The court concluded that, because both the car and its occupants were already in police custody, there were

no "exigent circumstances" justifying a warrantless search for contraband.[1]

We reverse. In *Chambers* v. *Maroney*, 399 U. S. 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas* v. *White*, 423 U. S. 67 (1975). See also *United States* v. *Ross*, 456 U. S. 798, 807, n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.[2] See *ibid.*

Here, the Court of Appeals recognized that the officers were justified in conducting an inventory search of the car's

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[1] The Court of Appeals did not directly address the State's contention that the discovery of marihuana in the glove compartment provided probable cause to believe there was contraband hidden elsewhere in the vehicle. However, the court apparently assumed that the officers possessed information sufficient to support issuance of a warrant to search the automobile; the court's holding was that the officers were required to obtain such a warrant, and could not search on the basis of probable cause alone. See 106 Mich. App., at 606–608, 308 N. W. 2d, at 172–173.

[2] Even were some demonstrable "exigency" a necessary predicate to such a search, we would find somewhat curious the Court of Appeals' conclusion that no "exigent circumstances" were present in this case. Unlike the searches involved in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Texas* v. *White*, 423 U. S. 67 (1975)—which were conducted at the station house—the search at issue here was conducted on the roadside, before the car had been towed. As pointed out by Judge Deneweth, in dissent, "there was a clear possibility that the occupants of the vehicle could have had unknown confederates who would return to remove the secreted contraband." 106 Mich. App., at 609, 308 N. W. 2d, at 174.

glove compartment, which led to the discovery of contraband. Without attempting to refute the State's contention that this discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle, the Court of Appeals held that the absence of "exigent circumstances" precluded a warrantless search. This holding is plainly inconsistent with our decisions in *Chambers* and *Texas* v. *White*.

The petition for certiorari and the motion of respondent to proceed *in forma pauperis* are granted, the judgment of the Michigan Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for a writ of certiorari and set the case for oral argument.

UNITED STATES v. HOLLYWOOD MOTOR CAR CO., INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1144. Decided June 28, 1982

After respondents, originally indicted on two federal criminal counts in the Eastern District of Kentucky, obtained a change of venue to the Central District of California, the Government secured a superseding indictment which added four new counts. The Government then obtained a voluntary dismissal of three of the counts (including one of the original counts), and respondents moved to dismiss the remaining counts on the ground that the superseding indictment manifested prosecutorial vindictiveness in retaliation for their exercising their right to a change of venue, and thus ran afoul of the rule announced in *Blackledge* v. *Perry*, 417 U. S. 21. The District Court denied the motion but stayed the trial to permit an appeal. The Court of Appeals held that the denial of the motion to dismiss was immediately appealable as a "final decision" under 28 U. S. C. § 1291, and that respondents had established a case of prosecutorial vindictiveness requiring dismissal of the superseding indictment.

Held: The Court of Appeals was without jurisdiction under 28 U. S. C. § 1291 to review the District Court's interlocutory order refusing to dismiss the indictment. The policy embodied in § 1291 is inimical to piecemeal appellate review of trial court decisions that do not terminate the litigation, and this policy is at its strongest in the field of criminal law. Respondents' claim of prosecutorial vindictiveness does not fall within the narrow group of claims coming within the "collateral order" exception to § 1291's rule of finality. *Stack* v. *Boyle*, 342 U. S. 1; *Abney* v. *United States*, 431 U. S. 651; and *Helstoski* v. *Meanor*, 442 U. S. 500, distinguished. A claim of prosecutorial vindictiveness does not meet the test under such exception of being "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468. Cf. *United States* v. *MacDonald*, 435 U. S. 850.

Certiorari granted; 646 F. 2d 384, reversed.

PER CURIAM.

Respondents, originally indicted in the Eastern District of Kentucky on two counts for violations of 18 U. S. C. §§ 371

and 545, succeeded in obtaining a change of venue to the Central District of California. In the latter District, the Government secured a superseding indictment charging four new substantive counts of making false statements to customs officers in violation of 18 U. S. C. § 542, in addition to the two original counts. The Government then obtained a voluntary dismissal of the original conspiracy count and two of the false statement counts. Respondents moved to dismiss the remaining counts on the ground that the superseding indictment manifested prosecutorial vindictiveness and therefore ran afoul of the rule announced in *Blackledge* v. *Perry*, 417 U. S. 21 (1974). The District Court denied respondents' motion, but stayed the commencement of trial to permit an appeal. The Court of Appeals for the Ninth Circuit held "that the denial of a motion to dismiss based on the ground of vindictive prosecution is immediately appealable as a final decision under 28 U. S. C. § 1291." 646 F. 2d 384, 386 (1981).[1] In reaching this holding the Court of Appeals relied on its prior decisions in *United States* v. *Burt*, 619 F. 2d 831 (1980), and *United States* v. *Griffin*, 617 F. 2d 1342, cert. denied, 449 U. S. 863 (1980). Reaching the merits, the court held that respondents had established a case of prosecutorial vindictiveness requiring dismissal of the superseding indictment. The United States then sought review in this Court.

We do not reach the question of prosecutorial vindictiveness, for we hold that the Court of Appeals was without jurisdiction under 28 U. S. C. § 1291 to review the District Court's interlocutory order refusing to dismiss the indictment. Congress has limited the jurisdiction of the Courts of Appeals to "final decisions of the district courts."

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[1] The rule in the Ninth Circuit directly conflicts with that adopted by the Courts of Appeals for the District of Columbia and Fifth Circuits. Those courts have held that claims of prosecutorial vindictiveness may not be aired in interlocutory appeals. *United States* v. *Brizendine*, 212 U. S. App. D. C. 169, 659 F. 2d 215 (1981); *United States* v. *Gregory*, 656 F. 2d 1132 (CA5 1981).

28 U. S. C. § 1291. This Court has long held that the policy of Congress embodied in this statute is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and that this policy is at its strongest in the field of criminal law:

> "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment. . . . This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases. See *Cobbledick* v. *United States*, 309 U. S. 323, 324–326." *DiBella* v. *United States*, 369 U. S. 121, 124 (1962).

This Court has interpreted the jurisdictional statute to permit departures from the rule of finality in only a limited category of cases falling within the "collateral order" exception delineated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545–547 (1949). Such orders "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). In criminal cases, we have adhered to the collateral order exception to the rule of finality on three occasions: present in each of these cases were factors noticeably lacking in the instant appeal.

In *Stack* v. *Boyle*, 342 U. S. 1 (1951), the Court held that an order denying a motion to reduce bail could be reviewed before trial. Writing separately, Justice Jackson (the author of *Cohen*) recognized that "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all."

342 U. S., at 12. In *Abney* v. *United States*, 431 U. S. 651 (1977), we permitted interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds. Perhaps most important among the relevant factors, we recognized that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660. One right guaranteed by the Double Jeopardy Clause was the right not to be tried twice for the same offense. "[I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.*, at 662 (emphasis in original). Finally, in *Helstoski* v. *Meanor*, 442 U. S. 500 (1979), we held that a United States Congressman could have taken an interlocutory appeal in a criminal case to assert the immunity conferred upon him by the Speech or Debate Clause of the Constitution. Crucial to the holding was our view that the Speech or Debate Clause protected Congressmen "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.*, at 508, quoting *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967). The right protected by the Clause would have been lost if the appeal had been postponed.

Each of these cases, in addition to satisfying the other requirements of *Cohen*, involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U. S. 850, 860 (1978). Our holding in *United States* v. *MacDonald* underscores the significance of this feature. The issue in *MacDonald* was whether a defendant could appeal, prior to trial, a District Court's order denying his motion to dismiss the indictment because of an alleged violation of his

Sixth Amendment right to a speedy trial. In concluding that such an appeal was not authorized by 28 U. S. C. § 1291, we noted:

> "There perhaps is some superficial attraction in the argument that the right to a speedy trial . . . must be vindicated before trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. . . . Proceeding with the trial does not cause or compound the deprivation already suffered." *Id.*, at 860–861.

Respondents assert that their claim of prosecutorial vindictiveness, based on the modification of the original indictment in retaliation for their exercise of a right to move for change of venue, is analogous to the three instances in which we have allowed appeal in criminal cases under the collateral order doctrine. But we think that their claim is more analogous to the speedy trial claim which we held unreviewable under the collateral order doctrine in *United States* v. *MacDonald*, *supra*. We think that it particularly fails the third part of the test for *Cohen* appeals articulated in *Coopers & Lybrand*, *supra*, that the claim "be effectively unreviewable on appeal from a final judgment."

Blackledge v. *Perry*, 417 U. S. 21 (1974), on which respondents base the merits of their claim of vindictive prosecution, was an application of the principles announced in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), to conduct on the part of a prosecutor. In *Perry* the defendant had been

convicted in a state court of limited jurisdiction, and had exercised his statutory right to a *de novo* appeal to the state court of general jurisdiction. Prior to the commencement of the latter trial, the prosecutor obtained an indictment charging the defendant with crimes more severe than those for which he was initially convicted. Because the facts suggested "a realistic likelihood of 'vindictiveness,'" 417 U. S., at 27, we deemed it necessary to apply the "prophylactic rule of *Pearce*," *id.*, at 26, in order to discourage retaliation by the State for the defendant's exercise of his procedural right.

Although there is language in the *Perry* opinion suggesting that the defendant possessed a "right not to be haled into court at all" upon the more serious charge, *id.*, at 30, it is clear that the Court was not using this language to indicate that he was entitled to be free of any retrial whatever. We stated in *Blackledge* that "[w]hile the Due Process Clause of the Fourteenth Amendment bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge." *Id.*, at 31, n. 8. The defendant in *Perry* was fully protected by postconviction relief, leading to a new trial free of the taint of vindictiveness.

Obviously, it is wholly desirable to correct prior to trial any substantive errors noticed at that time. It is equally evident that when relief must await postconviction proceedings, the defendant is subjected to the burden of defending himself at trial, even though the presence of errors might require reversal of his conviction and possibly a second trial. Nevertheless, reversal of the conviction and, where the Double Jeopardy Clause does not dictate otherwise, the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused.[2]

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[2] Noting that "encouragement of delay is fatal to the vindication of the criminal law," this Court has observed that "[b]earing the discomfiture and

As we noted in *United States* v. *MacDonald*, 435 U. S., at 860, n. 7:

> "Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial."

Even when the vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied. In *MacDonald*, for example, we declined to permit a defendant whose speedy trial motion had been denied before trial to obtain interlocutory appellate review, despite our recognition that "an accused who does successfully establish a speedy trial claim before trial will not be tried." *Id.*, at 861, n. 8. The nature of the speedy trial right was such that "[p]roceeding with the trial does not cause or compound the deprivation already suffered." *Id.*, at 861. This holding reflects the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. See *id.*, at 860, n. 7. The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not.

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cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940). Thus, in the run of cases, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Id.*, at 325–326. This limitation imposed by Congress must be observed even when the defendant's claim is considered meritorious. See *United States* v. *MacDonald*, 435 U. S. 850, 857–858, n. 6 (1978).

The right asserted by respondents is simply not one that must be upheld prior to trial if it is to be enjoyed at all.[3] As noted in *MacDonald, supra*, there is a superficial plausibility to the contention that any claim, particularly a constitutional claim, that would be dispositive of the entire case if decided favorably to a criminal defendant, should be decided as quickly as possible in the course of the litigation. But if such a principle were to be applied, questions as to the constitutionality of the statutes authorizing the prosecution and doubtless numerous other questions would fall under such a definition, and the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions. It is only a narrow group of claims which meet the test of being "effectively unreviewable on appeal from a final judgment," and the claim of prosecutorial vindictiveness is, we hold, not one of them.

The petition for certiorari is granted, and the judgment of the Court of Appeals for the Ninth Circuit is reversed, with instructions to that court to dismiss the appeal.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Today, the Court carries its recent penchant for summary decision to a new extreme. The substantial and controversial question raised here—whether an order denying a motion

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[3] By holding that the right asserted by respondents is not one that "will have been lost, probably irreparably," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), if appeal is postponed until the rendition of judgment, we imply no view on the merit of respondents' claim or on the more general question whether the Due Process Clause is violated by the addition of charges prior to trial. We merely hold that denial of a motion to dismiss an indictment when the motion is premised on a claim of prosecutorial vindictiveness is not a collateral order that can be appealed prior to judgment under § 1291.

to dismiss based on prosecutorial vindictiveness is appealable before trial—does not, in my view, lend itself to summary treatment. Nevertheless, the Court has decided this important question of appellate jurisdiction without briefing or argument, even though it was not briefed or argued before the District Court or the Court of Appeals and was not the subject of any lower court opinion. I dissent.

I

The Court, it seems to me, has shown a disturbing tendency of late to dispose of difficult cases by summary *per curiam* reversals. I must assume that this tendency is prompted, at least in part, by the growing pressures of the Court's calendar and an ill-conceived conviction that we must stay abreast of the increasing workload whatever the costs may be. I regret this pattern, for I think it demeans the Court and its work and surely tends to lessen the quality of its legal product.

Summary action is particularly unfortunate in this case, for the Court directs that respondents' appeal be dismissed on an issue that was not raised by the Government until its petition for rehearing in the Court of Appeals. Indeed, for more than a year—until the Court of Appeals ruled on the merits in favor of respondents—the Government affirmatively represented to that court that it "ha[d] jurisdiction to review prior to trial a District Court's denial of a defendant's motion to dismiss for vindictive prosecution." United States' Emergency Motion for Summary Affirmance of District Court, reprinted in App. to Brief in Opposition 5a. As a result, the jurisdictional question was not briefed or argued before the Court of Appeals or the District Court.

Respondents' opposition to the Government's petition for certiorari understandably focuses on arguments for denying certiorari—in particular, the Government's failure to raise the jurisdictional issue in a more timely fashion. Coupled

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with the Government's litigation strategy, the Court's summary disposition therefore deprives respondents of their "day in court" in a singularly inappropriate manner.

II

Additionally, I do not find today's ruling so clearly compelled as to warrant summary treatment, especially when the Solicitor General, contrary to his frequent practice, has not suggested summary reversal in his petition for certiorari. In my view, the issue is important enough to be briefed and argued fully in at least one court.

Certainly, the Court's disposition is not mandated by our precedents. As the Court explains, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and *Abney* v. *United States*, 431 U. S. 651 (1977), interpret 28 U. S. C. § 1291 as authorizing interlocutory appeals when a three-part standard has been met. The Court fails, however, to mention the first two requirements, presumably because they are satisfied here: that the denial of a defendant's motion to dismiss an indictment on vindictive prosecution grounds "constitute[s] a complete, formal, and, in the trial court, final rejection of a criminal defendant's [vindictive prosecution] claim," 431 U. S., at 659, and that it resolves an issue that is "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged," *ibid.* Unlike the speedy trial claim before the Court in *United States* v. *MacDonald*, 435 U. S. 850 (1978), which depended on an assessment of the extent to which delay had prejudiced the defense—an assessment that could only be "speculative" prior to trial, *id.*, at 858—an allegation that the prosecutor impermissibly increased the charges in response to the defendant's exercise of a legal right may be evaluated before trial, for all the facts relevant to such a claim are fully available.

The Court properly suggests that the third requirement set out in *Cohen* and *Abney* is the most difficult to apply in

this context. See *ante*, at 267. But, unlike the Court, I find force in respondents' contention that the right they seek to vindicate, in contrast to the right at issue in *MacDonald*, is "a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." 435 U. S., at 861. In *MacDonald*, it was "the delay before trial, not the trial itself, that offend[ed] against the constitutional guarantee of a speedy trial." *Ibid.* When the defendant has been the victim of vindictive prosecution, however, the Court has said that he may "not to be haled into court *at all* upon the [increased] charge." *Blackledge* v. *Perry*, 417 U. S. 21, 30 (1974) (emphasis added). And we have analogized that right to the right protected by the Double Jeopardy Clause, see *id.*, at 31, which must, of course, be vindicated prior to trial if it is to be protected at all.[1]

Moreover, postconviction review may not suffice to remedy the chilling effect the vindictive prosecution doctrine is designed to prevent. The Court repeatedly has declined to hold that the Due Process Clause forbids only prosecutorial action taken with an actual retaliatory motive. Rather, it has emphasized that "'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of [his] right[s] . . . , due process also requires that a defendant be freed of *apprehension* of such a retaliatory motivation . . . .'"

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[1] See *Abney* v. *United States*, 431 U. S. 651, 659 (1977) (noting that the defendant in *Blackledge* v. *Perry* was "contesting the very authority of the Government to hale him into court to face trial on the charge against him"); *Blackledge* v. *Perry*, 417 U. S., at 30–31 (observing that the defendant's vindictive prosecution claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him"; that, when the prosecutor acts vindictively in enhancing charges, the State is "simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge . . ."; that "[t]he very initiation of the proceedings against [a defendant subjected to vindictive prosecution] operated to deny him due process of law"; and that "North Carolina simply could not permissibly require Perry to answer to the felony charge").

Id., at 28 (emphasis added), quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 725 (1969); see also *United States* v. *Goodwin*, 457 U. S. 368, 375–376 (1982). Even if a defendant is convinced that his vindictive prosecution claim ultimately will prevail on postconviction review, the increased burdens attending a trial on enhanced charges may deter him from exercising his legal rights. This may well not be a case, then, where "reversal of the conviction and . . . a new trial free of prejudicial error" are "adequate means of vindicating the constitutional rights of the accused." *Ante*, at 268.

In addition to extending our precedents, the Court goes well beyond the rulings of the two Courts of Appeals it characterizes as "directly conflict[ing]" with the decision below. *Ante*, at 264, n. 1. In *United States* v. *Brizendine*, 212 U. S. App. D. C. 169, 180, 659 F. 2d 215, 226 (1981), the United States Court of Appeals for the District of Columbia Circuit refused to permit interlocutory appeals involving "claims of due process violations arising from the plea bargaining process." That court, however, expressly refused to consider the appealability of the denial of a motion to dismiss "in the *Blackledge* situation . . . ," where the defendant's claim "turned on a purely legal issue . . ." and challenged increased charges filed in response to his exercise of a legal right. *Id.*, at 175, 659 F. 2d, at 221. Similarly, in *United States* v. *Gregory*, 656 F. 2d 1132, 1136 (1981), the United States Court of Appeals for the Fifth Circuit did not foreclose the possibility that some claims of prosecutorial vindictiveness could be the subject of interlocutory appeal.[2]

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[2] Other Courts of Appeals have not restricted interlocutory appeals to the three instances in which this Court has applied the collateral-order doctrine in criminal cases, see *ante*, at 265–266. See *United States* v. *Venable*, 585 F. 2d 71, 74–75 (CA3 1978) (denial of motion to bar retrial on collateral estoppel grounds is immediately appealable); *United States* v. *Alessi*, 536 F. 2d 978, 980–981 (CA2 1976) (denial of motion to dismiss indictment that allegedly violated prior plea bargain may be the subject of an interlocutory appeal).

I cannot conclude that the Court's ruling is compelled by our prior cases or is even consistent with the clear weight of authority in the Courts of Appeals. I would grant the petition for certiorari and set the case for oral argument.

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SOUTH DAKOTA *v.* NEBRASKA ET AL.

ON BILL OF COMPLAINT

No. 72, Orig. Findings and decree entered June 28, 1982

The Report of the Special Master is received and ordered filed.

This matter comes before this Court on Stipulation by each of the parties hereto: the State of South Dakota, by and through its Attorney General, Mark Meierhenry; the State of Nebraska, by and through its Attorney General, Paul L. Douglas; the Intervenors, by and through themselves and their attorney, Everett A. Bogue.

FINDINGS AND DECREE

IT IS THE FINDING OF THIS COURT THAT:

1. The parties have concluded that it is in the best interest of each of them to avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect to the location of the boundary between the States and, therefore, to settle and to terminate this dispute by agreement and compromise and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to Rush Island in the future to a Joint State Boundary Commission.

2. In the furtherance of the best interests of each of the parties, it is agreed that that land known as "Elk/Rush Island," subject of this lawsuit, is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The State of South Dakota has agreed to cede to the Intervenors any right or title it may have in the subject property known as "Elk/Rush Island," more fully described in Appendix A attached to the Stipulation; and the State of South

Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska, dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the Intervenors, which action can be found in the records of Cedar County District Court of Nebraska, Case No. 5628, Docket 24, Page 13.

4. The State of South Dakota has further agreed to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota, regarding this subject property.

5. The States of Nebraska and South Dakota have agreed to submit the determination of future boundary changes with regard to "Elk/Rush Island" but not to the title to the premises therein, to a Joint State Boundary Commission appointed by the elected officials of these respective States for the Commission's determination from the date of that determination forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that pursuant to the above Stipulations and Findings:

1. That the land known as "Elk/Rush Island," the subject of this litigation, be and the same is within the boundary of the State of Nebraska, and subject to its jurisdiction;

2. That the State of South Dakota hereby cedes to the Intervenors any right or title it may have to the subject property known as "Elk/Rush Island" as more fully described in Appendix A attached hereto;

3. That the States of Nebraska and South Dakota will submit the determination of the future boundary changes, if any, with regard to "Elk/Rush Island," but not to the title of the premises thereto, to a Joint State Boundary Commission appointed by the elected officials of these respective States for the Commission's determination from the date of that determination forth;

4. That the State of South Dakota and the State of Nebraska will proceed to effectuate any and all other requirements agreed to in the Stipulation to the extent that conditions and circumstances permit; and

5. Each party shall bear its own costs.

APPENDIX A

Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1, East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, Page 70 as follows: Commencing at the Section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof.

WILLIAMS v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-2116. Argued April 20, 1982—Decided June 29, 1982

Title 18 U. S. C. § 1014 makes it a crime to "knowingly mak[e] any false statement or report," or "willfully overvalu[e] any land, property or security," for the purpose of influencing the action of described financial institutions (including federally insured banks) "upon any application, advance, . . . commitment, or loan." Petitioner engaged in a series of transactions seemingly amounting to a case of "check kiting" between his accounts in federally insured banks, first drawing a check far in excess of his account balance in one bank and depositing it in his account in the other, and then reversing the process between his accounts. Petitioner was convicted in Federal District Court of violating § 1014, and the Court of Appeals affirmed.

Held: Petitioner's conduct in depositing "bad checks" in federally insured banks is not proscribed by § 1014. Pp. 284–290.

(a) Petitioner's actions did not involve the making of a "false statement." Technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." Similarly, petitioner's conduct cannot be regarded as "overvalu[ing]" property or a security. In a literal sense, the face amounts of the checks were their "values." To interpret § 1014 as meaning that a drawer of a check has made a "false" statement whenever he has insufficient funds in his account at the moment the check is presented would "sligh[t] the wording of the statute" *United States* v. *Enmons*, 410 U. S. 396, 399, and would render a wide range of unremarkable conduct violative of federal law. When § 1014 was enacted, federal action was not necessary to interdict the deposit of bad checks, for fraudulent checking activities already were addressed in comprehensive fashion by state law. Pp. 284–287.

(b) The legislative history does not support the proposition that § 1014 was designed to have general application to the passing of worthless checks, and does not demand that the statute be read as applicable to anything other than representations made in connection with conventional loan or related transactions. A narrow interpretation of § 1014 is consistent with the usual approach of lenity in the construction of criminal statutes. Pp. 288–290.

639 F. 2d 1311, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 291. MARSHALL, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and WHITE, JJ., joined, *post*, p. 292.

Nicholas P. Chilivis argued the cause and filed briefs for petitioner.

Richard G. Wilkins argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Shapiro, William C. Bryson, Douglas S. Wood,* and *Janis H. Kockritz.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must decide whether the deposit of a "bad check" in a federally insured bank is proscribed by 18 U. S. C. § 1014.

I

In 1975, petitioner William Archie Williams purchased a controlling interest in the Pelican State Bank in Pelican, La., and appointed himself president. The bank's deposits were insured by the Federal Deposit Insurance Corporation.

Among the services the bank provided its customers at the time of petitioner's purchase was access to a "dummy account," used to cover checks drawn by depositors who had insufficient funds in their individual accounts. Any such check was processed through the dummy account and paid from the bank's general assets. The check was then held until the customer covered it by a deposit to his own account, at which time the held check was posted to the customer's account and the dummy account was credited accordingly. As president of the bank, petitioner enjoyed virtually unlimited use of the dummy account, and by May 2, 1978, his personal overdrafts amounted to $58,055.44, approximately half the total then covered by the account.

On May 8, 1978, federal and state examiners arrived at the Pelican Bank to conduct an audit. That same day, peti-

tioner embarked on a series of transactions that seemingly amounted to a case of "check kiting."[1] He began by opening a checking account with a deposit of $4,649.97 at the federally insured Winn State Bank and Trust Company in Winnfield, La. The next day, petitioner drew a check on his new Winn account for $58,500—a sum far in excess of the amount actually on deposit at the Winn Bank—and deposited it in his Pelican account. Pelican credited his account with the face value of the check, at the same time deducting from petitioner's account the $58,055.44 total of his checks that previously had been cleared through the dummy account. At the close of business on May 9, then, petitioner had a balance of $452.89 at the Pelican Bank.

On May 10, petitioner wrote a $60,000 check on his Pelican account—again, a sum far in excess of the account balance—and deposited it in his Winn account. The Winn Bank immediately credited the $60,000 to petitioner's account there, and Pelican cleared the check through its dummy account when it was presented for payment on May 11. The Winn Bank rou-

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[1] As the Government explains, a check-kiting scheme typically works as follows: "The check kiter opens an account at Bank A with a nominal deposit. He then writes a check on that account for a large sum, such as $50,000. The check kiter then opens an account at Bank B and deposits the $50,000 check from Bank A in that account. At the time of deposit, the check is not supported by sufficient funds in the account at Bank A. However, Bank B, unaware of this fact, gives the check kiter immediate credit on his account at Bank B. During the several-day period that the check on Bank A is being processed for collection from that bank, the check kiter writes a $50,000 check on his account at Bank B and deposits it into his account at Bank A. At the time of the deposit of that check, Bank A gives the check kiter immediate credit on his account there, and on the basis of that grant of credit pays the original $50,000 check when it is presented for collection.

"By repeating this scheme, or some variation of it, the check kiter can use the $50,000 credit originally given by Bank B as an interest-free loan for an extended period of time. In effect, the check kiter can take advantage of the several-day period required for the transmittal, processing, and payment of checks from accounts in different banks . . . ." Brief for United States 12–13.

tinely paid petitioner's May 9 check for $58,500 when it cleared on May 12.

Petitioner next attempted to balance his Pelican account by depositing a $65,000 check drawn on his account at yet another institution, the Sabine State Bank in Many, La. Unfortunately, the balance in petitioner's Sabine account at the time was only $1,204.81. The Sabine Bank therefore refused payment when Pelican presented the check on May 17. On May 23, petitioner settled his Pelican account by depositing at the Pelican Bank a $65,000 money order obtained with the proceeds from a real estate mortgage loan.

The bank examiners, meanwhile, had been following petitioner's activities with considerable interest. Their scrutiny ultimately led to petitioner's indictment, in the United States District Court for the Western District of Louisiana, on two counts of violating 18 U. S. C. § 1014.[2] That provision makes it a crime to

> "knowingly mak[e] any false statement or report, or willfully overvalu[e] any land, property or security, for the purpose of influencing in any way the action of [certain enumerated financial institutions, among them banks whose deposits are insured by the Federal Deposit Insurance Corporation], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan . . . ."

The first of the counts under § 1014 was directed at the May 9, 1978, check drawn on the Winn Bank, and charged that petitioner "did knowingly and willfully overvalue . . . a security, that is a check . . . for the purpose of influencing the Pelican State Bank, . . . a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, upon an advance of money and extension of credit." The other

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[2] Petitioner also was charged—and thereafter convicted—with one count of misapplying bank funds, in violation of 18 U. S. C. § 656. The validity of that conviction, which was affirmed on appeal, is not before us.

§ 1014 count used virtually identical language to indict petitioner for depositing in his Winn account the May 10 check drawn on the Pelican Bank. App. 3–4.[3]

At petitioner's trial the court charged the jury that "[a] check is a security for purposes of Section 1014." The court then explained that "[t]he Government charges that Mr. Williams was involved in check-kiting—a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks." *Id.*, at 36. To convict petitioner, the court continued, the jury had to find as to each count that "the defendant . . . did knowingly and willfully make a false statement of a material fact," that the statement "influence[d] the decision of the [bank] officers or employees," and that "the defendant made the false statement with fraudulent intent to influence the [bank] to extend credit to the defendant." *Id.*, at 37–38. "The crucial question in check-kiting," the court concluded, "is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them." *Id.*, at 38. The jury convicted petitioner on both counts, and he was sentenced to six months' incarceration on the second § 1014 count. For the first § 1014 count he was placed on five years' probation, to begin upon his release from confinement. App. 39.[4]

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[3] Neither of the § 1014 counts of the indictment expressly charged petitioner with making a "false statement." The first count, however, did allege that he "presented said check for deposit at Pelican State Bank . . . and represented and caused to be represented to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the [petitioner] then well knew, there were no sufficient funds in the account of W. A. Williams at the Winn State Bank and Trust Company, to cover said check." App. 3. Similar language was employed in the second § 1014 count. *Id.*, at 4.

[4] The sentence of probation also applied to petitioner's conviction for misapplication of bank funds. See n. 2, *supra*.

Among other things, petitioner argued on appeal that the indictment did not state a violation of § 1014. The Court of Appeals rejected this contention, however, concluding that petitioner's actions "constitute classic incidents of check kiting." 639 F. 2d 1311, 1319 (CA5 1981). In line with its earlier decision in *United States* v. *Payne*, 602 F. 2d 1215 (CA5 1979), cert. denied, 445 U. S. 903 (1980), the court found such action proscribed by the statute.

We granted certiorari, limited to questions 3 and 4 presented by the petition, in order to resolve a conflict concerning the reach of § 1014.[5] 454 U. S. 1030 and 1096 (1981).

II

To obtain a conviction under § 1014, the Government must establish two propositions: it must demonstrate 1) that the defendant made a "false statement or report," or "willfully overvalue[d] any land, property or security," and 2) that he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance, . . . commitment, or loan." We conclude that petitioner's convictions under § 1014 cannot stand, because the Government has failed to meet the first of these burdens.

A

Although petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a "false statement," for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." Petitioner's bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the obligations if the banks dishonored the drafts. Each check did not, in terms,

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[5] See *United States* v. *Sher*, 657 F. 2d 28 (CA3 1981), cert. pending, No. 81-1047 (holding that § 1014 does not proscribe check kiting). Cf. *United States* v. *Krown*, 675 F. 2d 46, 50 (CA2 1982) (noting the conflict).

make any representation as to the state of petitioner's bank balance. As defined in the Uniform Commercial Code, 2 U. L. A. 17 (1977), a check is simply "a draft drawn on a bank and payable on demand," § 3–104(2)(b), which "contain[s] an unconditional promise or order to pay a sum certain in money," § 3–104(1)(b). As such, "[t]he drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder." § 3–413(2), 2 U. L. A. 424 (1977). The Code also makes clear, however, that "[a] check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." § 3–409(1), 2 U. L. A. 408 (1977). Louisiana, the site of petitioner's unfortunate banking career, embraces verbatim each of these definitions. See La. Rev. Stat. Ann. §§ 10:3–104, 10:3–409, 10:3–413 (West Supp. 1982).[6]

For similar reasons, we conclude that petitioner's actions cannot be regarded as "overvalu[ing]" property or a security. Even assuming that petitioner's checks were property or a security as defined by § 1014, the value legally placed upon them was the value of petitioner's obligation; as defined by Louisiana law, that is the only meaning actually attributable to a bank check. See La. Rev. Stat. Ann. §§ 10:3–409(1), 10:3–413(2) (West Supp. 1982). In a literal sense, then, the face amounts of the checks were their "values."

The foregoing description of bank checks is concededly a technical one, and the Government therefore argues with some force that a drawer is generally understood to represent that he "currently has funds on deposit sufficient to cover the face value of the check." Brief for United States 19. See *United States* v. *Payne*, 602 F. 2d, at 1218. If the

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[6] Unlike many state statutes that do proscribe conduct such as that engaged in by petitioner, the federal scheme obviously does not in terms reach the deposit of checks that are supported by insufficient funds. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973).

drawer has insufficient funds in his account at the moment the check is presented, the Government continues, he effectively has made a "false statement" to the recipient. While this broader reading of § 1014 is plausible, we are not persuaded that it is the preferable or intended one. It "slights the wording of the statute," *United States* v. *Enmons*, 410 U. S. 396, 399 (1973), for, as we have noted, a check is literally not a "statement" at all. In any event, whatever the general understanding of a check's function, "false statement" is not a term that, in common usage, is often applied to characterize "bad checks." And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable "understandings."[7]

Equally as important, the Government's interpretation of § 1014 would make a surprisingly broad range of unremarkable conduct a violation of federal law. While the Court of Appeals addressed itself only to check kiting, its ruling has wider implications: it means that any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability, whether or not the drawer had an intent to defraud. Under the Court of Appeals' approach, the violation of § 1014 is not the *scheme* to pass a number of bad checks; it is the presentation of one false statement—that is, one check that at the moment of deposit is not supported by sufficient funds—to a federally in-

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[7] That is particularly true where, as here, it is not immediately clear what "common understanding" would recognize as the implied representation of the act of depositing one's own check. The United States suggests that one who deposits a check represents that he "currently has funds on deposit sufficient to cover the face value." Brief for United States 19. But it would be equally plausible to suggest that many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears, or that the drawer will make good the face value of the draft if it is dishonored by the bank. We therefore find "common understanding" a particularly fragile foundation upon which to base an interpretation of § 1014.

sured bank. The United States acknowledged as much at oral argument. Tr. of Oral Arg. 40. Indeed, each individual count of the indictment in this case stated only that petitioner knowingly had deposited a single check that was supported by insufficient funds, not that he had engaged in an extended scheme to obtain credit fraudulently.[8]

Yet, if Congress really set out to enact a national bad check law in § 1014, it did so with a peculiar choice of language and in an unusually backhanded manner. Federal action was not necessary to interdict the deposit of bad checks, for, as Congress surely knew, fraudulent checking activities already were addressed in comprehensive fashion by state law. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973). Absent support in the legislative history for the proposition that § 1014 was "designed to have general application to the passing of worthless checks," *United States* v. *Krown*, 675 F. 2d 46, 50 (CA2 1982), we are not prepared to hold petitioner's conduct proscribed by that particular statute.[9]

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[8] JUSTICE MARSHALL's dissent does not fully respond to this point. That opinion, like the Government's brief, emphasizes that petitioner's "conduct was wrongful," *post*, at 293, and deals only with § 1014's application to check kiting. See also *post*, at 294, 295, 299, 300, and 301. Indeed, the dissent seems to suggest that that statute would not reach the conduct of a defendant who "wrote a check on an account containing insufficient funds with the good-faith intention to deposit in that account an amount that would cover the check before it cleared in the normal course of business." *Post*, at 292. Accepting JUSTICE MARSHALL's theory, however, would bring such conduct within the literal language of the statute, for a "false statement" would have been submitted with the hope of inducing a bank to "advance" funds. While the dissent attempts to avoid this by suggesting that there would be no violation of § 1014 absent an intent "to defraud," *post*, at 301, n. 4, the language of the statute imposes no such intent requirement. And as we emphasize above, we believe that the wording of § 1014 would be a peculiar choice of terms if Congress wished to proscribe such conduct.

[9] JUSTICE MARSHALL's dissent rests entirely on the proposition that petitioner's conduct falls within the "plain language" of § 1014. *Post*, at 293. See also *post*, at 301, 302, and 305–306. In our view, that literally is not

B

In the 1948 codification of Title 18 of the United States Code, 62 Stat. 683, § 1014 reduced 13 existing statutes, which criminalized fraudulent practices directed at a variety of financial and credit institutions, to a single section. See 18 U. S. C. § 1014, Historical and Revision Notes. Of the originally enumerated institutions,[10] only two—the Reconstruction Finance Corporation, see 15 U. S. C. § 616(a) (1946 ed.), and the Federal Reserve Banks, see 12 U. S. C. § 596 (1946 ed.)—performed duties other than the making of farm and home loans, and neither of those two organizations accepted checks for deposit from private customers. See *United States* v. *Sabatino*, 485 F. 2d 540, 548 (CA2 1973), cert. denied, 415 U. S. 948 (1974); *United States* v. *Edwards*, 455 F. Supp. 1354, 1357 (MD Pa. 1978). It is evident, then, that bad checks were not among the "false statements" or "overvalued property" originally addressed by the statute. While Congress has added and subtracted certain institutions to and from the list covered by § 1014 over the intervening years, no changes have been made in the type of transactions proscribed by the provision.

The legislative history does not demand a broader reading of the statute. The amendments adding institutions to § 1014's list attracted little attention in Congress and were dealt with summarily; at no point was it suggested that the statute should be applicable to anything other than represen-

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true. And even if one looks to the "common understanding" so emphasized by JUSTICE MARSHALL, *post*, at 296–298, the statute is at best ambiguous, for we doubt that the public typically describes bad checks as "false statements."

[10] These included the Farmers' Home Corporation, the Federal Crop Insurance Corporation, Federal Reserve Banks, the Farm Credit Administration, Federal Credit Banks, the Federal Farm Mortgage Corporation, the National Agricultural Credit Corporation, Federal Home Loan Banks, the Home Owners' Loan Corporation, the Reconstruction Finance Corporation, and related institutions. See 7 U. S. C. §§ 1026(a), 1514(a) (1946 ed.); 12 U. S. C. §§ 596, 981, 1122, 1123, 1138d(a), 1248, 1312, 1313, 1441(a), 1467(a) (1946 ed.); 15 U. S. C. § 616(a) (1946 ed.).

tations made in connection with conventional loan or related transactions. In 1964, for example, when Congress, by Pub. L. 88–353, § 5, 78 Stat. 269, added federal credit unions to the statutory list, § 1014 was described as barring "false statements or willful overvaluations in connection with applications, loans, and the like." S. Rep. No. 1078, 88th Cong., 2d Sess., 1 (1964). Thus, the Senate Committee on Banking and Currency declared that § 1014 "is designed primarily to apply to borrowers from Federal agencies or federally chartered organizations."[11] *Id.*, at 4. Similarly, the first of two 1970 amendments, which added state-chartered credit unions to the statutory list, Pub. L. 91–468, § 7, 84 Stat. 1017, was characterized simply as "relating to false statements in loan and credit applications." H. R. Rep. No. 91–1457, p. 21 (1970).

A second 1970 amendment, Pub. L. 91–609, § 915, 84 Stat. 1815, added banks insured by the Federal Deposit Insurance Corporation, federal home loan banks, and institutions insured by the Federal Savings and Loan Insurance Corporation, for the first time listing institutions that engaged in commercial checking.[12] But there was no contemporaneous congressional recognition of the substantial expansion of federal criminal jurisdiction that would attend the proscription of bad checks. To the contrary, the Reports accompanying the amendment stated simply that the addition "would describe more explicitly the institutions which are covered by 18 U. S. C. § 1014, which provides penalties for making false statements or reports in connection with loans or other simi-

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[11] The Committee added ambiguously that the statute "is not, however, limited by its terms to borrowers and would seem also to apply to others, including for example, officers and employees of the agencies and institutions named." S. Rep. No. 1078, 88th Cong., 2d Sess., 4 (1964).

[12] Also added to the list in 1970 were the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation themselves, as well as the Administrator of the National Credit Union Administration. Pub. L. 91–609, § 915, 84 Stat. 1815.

lar transactions." H. R. Rep. No. 91-1556, p. 35 (1970). See H. R. Conf. Rep. No. 91-1784, p. 66 (1970). Congressional debate was directed only at the addition of federally insured savings and loan institutions, which was said to "mak[e] it a Federal crime to submit false data to an insured savings and loan on the true value of a property on which a mortgage is to be granted." 116 Cong. Rec. 42633 (1970) (remarks of Rep. Sullivan).

Given this background—a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law—we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes. The Court has emphasized that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States* v. *Bass*, 404 U. S. 336, 347 (1971), quoting *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221-222 (1952).[13] To be sure, the rule of lenity does not give courts license to disregard otherwise applicable enactments. But in a case such as this one, where both readings of § 1014 are plausible, "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the" deposit of bad checks. *United States* v. *Enmons*, 410 U. S., at 411.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[13] We therefore find it somewhat surprising that JUSTICE MARSHALL's dissenting opinion takes us to task for noting the applicability of the rule of lenity to the interpretation of what we believe to be an ambiguous statute.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The majority reverses petitioner's conviction under 18 U. S. C. § 1014 on the grounds that the Government has not shown that he made a "false statement or report" or "willfully overvalue[d] any land, property or security." *Ante*, at 284. According to the majority, a check is not a statement; it is merely an order to the drawee bank to pay the face amount to the payee and a promise to pay the amount of the check upon notice of dishonor. *Ante*, at 284–285. Like JUSTICE MARSHALL, I do not disagree with the majority that under the Uniform Commercial Code a check constitutes an order to the drawee bank and a promise to pay upon notice of dishonor. However, the fact that the Uniform Commercial Code describes a check in this manner does not mean that a check does not carry with it other representations, for the Code does not purport to contain an all-inclusive definition of a check.

It defies common sense and everyday practice to maintain, as the majority does, that a check carries with it no representation as to the drawer's account balance. No bank would give a customer immediate credit for a check drawn on another bank or reduce a check to cash if it did not believe that the check would be paid in the normal course of collection. It could be argued that petitioner did not make a false statement with respect to the May 10 check drawn on the Pelican Bank because he knew the bank would pay the check through its dummy account. However, petitioner does not contend that he had any such arrangement with the Winn Bank, and thus the May 9 check for $58,500 drawn on the Winn Bank, when his balance was $4,649.97, can fairly be said to constitute a false statement. In any event, a properly instructed jury surely found that Williams had made false representations with respect to each of the checks that were the subject of this indictment.

If the majority really means what it says in Part II–A of its opinion—that the Government failed to show that petitioner

made a false statement or overvalued property or security—it is unnecessary to explore the legislative history of § 1014 or to apply the rule of lenity. On the other hand, if the majority reverses the Court of Appeals because it cannot conceive that Congress intended § 1014 to reach the conduct at issue because the area has long been regulated by state law, it is not necessary to employ the fiction that a check does not entail a representation that it will be paid in the normal course of business by the drawee bank. Because the majority opinion appears to me to rest on that fiction, I respectfully dissent. I also join JUSTICE MARSHALL's dissenting opinion.

JUSTICE MARSHALL, with whom THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE WHITE join, dissenting.

The majority, after developing an overly technical "definition" of the meaning of a check—a definition which will come as quite a surprise to banks and businesses that accept checks in exchange for goods, services, or cash on the representation that the drawer has sufficient funds to cover the check—concludes that the question whether petitioner Williams' check-kiting scheme is covered by 18 U. S. C. § 1014 is ambiguous. The majority then applies its version of the rule of lenity, and decides that Williams cannot be convicted for violating this statute. Because I believe that the majority misapplies the rule of lenity, and because Williams' conduct is clearly prohibited by the statute, I respectfully dissent.

I

Before addressing the application of § 1014 to Williams' conduct, I think that it is helpful to set forth clearly what is *not* involved here. This is not a case in which a defendant, through careless bookkeeping, wrote checks on accounts with insufficient funds. Nor is this a case in which a defendant wrote a check on an account containing insufficient funds with the good-faith intention to deposit in that account an amount that would cover the check before it cleared in the normal course of business. Rather, this case clearly involves

fraudulent conduct. Petitioner Williams engaged in an intentional check-kiting scheme. He misled the first bank into honoring his worthless, or virtually worthless, check and extending him immediate credit. This extension of credit enabled him to "play the float" and cover that check by misleading another bank into extending him credit on an equally worthless check. In effect, Williams was able to obtain interest-free extensions of credit. Williams, who was a bank president, does not, nor can he, make any credible argument that he was unaware that his conduct was wrongful. With this in mind, I turn to the question whether Williams' conduct constitutes a violation of 18 U. S. C. § 1014.

Section 1014 is a comprehensive statute designed to protect the assets of federally insured lending institutions. The Government establishes a violation of this statute by proving that the defendant "knowingly [made] *any* false statement or . . . willfully overvalue[d] *any* . . . property or security, for the purpose of influencing *in any way* the action of [any federally insured bank] upon *any* . . . *advance*, . . . commitment, or loan." 18 U. S. C. § 1014 (emphasis added). Just last Term, we reiterated that "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, 452 U. S. 576, 580 (1981) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980)). In my view, the plain language of § 1014 covers the check-kiting scheme practiced by Williams, and nothing in the legislative history of the statute indicates that Congress intended to exclude this type of scheme from the coverage of the statute.

A

The language of § 1014 is sweeping. It embraces numerous entities in which the Federal Government has a financial interest. It proscribes, in the disjunctive, a wide variety of

deceptive schemes that might impair the financial stability of these institutions. Cf. *United States* v. *Naftalin*, 441 U. S. 768, 774 (1979) (disjunctive prohibitions intended to "cover additional kinds of illegalities—not to narrow the reach of the prior sections"). The statute refers broadly to "any false statement or report," and to overvaluations of "any" property or security. The list of transactions to which the statute applies is equally expansive—it covers "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor." 18 U. S. C. § 1014.

The broad statutory language clearly evinces its legislative purpose—Congress hoped to protect federally insured institutions from losses stemming from false statements or misrepresentations that mislead the institutions into making financial commitments, advances, or loans. The statute was intended to be broad enough "to maintain the vitality of the FDIC insurance program . . . and 'to cover all undertakings which might subject the FDIC insured bank to risk of loss.'" *United States* v. *Pinto*, 646 F. 2d 833, 838 (CA3), cert. denied, 454 U. S. 816 (1981) (quoting *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (CA10 1978)). This broad language does not lend itself to the restrictive interpretation endorsed by the Court today. Cf. *United States* v. *Culbert*, 435 U. S. 371 (1978).

Nothing on the face of § 1014 "suggests a congressional intent to limit its coverage" to a particular kind of transaction. *United States* v. *Culbert*, *supra*, at 373. Check kiting, which threatens the assets of federally insured banks in precisely the same way as a misrepresentation in a loan application, should not be excluded from the reach of the statute simply because the terms of the statute and its legislative history do not specifically identify check kiting by name or precise description. This method of statutory construction was

rejected recently in *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980):

> "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."

Unfortunately, in my view, the Court's approach to interpreting § 1014 comes dangerously close to the method we rejected in *Harrison*. Unless one accepts the Court's overly restrictive and technical "definition" of a check, check-kiting schemes clearly fall within the broad language of that statute.

B

As the majority recognizes, a violation of § 1014 is established when the Government proves two elements: that the defendant either made a "false statement or report," or "willfully overvalue[d] any . . . property or security;" and that the defendant did so "for the purpose of influencing in any way the action of [a federally insured institution] upon any application, advance, . . . commitment, or loan." After recognizing this, however, the majority's analysis jumps the track. The majority concludes that when a drawer presents a kited check to a bank with the knowledge that he does not have sufficient funds, and with the intent not to cover that check with anything other than another virtually worthless kited check, he has not made "any false statement or report," or "willfully overvalue[d] any . . . property or security" within the meaning of the statute. In my view, neither of these conclusions withstands analysis.

(1)

The basis for the Court's conclusion that Williams did not make a "false statement or report" is concededly technical

and "simple:" "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Ante*, at 284. This argument proves too much: it would apply equally to material omissions or failures to disclose in connection with loan applications. However, the Courts of Appeals have held that the failure to disclose material information needed to avoid deception in connection with loan transactions covered by § 1014 constitutes a "false statement or report," and thus violates the statute. See, *e. g.*, *United States* v. *Greene*, 578 F. 2d 648, 657 (CA5 1978), cert. denied, 439 U. S. 1133 (1979). I assume that the majority would not disagree with this analysis, which is based on established contract principles. I am at a loss as to why the majority does not apply the same analysis to the transactions at issue in this case.

The majority's description of a check as an "'unconditional promise or order to pay a sum certain in money,'" *ante*, at 285 (quoting the Uniform Commercial Code § 3–104(1)(b), 2 U. L. A. 17 (1977)), is unexceptionable as a conclusory description of "black-letter" law. However, this oversimplified description fails to look behind the bare technical definition of a check. Moreover, this description is not at all inconsistent with the necessary implications that a check carries. "In giving a check, the drawer impliedly represents that he has on deposit with the drawee banks funds equivalent to the face amount of the check." F. Whitney, The Law of Modern Commercial Practices § 341 (2d ed. 1965).[1] Despite the ma-

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[1] The Court's facile conclusion that Williams made no false statement or misrepresentation when he presented his check to a bank for immediate credit, knowing that the check was not supported by sufficient funds and that he was not going to cover the check before it cleared with anything other than another kited check, is contrary to the theory underlying most prosecutions under state bad check laws. These laws are not based upon the defendant's breach of a contractual promise that he will pay a sum certain upon demand, but upon the fact that in knowingly presenting a bad check the defendant has committed fraud and misrepresentation and can be punished for committing a crime. Brief for United States 20; Brief for Pe-

jority's equivocation on this point, those who write or accept checks in exchange for goods, services, or cash undoubtedly understand that this implicit representation has been made.[2]

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titioner 28–29, and n. 17. See also F. Whitney, The Law of Modern Commercial Practices § 341 (2d ed. 1965). The Court attempts to avoid the obvious problem this fact presents to its method of statutory interpretation by stating that the federal statute does not apply "in terms" to check kiting, while some state laws do. See *ante*, at 285, n. 6. This reasoning is circular. The *reason* why § 1014 does not "in terms" reach a check-kiting scheme, while certain state laws do, is because the Court *ipse dixit* totally discredits the theory upon which the state laws are premised and refuses to read the terms of the statute in the only manner that is consistent with this theory.

[2] The manner in which the Court manufactures "confusion" over the common understanding of a check is difficult to comprehend. See *ante*, at 286, n. 7. Most of it is totally irrelevant because each of the majority's "common understandings" of the meaning of a check are entirely consistent with prosecuting a check-kiting scheme under § 1014. The majority suggests that the "common understanding" of a check is only that sufficient funds will be present by the time the check clears *or* that the drawer will make good the payment of the face amount of the check if the bank refuses payment. Even if the majority is correct, prosecuting a check-kiting scheme under § 1014 would be justified because the jury found that Williams had intentionally acted inconsistently with each of these understandings.

The jury was specifically instructed that it could not convict unless it found that Williams "made the false statement with fraudulent intent to influence the [bank] to extend [him] credit." App. 37. The judge added that a statement is "false" if it "relates to a material fact and is untrue and is then known to be untrue by the person making it." *Id.*, at 38. The judge further instructed the jury that "[t]he crucial question in check-kiting is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them. Hence, proof that the checks were eventually paid might well be pertinent to defendant's initial intent, that is, whether he intended to deceive the bank." *Ibid.* Therefore, the jury was clearly instructed to acquit Williams if he had shared with the Court even its most lenient and unrealistic interpretation of the implied representation made when one presents a check. The jury had to find that Williams had given the bank the kited check with the express intent not to actually cover the check, but only to receive this extension of credit for as long as the check-kiting scheme continued.

A check is accepted with the expectation that it will be paid in the normal course of collection. A banker who knew that the drawer did not have funds on deposit would not credit the check to the drawer's account or reduce it to cash. Regardless of any contractual breach also involved in check kiting, a person who writes a series of checks knowing that there are no funds to cover them has made intentional false representations within the reach of § 1014.

Any other view, including that endorsed by the Court today, would interfere with the manner in which a major portion of commercial transactions are conducted in our society today. Williams was charged with, and the jury convicted him of, making a false representation (or, more precisely, a material omission) when he presented his check to the bank with the knowledge that he did not have sufficient funds to cover the check, and with the further intent not to cover that check before it cleared with anything other than another worthless kited check. See n. 2, *supra*. Therefore, his conviction under § 1014 should stand.

(2)

In addition to violating § 1014 by intentionally making a false statement to a federally insured bank for the purpose of obtaining credit, Williams also violated the statute for a separate and independent reason. Although Williams presented to the bank for immediate credit a check which on its face represented an amount exceeding $50,000, he well knew that in fact the check was virtually worthless. In so doing, he "willfully overvalue[d] . . . property or security" for the purpose of obtaining credit.[3] The Court's rejection of the Gov-

[3] Section 1014 applies to the willful overvaluation of "any . . . property, or security." Again, this element of the statute is cast in broad rather than restrictive terms. Congress plainly intended to proscribe the willful overvaluation of anything of value given to a lending institution. There is no suggestion that the broad generic terms "any . . . property or security"

ernment's argument with respect to this issue is startling in both its brevity and its concededly technical and "literal" interpretation of the legal value of a check which completely ignores the meaning attributed to checks in the real world.

The very essence of a check-kiting scheme is the successful overvaluation of a security or property which misleads a bank into issuing immediate credit on the assumption that the security or property is in fact valued at the amount represented on its face. A check-kiting scheme is successful only when the bank to which the check is presented assumes that the check is supported by adequate funds in the account upon which it is drawn, and that the face amount of the check is in fact its value. See *supra*, at 296–298; *United States* v. *Payne*, 602 F. 2d 1215, 1217–1218 (CA5 1979). If the bank does not accept the valuation on the face of the check, and instead either inquires into the status of the account on which the check is drawn or waits until the check clears before paying the face amount of the check, the scheme will collapse. Of course, it would be more prudent for a bank to take such precautions just as it would be prudent for banks to inquire carefully into the accuracy of all representations made concerning the value of collateral pledged as security for conventional loans. However, this more prudent course is not always practicable. Moreover, the bank may not believe that such precautions are necessary where, as here, the person presenting the check is the president of another bank presumed to know the illegality, and the drastic adverse conse-

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were meant to exclude items such as checks presented to obtain a temporary extension of credit. There is no reason to interpret this language to exclude checks.

A check is plainly a form of property under even the majority's most restrictive definition—it is a demand to a drawee to pay a sum certain of money, which is backed by a promise of the drawer to make payment in the event of default. Furthermore, as evidenced by other provisions of Title 18, including the general definitional section, 18 U. S. C. § 8, a check is a type of "security." See, *e. g.*, 18 U. S. C. § 2311.

quences to a bank, of a check-kiting scheme. In any event, a bank's failure to take all possible precautions does not bar prosecution under § 1014, which places the burden of avoiding false representations, at the risk of criminal prosecution, upon the person who seeks the funds of the federally insured bank. Section 1014 forbids a person seeking such funds to make "any" false statement or to "willfully overvalue" any security or property to obtain use of the bank's funds. A kited check is "willfully overvalued" within the meaning of the statute, just as worthless securities presented as collateral for a loan are "willfully overvalued." See *United States* v. *Calandrella*, 605 F. 2d 236 (CA6), cert. denied *sub nom. Kaye* v. *United States*, 444 U. S. 991 (1979).

(3)

The Court does not question that the second element of a § 1014 violation—that Williams presented his kited check for the purpose of influencing the bank to extend him credit in the form of a loan or an advance—is satisfied in this case. Clearly, Williams' conduct was directed at misleading a bank into extending immediate credit. Indeed, the whole purpose of Williams' kiting scheme was to obtain an immediate extension of credit by depositing a check purportedly supported by adequate funds. The banks that extended funds on the basis of Williams' worthless, and not yet collected, checks made an "advance," a "loan," and a "commitment" within the ordinary meaning of these terms. See, *e. g.*, *United States* v. *Payne*, *supra*, at 1218 (check kiting has effect of inducing a credit, a loan, or an advance); *United States* v. *Street*, 529 F. 2d 226, 229 (CA6 1976) (check kiting is the obtaining of "forced credit"); J. White & R. Summers, Uniform Commercial Code 558 (2d ed. 1980); F. Whitney, *supra* n. 1, § 310, pp. 451–452.

If a worthless check is submitted to a bank for reasons other than to obtain an extension of credit, the conduct simply is not check kiting in the ordinary sense of the term, and

would not fall within the prohibition of § 1014.[4] However, if a properly instructed jury concludes that a worthless check was submitted in order to obtain immediate credit from a bank, there is no reason to regard the conduct as falling outside the reach of § 1014. The jury that convicted Williams was so instructed, see n. 2, *supra*, and found that Williams' conduct constituted a "false representation" designed to influence the banks into extending him immediate credit.

C

The unambiguous language of § 1014 clearly proscribes conduct commonly referred to as check kiting. This language should be given effect in the absence of clear indications in the legislative history that Congress did not intend to proscribe this conduct. See *United States* v. *Turkette*, 452 U. S., at 580. There are no such indications in the legislative history. To the contrary, the legislative history makes clear that the statute was not limited to borrowers or to loan applications. See S. Rep. No. 1078, 88th Cong., 2d Sess., 4 (1964); H. R. Conf. Rep. No. 91–1784, p. 66 (1970).

The Court finds no indication that Congress intended to exclude check-kiting schemes from the scope of the statute. The Court's brief review of the legislative history to § 1014 does suggest that the primary purpose of the statute is to prohibit misrepresentations in connection with conventional loan applications. However, neither this fact, nor the fact that most convictions under the statute involve such transactions, compels the Court to ignore the broad language and

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[4] The Court's fears that holding a check-kiting scheme to be covered by § 1014 would entail broad implications, see *ante*, at 286–287, are misguided. If there was no intent on the part of the check kiter to defraud the bank into extending credit, there would be no § 1014 violation. The fact that the Government brought separate counts for each check in the check-kiting scheme does not alter the fact that it was essential to conviction under the jury instructions for the jury to find that petitioner was involved in a check-kiting scheme intentionally designed to defraud the banks.

purposes of the statute by interpreting it to cover *only* these transactions. In the past, we have consistently rejected the argument that a criminal statute must be given its narrowest meaning by limiting its scope to effectuate only its primary purpose. See, *e. g., United States* v. *Turkette, supra; United States* v. *Naftalin*, 441 U. S. 768 (1979); *United States* v. *Moore*, 423 U. S. 122 (1975).

II

In light of the broad protection Congress intended to accord federally insured institutions against fraudulent or deceptive conduct intended to mislead these institutions into extending credit and the broad, unrestricted statutory language embodied in § 1014, I marvel at the Court's method of interpreting this statute. Indeed, today's decision is utterly incompatible with a number of prior decisions of this Court in which we addressed similar arguments raised by persons convicted under broad federal statutes. See, *e. g., United States* v. *Turkette, supra; Rubin* v. *United States*, 449 U. S. 424 (1981); *United States* v. *Naftalin, supra; United States* v. *Culbert*, 435 U. S. 371 (1978). In these decisions, we have consistently looked first to the statutory language to determine the scope and purpose of the statute. If it were evident from the face of the statute that the statute was written broadly in order to prohibit certain kinds of conduct which entail specific risks or dangers deemed by the legislators to be sufficiently unacceptable to warrant criminal sanction, we do not frustrate this purpose by distorting either the statutory language employed or the conduct of the accused in the name of the "rule of lenity." See, *e. g., United States* v. *Turkette, supra; Rubin* v. *United States, supra*.

In contrast with this established approach, the majority today interprets § 1014 without acknowledging the broad statutory language chosen by Congress. This error is compounded by the Court's failure to address the fact that this broad language was intended to proscribe, in generic and dis-

junctive terms, precisely the type of conduct of which Williams was found guilty—intentionally misleading the bank into extending him credit—and to protect federally insured institutions from precisely the risk of loss to which Williams' conduct subjected them. Ignoring these factors, the majority begins its analysis by employing an oversimplified, concededly technical and literal interpretation of the "legal definition" of a check. In then observes that Congress never explicitly stated that it intended the statute to cover check-kiting schemes. It concludes that in the absence of such an express statement, the rule of lenity requires that the statute not cover these schemes.

The majority's approach to the question of statutory construction is a prime example of what this Court has time and again said the rule of lenity does *not* entail:

> "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin*, 320 U. S. 527, 530, the canon 'does not require distortion or nullification of the evident meaning and purpose of the legislation.' Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948) (quoted in *United States* v. *Turkette*, *supra*, at 588, n. 10, and *United States* v. *Moore*, *supra*, at 145).

If the broad language and evident purpose of the statute had been given effect, there would have been no need to parse the legislative history for affirmative evidence that Congress "demand[ed] a broader reading of the statute." *Ante*, at 288. Holding that § 1014 reaches check kiting does

379-676 O—83——11 : QL 3

not produce an absurd result, render the statute internally contradictory, or diverge from legislative policy. To the contrary, Congress' policy, manifest in § 1014 and elsewhere throughout Title 18 of the United States Code, is that federal criminal sanctions are necessary to provide federally insured banking institutions with comprehensive protection against practices that cause risk of loss. The Court's construction of § 1014, on the other hand, results in a large loophole in the protection afforded these institutions by limiting the statute's application to formal loan transactions. After today's decision, a bank's protection against false statements intended to influence credit transactions depends not upon whether a misrepresentation was made in connection with a loan, advance, or commitment, but rather upon whether a court concluded that the transaction was "traditional" or that Congress specified that transaction by name in a committee report.

It is worth observing that in this case, none of the general justifications for applying the rule of lenity are present. In *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974), this Court explained that the rule of lenity "is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." There is no question that Williams, a bank president, knew that his check-kiting scheme was wrongful. The majority's attempt to buttress its decision by arguing that check kiting has traditionally been regulated by the States, and that federal enforcement might interfere with this regulation, is completely unjustified.[5] The Federal Government, which pro-

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[5] In Title 18, Congress has provided comprehensive criminal sanctions to protect federally insured institutions. See, *e. g.*, 18 U. S. C. §§ 212, 213 (loans or gratuities offered to bank examiners by bank officials; acceptance of same by examiners); 18 U. S. C. § 493 (forging, counterfeiting, or

vides deposit insurance, has a paramount interest in safeguarding the financial integrity of federally insured banking institutions. The Courts of Appeals have been virtually unanimous in holding that check kiting is subject to federal prosecution under the mail and wire fraud statutes, see, *e. g.*, *United States* v. *Giordano*, 489 F. 2d 327 (CA2 1973); *United States* v. *Constant*, 501 F. 2d 1284 (CA5 1974), cert. denied, 420 U. S. 910 (1975), and the majority apparently does not question these decisions. Therefore, a check-kiting prosecution under § 1014, which by its terms applies only to federally insured institutions, results in no new inroad upon state criminal jurisdiction.

Under the version of the rule of lenity adopted today, conduct which falls within the literal terms of a broad statute, which proscribes in disjunctive and generic terms the type of conduct at issue, and which is designed to protect against the very risk created by such conduct, escapes the reach of the statute unless Congress specifies that conduct by name in the statute or describes it in detail in the statute's legislative his-

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passing bonds and obligations); 18 U. S. C. § 656 (theft from banks by bank examiners); 18 U. S. C. § 709 (1976 ed. and Supp. IV) (false advertising that bank deposits are insured by Federal Deposit Insurance Corporation). Congress has sought to protect fully the integrity of the federal insurance program, and the protection against check kiting afforded by § 1014 is consistent with this scheme. See, *e. g.*, *United States* v. *Bush*, 599 F. 2d 72, 75 (CA5 1979); *United States* v. *Pinto*, 646 F. 2d 833, 838 (CA3), cert. denied, 454 U. S. 816 (1981); *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (CA10 1978). Construing § 1014 to cover check kiting does not displace the authority of the States. Rather, it complements state law enforcement in an area where the federal interest is substantial. See *United States* v. *Turkette*, 452 U. S. 576, 586, n. 9 (1981) (interpreting the Racketeer Influenced and Corrupt Organizations statute) ("[T]he States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute [violations of federal law], is no restriction on the separate administration of criminal justice by the States").

tory. In order to find Williams' conduct outside the scope of § 1014, the majority ignores the function of a check in today's society. The rule of lenity has never been interpreted to require this kind of result. I am at a loss to explain why the Court adopts this approach today and consequently turns the rule of lenity on its head. Accordingly, I dissent.

ASARCO INC. v. IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

No. 80-2015. Argued April 19, 1982—Decided June 29, 1982

Held: The State of Idaho may not constitutionally include within the taxable income of appellant nondomiciliary parent corporation doing some business (primarily silver mining) in the State a portion of intangible income (dividends, interest payments, and capital gains from the sale of stock) that appellant received from subsidiary corporations having no other connection with the State. Pp. 315–330.

(a) As a general principle, a State may not tax value earned outside its borders. "[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 439; *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 223. Pp. 315–320.

(b) Here, based on the findings in the state trial court and the undisputed facts, appellant succeeded in proving that no unitary business relationship existed between appellant and its subsidiaries. Pp. 320–324.

(c) To have, as Idaho proposes, corporate *purpose* define unitary business—*i. e.*, to consider intangible income as part of a unitary business if the intangible property (shares of stock) is "acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business"—would destroy the concept of unitary business. Such a definition, which would permit nondomiciliary States to apportion and tax dividends "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State," *Mobil Oil Corp.*, *supra*, at 442, cannot be accepted consistently with recognized due process standards. While the dividend-paying subsidiaries in this case "ad[d] to the riches" of appellant, *Wallace* v. *Hines*, 253 U. S. 66, 70 (1920), they are "discrete business enterprise[s]" that in "any business or economic sense" have "nothing to do with the activities" of appellant in Idaho. *Mobil Oil Corp.*, *supra*, at 439–442. Therefore, there is no "rational relationship between [appellant's dividend] income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.*, *supra*, at 437. The Due Process Clause bars Idaho's effort to levy upon income that is not properly within the reach of its taxing power. Pp. 325–329.

(d) Under the same unitary-business standard applied to the dividend income in question, Idaho's attempt to tax the interest and capital gains

income derived from its subsidiaries also violates the Due Process Clause. Pp. 329–330.

102 Idaho 38, 624 P. 2d 946, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 331. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 331.

George W. Beatty argued the cause for appellant. With him on the briefs were *C. Rudolf Peterson*, *William L. Goldman*, *James A. Riedy*, *Philip E. Peterson*, and *Alexander J. Gillespie, Jr.*

Theodore V. Spangler, Jr., Deputy Attorney General of Idaho, argued the cause for appellee. With him on the brief was *David H. Leroy*, Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary

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*Briefs of *amici curiae* urging affirmance were filed for the State of Illinois by *Tyrone Fahner*, Attorney General, *Fred H. Montgomery*, Special Assistant Attorney General, and *Lloyd B. Foster*; and for the Multistate Tax Commission et al. by *William D. Dexter*; *Wilson L. Condon*, Attorney General of Alaska; *J. D. MacFarlane*, Attorney General of Colorado; *Carl R. Ajello*, Attorney General of Connecticut; *Richard S. Gebelein*, Attorney General of Delaware; *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General; *Linley E. Pearson*, Attorney General of Indiana; *Robert T. Stephan*, Attorney General of Kansas; *Stephen H. Sachs*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank K. Kelley*, Attorney General of Michigan; *Warren R. Spannaus*, Attorney General of Minnesota; *John Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Gregory H. Smith*, Attorney General of New Hampshire; *Jeff Bingaman*, Attorney General of New Mexico; *Rufus L. Edmisten*, Attorney General of North Carolina, and *M. C. Banks*, Deputy Attorney General; *Robert O. Welfald*, Attorney General of North Dakota, and *Albert R. Hausauer*, Assistant Attorney General; *Dave Frohnmayer*, Attorney General of Oregon; and *David L. Wilkinson*, Attorney General of Utah.

John J. Easton, Attorney General of Vermont, and *Paul P. Hanlon* filed a brief for the State of Vermont as *amicus curiae*.

parent corporation doing some business in Idaho a portion of intangible income—such as dividend and interest payments, as well as capital gains from the sale of stock—that the parent receives from subsidiary corporations having no other connection with the State.

I

This case involves corporate income taxes that appellee Idaho State Tax Commission sought to levy on appellant ASARCO Inc. for the years 1968, 1969, and 1970. ASARCO is a corporation that mines, smelts, and refines in various States nonferrous metals such as copper, gold, silver, lead, and zinc. It is incorporated in New Jersey and maintains its headquarters and commercial domicile in New York. ASARCO's primary Idaho business is the operation of a silver mine. It also mines and sells other metals and operates the administrative office of its northwest mining division in Idaho. According to the appellee's tax calculations, approximately 2.5% of ASARCO's total business activities take place in Idaho. App. 59a, 67a, and 75a.

During the years in question, ASARCO received three types of intangible income of relevance to this suit.[1] First, it collected dividends from five corporations in which it owned major interests: M. I. M. Holdings, Ltd.; General Cable Corp.; Revere Copper and Brass, Inc.; ASARCO Mexicana, S. A.; and Southern Peru Copper Corp.[2] Second,

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[1] ASARCO also received other intangible income, but the proper tax treatment of that income is not at issue in this case.

[2] M. I. M. Holdings, Ltd., is a publicly owned corporation engaged in the mining, milling, smelting, and refining of nonferrous metals in Australia and England. ASARCO owned about 53% of M. I. M.'s stock during the period in question. General Cable Corp. and Revere Copper and Brass, Inc., are publicly owned companies that respectively fabricate cables and manufacture copper wares. ASARCO owned about 34% of the stock of each. ASARCO Mexicana, S. A., engages in Mexico in the same general line of business as does ASARCO in the United States. ASARCO owned 49% of Mexicana. Southern Peru Copper Corp. mines and smelts

ASARCO received interest income from three sources: from Revere's convertible debentures; from a note received in connection with a prior sale of Mexicana stock; and from a note received in connection with a sale of General Cable Stock. Third, ASARCO realized capital gains from the sale of General Cable and M. I. M. stock.

In 1965, Idaho adopted its version of the Uniform Division of Income for Tax Purposes Act (UDITPA).[3] See Idaho Code § 63–3027 (1976 and Supp. 1981); 7A U. L. A. 91 (1978). Under this statute, Idaho classifies corporate income from intangible property as either "business" or "nonbusiness" income. "Business" income is defined to include income from intangible property when "acquisition, management, or disposition [of the property] constitute[s] integral or necessary parts of the taxpayers' trade or business operations."[4] Idaho apportions such "business" income according

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copper in Peru. ASARCO owned about 51.5% of Southern Peru during the time at issue.

[3] The UDITPA is a tax allocation system approved in 1957 by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. See 7A U. L. A. 91 (1978). At least 22 States have adopted substantially all of the UDITPA to date. See *id.*, at 10 (Supp. 1982); Brief for State of Illinois as *Amicus Curiae* 1–2. The UDITPA has been adopted as Article IV of the Multistate Tax Compact. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 457–458, n. 6 (1978).

[4] Idaho Code § 63–3027(a)(1) (Supp. 1981). The complete definition provides that "'[b]usiness income' means income arising from transactions and activity in the regular course of the taxpayers' trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute[s] *integral or necessary parts of the taxpayers' trade or business operations*. Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary." *Ibid.* (emphasis added). See UDITPA, *supra*, § 1(a), 7A U. L. A. 93 (1978).

to a three-factor formula and includes this apportioned share of "business" income in the taxpayer's taxable Idaho income.[5] "Nonbusiness" income, on the other hand, is defined as "all income other than business income." Idaho Code § 63-3027(a)(4) (Supp. 1981). Idaho allocates intangible "nonbusiness" income entirely to the State of the corporation's commercial domicile instead of apportioning it among the States in which a corporate taxpayer owns property or carries on business.[6]

Idaho is a member of the Multistate Tax Compact, an interstate taxation agreement concerning state taxation of multistate businesses. The Compact established the Multistate Tax Commission, which is composed of the tax adminis-

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[5] "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3)." Idaho Code § 63-3027(i) (Supp. 1981).

"The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period." § 63-3027(j). "The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period." § 63-3027(m). "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." § 63-3027(o).

[6] "Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state, unless such gains and losses constitute business income as defined in this section." Idaho Code § 63-3027(f)(3) (Supp. 1981). "Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state unless such interest or dividends constitute business income as defined in this section." § 63-3027(g).

Idaho defines "commercial domicile" as "the principal place from which the trade or business of the taxpayer is directed or managed." § 63-3027(a)(2).

trators from the member States.[7] Article VIII of the Compact provides that any member State may request that the Commission perform an audit on its behalf. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 457 (1978) (upholding the Compact against a facial attack on Compact and Commerce Clauses and Fourteenth Amendment grounds).

In 1971, the Multistate Tax Commission audited ASARCO's tax returns for the years in question on behalf of six States, including Idaho. The auditor recommended adjusting ASARCO's tax computations in several respects. As accepted by the Idaho State Tax Commission and as relevant to the present dispute, the auditor first "unitized"—or treated as one single corporation—ASARCO and six of its *wholly* owned subsidiaries.[8] As a consequence of unitization, the auditor combined ASARCO's income with that of these six subsidiaries and disregarded (as intracompany accounting transfers) the subsidiaries' dividend payments to ASARCO. Cf. *United States Steel Corp.* v. *Multistate Tax Comm'n*, *supra*, at 473, n. 25. The auditor listed five factors thought to justify unitizing treatment. First, ASARCO

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[7] Presently 19 States and the District of Columbia have joined the Compact as full members. Eleven States have joined as associate members. Brief for Multistate Tax Commission and Participating States as *Amici Curiae* 2.

[8] Idaho law provides that "two . . . or more corporations the voting stock of which is more than fifty percent . . . owned directly or indirectly by a common owner or owners may, when necessary to accurately reflect income, be considered a single corporation." Idaho Code § 63-3027(s) (Supp. 1981).

The six unitized subsidiaries are Federated Metals of Canada; ASARCO Mercantile Co.; Enthone, Inc.; International Mining Co.; Lone Star Lead Construction Corp.; and Northern Peru Mining Corp.

The auditor also stated that Southern Peru Copper Corp. and Southern Peru Copper Sales Corp. "were deemed unitary and were combined only for those states in which ownership of less than 80% presents no problem." App. 88a. See *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 435, n. 12 (1980). These two corporations were not "deemed unitary" in Idaho.

owned a majority (in fact, all) of the stock of each subsidiary. Second, "ASARCO, with its subsidiaries, conducts a vertically integrated non-ferrous metals operation. This is evidenced by the flow from the mines to the smelters to the refineries and ultimately to the sales made by the New York office." App. 88a. Third, "ASARCO and its subsidiaries have interlocking officers and directors, which enables ASARCO to control the major management decisions of each subsidiary." *Ibid.* Fourth, sales between the companies were numerous, making it "apparent . . . that the companies supplied markets to each other . . . ." *Id.*, at 89a. And finally, various services were provided to the ASARCO group either by ASARCO or by subsidiaries specifically set up for such a purpose.[9] The propriety of this treatment of the six wholly owned subsidiaries is not an issue before us.

The auditor found the situation to differ with respect to ASARCO's interest in M. I. M., General Cable, Revere, Mexicana, and Southern Peru. This judgment planted the seed of the current dispute. As to these five companies, the auditor determined that the links with ASARCO were not sufficient to justify unitary treatment. Nonetheless, he found that ASARCO's receipt of dividends from each of these did constitute "business" income to ASARCO. See n. 4, *supra*. The auditor similarly classified the interest and capital gains income at issue in this case. These categories of income also were added in ASARCO's total income to be apportioned among the various States in which ASARCO was subjected to an income tax.

The Idaho State Tax Commission adopted the auditor's ad-

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[9] The auditor noted that ASARCO Mercantile bought and sold equipment for the subsidiaries and that International Metals acted as ASARCO's foreign sales agent. He further observed that exploration, research and development, insurance procurement, and tax preparation were performed jointly for most or all of these companies. Finally, he stated that ASARCO's audit staff examined the operations of these subsidiaries to enable "ASARCO to know whether the subsidiaries are operating along the lines set down by its management." App. 90.

justments in an unreported decision. App. to Juris. Statement 46a. In rejecting ASARCO's challenge to the auditor's unitized treatment of the six wholly owned corporations, see n. 8, *supra*, the Commission stated that it was "quite clear from the evidence produced at the hearing that [ASARCO's] business activities are so inter-related as to defy measurement by separate accounting . . . ." App. to Juris. Statement 49a–50a. The Commission likewise upheld the auditor's conclusion that the dividends presently at issue were properly treated as apportionable "business" income. It consequently assessed tax deficiencies against ASARCO of $92,471.88 for 1968, $111,292.44 for 1969, and $121,750.76 for 1970, plus interest.

On ASARCO's petition for review, the State District Court upheld the Commission's unitized treatment of the six subsidiaries in an unpublished opinion. The court, however, overruled the Commission's determination that the disputed dividends, interest, and capital gains constituted "business" income, on the reasoning that this income did not come from property or activities that were "an integral part of [ASARCO's] trade or business." Idaho Code § 63–3027(a)(1) (Supp. 1981). In the court's view, "if the dividend income from other corporations is an integral part of the business of [ASARCO] . . . they should be unitized and all matters considered and[,] if they are not[,] . . . the income is not business income but is [nonapportionable] non business income." App. to Juris. Statement 37a.

The Commission, but not ASARCO, appealed to the Idaho Supreme Court. That court held that the trial court had erred by excluding from "business" income ASARCO's receipt of dividends, interest, and capital gains as a result of its owning stock in the five corporations.[10] *American Smelting*

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[10] The Idaho Supreme Court also ruled that ASARCO's receipt of certain rents and royalties, as well as its receipt of dividends from Compania American Smelting, S. A., constituted apportionable "business" income. It further upheld the trial court's "nonbusiness" income classification with

and Refining Co. v. *Idaho State Tax Comm'n*, 99 Idaho 924, 935–937, 592 P. 2d 39, 50–52 (1979). In response to ASARCO's constitutional arguments, the court decided that this tax treatment withstood attack under the Commerce and Due Process Clauses. We vacated and remanded the case for reconsideration in light of our decision in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980). *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 445 U. S. 939 (1980). The Idaho Supreme Court reinstated its previous opinion in a brief *per curiam* order on March 4, 1981. 102 Idaho 38, 624 P. 2d 946. We noted probable jurisdiction, 454 U. S. 812 (1981), and we now reverse.

II

As a general principle, a State may not tax value earned outside its borders. See, *e. g.*, *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 80–81 (1938).[11] The broad inquiry in a case such as this, therefore, is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

Our application of this general principle in this case is guided by two of our recent decisions. In *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, the taxpayer conducted "an integrated petroleum business," 445 U. S., at

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respect to dividends received by ASARCO from Lake Asbestos of Quebec; ASARCO International Corp.; Hecla Mining Co.; Kennecott Copper Co.; Phelps-Dodge; and United Park City Mines. *American Smelting and Refining Co.* v. *Idaho State Tax Comm'n*, 99 Idaho 924, 935–937, 592 P. 2d 39, 50–52 (1979).

These rulings are not disputed here.

[11] See Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L. Rev. 171, 181 (1970).

428, that included international petroleum exploration, production, refining, transportation, distribution, and sale of petroleum, as well as related chemical and mining enterprises. Much of its business abroad was conducted through wholly or partly owned subsidiaries. The State of Vermont imposed a corporate income tax on that portion of Mobil's total income that the State attributed to Mobil's Vermont activity, which was confined to the wholesale and retail marketing of petroleum. The State sought to include within Mobil's apportionable Vermont income its receipt of dividends from its subsidiaries and affiliates that operated abroad. Mobil protested that the State could not properly apportion and tax this "foreign source" dividend income.

For present purposes, our analysis in *Mobil* began with the observation that Mobil's principal dividend payors were part of Mobil's integrated petroleum business. Although Mobil was "unwilling to concede the legal conclusion" that activities by these dividend payors formed part of Mobil's "'unitary business,'" it "offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates contribute[d] to [Mobil's] worldwide petroleum enterprise." *Id.*, at 435.

The Court next stated that due process limitations on Vermont's attempted tax would be satisfied if there were "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Id.*, at 436–437, citing *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978); *National Bellas Hess, Inc.* v. *Illinois Dept. of Revenue*, 386 U. S. 753, 756 (1967); *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968). And we said that these limitations would not be contravened by state apportionment and taxation of income that were determined by geographic accounting to have arisen from a different State "so long as the intrastate and extrastate activities formed part of *a single unitary business*." 445 U. S., at 438 (emphasis added).

The *Mobil* Court explicated the limiting "unitary business" principle by observing that geographic accounting, in purporting to isolate income received in various States, "may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." *Ibid.* The fact that "these factors of profitability arise from the operation of the business as a whole," *ibid.*, therefore could justify a State's otherwise impermissible inclusion of corporate income derived from corporate activities beyond the State's borders. The Court thus stated:

> "*[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle.* In accord with this principle, what appellant must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. [Mobil] has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont. Indeed, all indications in the record are to the contrary, since it appears that these foreign activities are part of [Mobil's] integrated petroleum enterprise. In the absence of any proof of *discrete business enterprise*, Vermont was entitled to conclude that the dividend income's foreign source did not destroy the requisite nexus with in-state activities." *Id.*, at 439–440 (emphasis added and footnote omitted).

We consequently rejected Mobil's constitutional challenge to Vermont's tax. In so doing, however, we cautioned that we did

> "not mean to suggest that *all* dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have *nothing to do* with the activities of the

recipient in the taxing State, *due process considerations might well preclude apportionability, because there would be no underlying unitary business.*" *Id.*, at 441–442 (emphasis added).

We soon had occasion to reiterate these principles. Three months after *Mobil*, we decided *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980). In *Exxon*, "a vertically integrated petroleum company," *id.*, at 210, explored for, produced, refined, and marketed petroleum and related products. Although Exxon's activities in Wisconsin were confined to marketing, the State sought to apportion and tax Exxon's income from nonmarketing activities in the United States.

Exxon disputed the propriety of this treatment. The Wisconsin Tax Appeals Commission agreed with the objection on the basis of its conclusion that Exxon's "three main functional operating departments—Exploration and Production, Refining, and Marketing—were *separate* unitary businesses." *Id.*, at 215 (emphasis added). The Commission found that the tax as applied "'had the effect of imposing a tax on [Exxon's] exploration and on its refining net income, all of which was derived solely from operations outside the State of Wisconsin and which had no integral relationship to [Exxon's] marketing operations within Wisconsin.'" *Ibid.* On appeal, however, the Circuit Court for Dane County held that Exxon's three main functional operating departments were all part of a *single* unitary business. The Wisconsin Supreme Court agreed.[12]

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[12] That court examined Exxon's organizational structure and business operations. It found that Exxon's full utilization of its production and refining functions were dependent on its marketing system, which encompassed Exxon's Wisconsin activities. The court therefore agreed with the Circuit Court for Dane County that Exxon's marketing in Wisconsin was an integral part of one unitary business and, consequently, that its total corporate income derived from the United States was subject to Wisconsin's apportioned taxation. See 447 U. S., at 217–219.

In reviewing the case, this Court unanimously agreed with the State Commission and the two state courts that the decisive concept in the case was that of a unitary business. Significantly, we repeated *Mobil*'s teaching that "[t]he 'linchpin of apportionability' for state income taxation of an interstate enterprise is the 'unitary-business principle.'" *Id.*, at 223, quoting *Mobil*, 445 U. S., at 439. We also repeated:

> "In order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to the sale of petroleum products in that State.' . . . The court looks to the 'underlying economic realities of a unitary business,' and the income must derive from 'unrelated business activity' which constitutes a 'discrete business enterprise,' 445 U. S., at 441, 442, 439." 447 U. S., at 223–224.

Examining the facts, the Court found that Exxon was "a highly integrated business which benefits from an umbrella of centralized management and controlled interaction." *Id.*, at 224.[13] We rejected the company's protest because "[w]e agree[d] with the Wisconsin Supreme Court that Exxon [was] such a unitary business and that Exxon has not carried

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[13] It was noted that Exxon's Coordination and Services Management office "provided many essential corporate services for the entire company, including the coordination of the refining and other operational functions 'to obtain an optimum short range operating program.' . . . Many of the items sold by appellant in Wisconsin were obtained through a centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers. . . . Even the gasoline sold in Wisconsin was available only because of an exchange agreement with another company arranged by the Supply Department, part of Coordination and Services Management, and the Refining Department. Similarly, sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters." *Id.*, at 224.

its burden of showing that its functional departments are 'discrete business enterprises'. . . ." *Ibid.*[14]

III

In this case, ASARCO claims that it has succeeded, where the taxpayers in *Mobil* and *Exxon* failed, in proving that the dividend payors at issue are not part of its unitary business, but rather are "discrete business enterprises." 447 U. S., at 224. We must test this contention on the record before us.

A

The closest question is posed by ASARCO's receipt of dividends from Southern Peru. ASARCO is one of Southern Peru's four shareholders, holding 51.5% of its stock.[15]

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[14] The unitary-business principle applied in *Mobil* and *Exxon* is not new. It has been a familiar concept in our tax cases for over 60 years. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S., at 473, n. 25, 474, n. 26; *General Motors Corp.* v. *Washington*, 377 U. S. 436, 439 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 460 (1959); *Butler Bros.* v. *McColgan*, 315 U. S. 501, 508 (1942); *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 336 (1939); *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 684 (1936); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 132–133 (1931); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271, 282 (1924). Cf. *Burnet* v. *Aluminum Goods Mfg. Co.*, 287 U. S. 544, 550 (1933); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120–121 (1920); *Wallace* v. *Hines*, 253 U. S. 66, 69 (1920); *Fargo* v. *Hart*, 193 U. S. 490, 499–500 (1904); *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 221–222 (1897); *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 219, 222, 223–224 (1897).

A review of our cases before *Mobil* made plain that "[f]ormulary apportionment, which takes into account the entire business income of a multistate business in determining the income taxable by a particular state, is constitutionally permissible only in the case of a unitary business." Rudolph, *supra* n. 11, at 183–184.

[15] The other shareholders are Phelps Dodge, 16%; Newmont Mining, 10.25%; and Cerro Corp., 22.25%. App. 86a. Either these large compa-

Southern Peru produces smelted but unrefined "blister copper" in Peru, and sells 20–30% of its output to the Southern Peru Copper Sales Corp.[16] The remainder of Southern Peru's output is sold under contracts to its shareholders in proportion to their ownership interests. Southern Peru sold about 35% of its output to ASARCO, App. 89a, at prices determined by reference to average representative trade prices quoted in a trade publication and over which the parties had no control.[17] *Id.*, at 125a–126a; 99 Idaho, at 928, 592 P. 2d, at 43.

ASARCO's majority interest, if asserted, could enable it to control the management of Southern Peru. The Idaho State

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nies or their parents were traded on the New York Stock Exchange at the time in question.

[16] Southern Peru Copper Sales Corp. in turn sells the copper to European customers. These European sales are handled in this manner to preserve Southern Peru's favorable federal tax status as a Western Hemisphere Trading Corporation.

Southern Peru Copper Sales Corp.'s stock is owned in the same manner as is Southern Peru's. Unlike Southern Peru, however, Southern Peru Copper Sales Corp. has no employees of its own. Sales are generally transacted by ASARCO's New York office, for which that office earns a sales commission. *Ibid.*

[17] These sales ranged between $44 and $65 million for the years in question. *Id.*, at 89a. There was evidence that ASARCO could replace this output contract "[w]ithin a short time" if it were lost, and that loss of ASARCO's ownership in Southern Peru would not cause the loss of the output contract. *Id.*, at 128a.

Southern Peru has a "staff that you'd expect a major corporation to have." *Id.*, at 122a. ASARCO provided Southern Peru with purchasing service outside of Peru, traffic service for its exports and imports outside of Peru, and preparation service for its United States tax return. *Id.*, at 123a–124a. The contract for ASARCO's purchasing services provided for payment of this service on the basis of a fixed fee plus a commission based on the dollar volume of purchases. *Id.*, at 124a. ASARCO received separate "negotiated fair fee[s]" for its tax and traffic services. *Ibid.* Southern Peru has its own purchasing, traffic, and tax departments in Peru. *Id.*, at 123a.

Tax Commission, however, found that Southern Peru's "remaining three shareholders, owning the remainder of the stock, refuse[d] to participate in [Southern Peru] unless assured that they would have a way to assure that management would not be completely dominated by ASARCO." App. to Juris. Statement 55. Consequently ASARCO entered a management agreement giving it the right to appoint 6 of Southern Peru's 13 directors. The other three shareholders also appointed six directors. *Ibid.* The thirteenth and final director is appointed by the joint action of either the shareholders or the first 12 directors. *Ibid.;* App. 121a. Southern Peru's bylaws provide that eight votes are required to pass any resolution, *ibid.* and its articles and bylaws can be changed only by unanimous consent of the four stockholders.

In its unreported opinion, the state trial court concluded that this management contract "insures that [ASARCO] will not be able to control [Southern Peru]." App. to Juris. Statement 43a. It likewise found that Southern Peru "operates independently of [ASARCO]." *Id.*, at 42a. The court reached this conclusion after hearing testimony that ASARCO did not "control Southern Peru in any sense of that term," App. 121a, and that Southern Peru did not "seek direction or approval from ASARCO on major decisions." *Id.*, at 124a. Idaho does not dispute any of these facts. In view of the findings and the undisputed facts, we conclude that ASARCO's Idaho silver mining and Southern Peru's autonomous business are insufficiently connected to permit the two companies to be classified as a unitary business.

B

Under the principles of our decisions, the relationship of each of the other four subsidiaries to ASARCO falls far short of bringing any of them within its unitary business. M. I. M. Holdings engages in the mining, milling, smelting, and refining of copper, lead, zinc, and silver in Australia. The company also operates a lead and zinc refinery in England. During the years in question M. I. M. sold only about 1%

of its output to ASARCO, for sums in the range of $0.2 to $2.2 million. *Id.*, at 43a–47a. It appears that these sales were on the open market at prevailing market rates. ASARCO owns 52.7% of M. I. M.'s stock, and the rest is widely held. Although ASARCO has the control potential to manage M. I. M., no claim is made that it has done so.[18] As an ASARCO executive explained, it never even elected a member of M. I. M.'s board:

> "This company has been very successful in staffing the corporation with Australian people and [they have] been able to run this company by themselves and, therefore, in consequence of the nationalistic feeling which develops in most of such developing countries we have not exercised any right we might have to elect a director to the board of the company." *Id.*, at 132a.

In addition to forgoing its right to elect directors, ASARCO similarly has taken no part in the selection of M. I. M.'s officers—a function of the board of directors. Nor do the two companies have any common directors or officers. *Id.*, at 34a, 40a. The state trial court found that M. I. M. "operates entirely independently of and has minimal contact with" ASARCO. App. to Juris. Statement 43a. As the business relation also is nominal, it is clear that M. I. M. is merely an investment. See, *e. g.*, Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42, 52–53 (1960).

General Cable and Revere Copper, large publicly owned companies, fabricate metal products. Both are ASARCO customers.[19] But ASARCO held only minority interests, own-

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[18] M. I. M. did use an ASARCO melting furnace patent for which it pays a price "the same that would be paid by any other company using it." *Id.*, at 133a.

[19] For the years in question, Revere's purchases averaged 3–4% of ASARCO's sales and totalled from $17 to $29 million. *Id.*, at 27a. Revere in turn sold ASARCO from 1 to 2% of its total output, which totalled $4–$6 million. *Id.*, at 43a–47a. General Cable's purchases accounted for

ing approximately 34% of the outstanding common shares of each. The remaining shares—listed on the New York Stock Exchange—are widely held. App. 135a. The two companies occupy parallel positions with respect to ASARCO as a result of a 1961 Department of Justice antitrust suit against ASARCO. The suit was based on ASARCO's interests in each. In 1967, ASARCO consented to a decree that prohibited it from maintaining common officers in these companies, voting its stock in them, selling the companies copper at prices below those quoted to their competition, and from acquiring stock in any other copper fabricator. *Id.*, at 96a. Neither Revere's nor General Cable's management seeks direction or approval from ASARCO on operational or other management decisions.[20] *Id.*, at 137a.

Mexicana mines and smelts lead and copper in Mexico. Originally it was a wholly owned subsidiary of ASARCO, but a change in Mexican law required ASARCO to divest itself of 51% of Mexicana's stock in 1965. This stock is now publicly held by Mexican nationals. The record does not reveal whether ASARCO and Mexicana have any common directors. The state trial court found, however, that Mexicana "operates independently of [ASARCO]," App. to Juris. Statement 43a, and the Idaho Supreme Court stated that "Mexicana does not seek approval from ASARCO concerning major policy decisions . . . ." 99 Idaho, at 929, 592 P. 2d, at 44.[21]

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approximately 6% of ASARCO's sales and ranged from $31 to $47 million. *Id.*, at 27a. ASARCO's purchases from General Cable averaged 0.1% of General Cable's total sales and ranged between $0.3 and $0.5 million. *Id.*, at 43a–47a.

[20] Both Revere and General Cable utilized ASARCO's stock transfer department on a contract basis, and Revere licensed one patent from ASARCO for a "fair price." *Id.*, at 136a.

In 1970, ASARCO was compelled, apparently by the Department of Justice, to divest itself of all its General Cable stock. *Id.*, at 95a.

[21] ASARCO sold Mexicana none of its output in 1968 and insignificant amounts (totalling $24,169 and $14,902) in 1969 and 1970. *Id.*, at 27a. Mexicana apparently did not sell ASARCO any of its output during the

C

Idaho does not dispute the foregoing facts. Neither does it question that a unitary business relationship between ASARCO and these subsidiaries is a necessary prerequisite to its taxation of the dividends at issue. *E. g.*, Brief for Appellee 10 ("When income is earned from activities which are part of a unitary business conducted in several states, then the requirement that the income bear relation to the benefits and privileges conferred by the several states has been met"). See also Tr. of Oral Arg. 25 ("[W]hen intangible assets such as, for example, shares of stock, are found to be a part of a taxpayer's own unitary business, . . . there is no logical or constitutional reason why the income from those same intangibles should be treated any differently than any other business income that that taxpayer might earn"). Rather the State urges that we expand the concept of a "unitary business" to cover the facts of this case.

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time in question. *Id.*, at 43a–47a. For a commission, ASARCO does act as a contract sales agent for Mexicana in the United States. *Id.*, at 131a. This contract would continue if ASARCO lost its investment interest in Mexicana. *Ibid.* ASARCO also provides technical services to Mexicana for a fee. *Id.*, at 130a; 99 Idaho, at 929, 592 P. 2d, at 44.

The dissent's perception of some of the facts differs substantially from the record. It speculates that ASARCO's unitary business experience "must" have aided ASARCO's stock investments, *post*, at 336, despite the undisputed trial court finding that ASARCO's stock investments were "not integral to nor a necessary part of [ASARCO's] business operation . . . ." App. to Juris. Statement 44a. See also *id.*, at 43a. It maintains that—"[f]or all we know"—ASARCO's stock investments were interim uses of idle funds "accumulated for the future operation of [ASARCO's] own primary business." *Post*, at 337. The trial court, however, found that ASARCO "has never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues." App. to Juris. Statement 41a. Moreover, ASARCO was found to have "sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from . . . income from intangibles." *Ibid.*

The dissent also describes the five companies as "captive suppliers and customers . . . ." *Post*, at 342. This description is at odds with the undisputed facts. See *supra*, at 320–324.

Idaho's proposal is that corporate *purpose* should define unitary business. It argues that intangible income should be considered a part of a unitary business if the intangible property (the shares of stock) is "acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business." Brief for Appellee 4. See also Tr. of Oral Arg. 25 (urging that income from intangible property be considered part of a unitary business when the intangibles "contribute to or relate to or are some way in furtherance of the taxpayer's own trade or business"). Idaho asserts that "[i]t is this integration—i. e., between the business use of the intangible asset (the shares of stock) and ASARCO's mining, smelting, and refining business—which makes the income part of the unitary business." Brief for Appellee 4.

This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently *all* of its operations, including any investment made, in some sense can be said to be "for purposes related to or contributing to the [corporation's] business." When pressed to its logical limit, this conception of the "unitary business" limitation becomes no limitation at all. When less ambitious interpretations are employed, the result is simply arbitrary.[22]

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[22] Cf. Keesling & Warren, California's Uniform Division of Income for Tax Purposes Act, Part I, 15 UCLA L. Rev. 156, 172 (1967).

Such arbitrariness is evident in this case. As previously noted, see n. 10, *supra*, ASARCO received dividend income from Lake Asbestos of Quebec. Lake Asbestos is a wholly owned subsidiary of ASARCO that is engaged in extracting and processing asbestos fibers in Canada. App. 86a. Its selling agent is ASARCO International, another wholly owned ASARCO subsidiary. *Ibid.* The Idaho Supreme Court found that "Lake Asbestos has its own staff, but ASARCO provides important management services. Lake Asbestos seeks ASARCO's direction and approval on major policy decisions." 99 Idaho, at 929, 592 P. 2d, at 44.

Lake Asbestos consequently appears in many respects to be more likely to qualify as part of ASARCO's unitary business than does any of the five

We cannot accept, consistently with recognized due process standards, a definition of "unitary business" that would permit nondomiciliary States to apportion and tax dividends "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State . . ."[23] *Mobil Oil Corp.* v. *Commissioner of Taxes of*

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corporations involved in this case. Yet Idaho now agrees, as the courts below held, that on this record Lake Asbestos is *not* part of such a business. See Tr. of Oral Arg. 39.

ASARCO also received approximately $250,000 a year in dividends from Kennecott Copper Corp., and approximately $300,000 a year in dividends from Phelps Dodge. App. 52a. The record describes the business of these two corporations as the mining, smelting, refining, and sale of copper. *Id.*, at 50a. ASARCO made sales in the range of $3–$5 million a year to Kennecott, and $24,000–$800,000 a year to Phelps Dodge. *Id.*, at 27a. Each in turn made some (albeit "minimal") sales to ASARCO. *Id.*, at 43a–47a.

In light of this information, we have no basis for concluding that ASARCO did *not* "acquire" stock in Kennecott and Phelps Dodge "for purposes relating or contributing to the taxpayer's business." Brief for Appellee 4. ASARCO's management scarcely would make such an admission. Yet Idaho makes no claim that Kennecott and Phelps Dodge are part of ASARCO's unitary business.

JUSTICE O'CONNOR's dissent views the Court's decision as "prohibiting apportioned taxation of investment income by non-domiciliary states." *Post*, at 345 *et seq.* This reflects a serious misunderstanding of our decision today and the cases on which we rely. The case we follow primarily is *Mobil*. It sustained the taxation of investment income after applying enunciated principles carefully to the facts of the case. In this case we have applied the same principles but have reached a different result because the facts differ in critical respects. As we have said elsewhere, the application of the unitary-business principle requires in each case a careful examination both of the way in which the corporate enterprise is structured and operates, and of the relationship with the taxing State.

[23] The dissent, argues that our reliance on the Due Process Clause is inappropriate. It also says that our holding that Idaho has exceeded its jurisdiction to tax somehow "strip[s] Congress of the authority" to authorize or regulate state taxation. *Post*, at 331. See also *post*, at 349–350, 353. In analyzing the validity of Idaho's tax, we follow long-established precedent in relying on the Due Process Clause of the Fourteenth Amendment. See,

Vermont, 445 U. S., at 442. In such a situation, it is not true that "the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S., at 444.

Justice Holmes stated long ago that "the possession of bonds secured by mortgages of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the [taxing State's] part of the [business] is no sufficient ground for the increase of the tax—whatever it may be . . . ." *Wallace* v. *Hines*, 253 U. S. 66, 69–70 (1920). In this case, it is plain that the five dividend-paying subsidiaries "add to the riches" of ASARCO. But it is also true that they are "discrete business enterprise[s]" that—in "any business or economic sense"—have "nothing to do with the activities" of ASARCO in Idaho. *Mobil, supra*, at 439–442. Therefore there is no "rational relationship between the [ASARCO dividend] income attributed to the State and the intrastate values of the enterprise. *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978)." *Mobil, supra*, at 437. Idaho's attempt to tax a portion of these dividends can be viewed as "a mere effort to reach profits earned elsewhere under the guise of legitimate taxation." *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271, 283 (1924). The Due Process Clause bars such an effort to levy upon income that is

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e. g., *Exxon*, 447 U. S., at 219, 221–225, 226, 227; *Mobil*, 445 U. S., at 436–442; *Butler Bros.* v. *McColgan*, 315 U. S., at 507, 508; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., at 120–121. In view of our decision on due process, it is unnecessary to address appellant's Commerce Clause argument. In any event, it is elementary that the "States . . . are subject to limitations on their taxation powers that do not apply to the Federal Government." *F. W. Woolworth Co.* v. *Taxation & Revenue Dept.*, *post*, at 363. Cf. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 713 (1982) (POWELL, J., concurring in judgment). The question of federal authority to legislate in this area—whether to lay taxes or to delegate such power—is not presented in this case, and we imply no view as to it.

not properly "within the reach of [Idaho's] taxing power." *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S., at 80.[24]

IV

In addition to the disputed dividend income, Idaho also has sought to tax certain ASARCO interest and capital gains in-

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[24] The dissenting opinion reflects profound—though unexpressed—dissatisfaction with the unitary-business principle, even though it was firmly established by more than a half a dozen decisions of this Court prior to *Mobil* and *Exxon*. See n. 14, *supra*. The dissent purports to rely on these recent cases, and yet its basic arguments—in practical effect—would seriously undermine their force as precedents. It relies primarily on considerations quite different from those identified as controlling in *Mobil* and *Exxon*. The dissent does not deny that ASARCO's subsidiaries were discrete business enterprises; rather it submits that they were engaged "in the same general line of business." *Post*, at 335. It notes—though the relevance is not obvious—that the management of ASARCO had special knowledge of the types of business engaged in by these subsidiaries. *Post*, at 336–337. The dissent also perceives a relationship between Idaho and the investment income simply because ASARCO has the use in its business of income from whatever source it may be derived. *Post*, at 337–339. Finally, it emphasizes the limited amount of open market buying and selling of products between ASARCO and the companies in which it has invested funds. See Parts III–A and III–B, *supra*.

In *Mobil*, in applying the unitary-business principle, the Court stated that the question is whether "the [investment] income was earned in the course of activities unrelated to the sale of petroleum products" in the State seeking to tax the income. Our decision went against Mobil Oil Corp. because we found that its "foreign activities [were] part of appellant's integrated petroleum enterprise," and because the subsidiaries in question were not shown to operate as "discrete business enterprise[s]." 445 U. S., at 439. In this case, in sharp contrast, the record establishes that each of the three partial subsidiaries in question operated a "discrete business enterprise" having "nothing to do with the activities of [ASARCO] in the taxing State." *Id.*, at 442.

As we recognize in this opinion, these cases are decided on their facts in light of established general principles. The most comprehensive discussion of the factors that are relevant is contained in our recent decisions in *Mobil* and *Exxon*. In both of those cases, that we follow today, the States

come. The interest income arose from a note ASARCO received from its sale of Mexicana stock and from a Revere convertible debenture, as well as in connection with ASARCO's 1970 disposition of its General Cable stock. See n. 21, *supra*. The General Cable stock sale also generated capital gains for ASARCO, as did ASARCO's sale of a portion of its stock in M. I. M.

Idaho and ASARCO agree that interest and capital gains income derived from these companies should be treated in the same manner as the dividend income.[25] Brief for Appellant 27; Brief for Appellee 21. Cf. 99 Idaho, at 937; 592 P. 2d, at 52 ("In our view the same standard applies to the question whether gains from the sale of stock are business income as applies to the question whether dividends from the stock are business income"). We also agree. "One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability." *Mobil*, 445 U. S., at 440. Changing the form of the income "works no change in the underlying economic realities of [whether] a unitary business [exists], and accordingly it ought not to affect the apportionability of income the parent receives." *Id.*, at 441. We therefore hold that Idaho's attempt to tax this income also violated the Due Process Clause.

V

For the reasons stated, the judgment of the Supreme Court of Idaho is

Reversed.

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prevailed because it was clear that the corporations operated unitary businesses with a continuous flow and interchange of common products. ASARCO has proved that these essential factors are wholly absent in this case. It is late in the day to confuse this important area of state tax law by rewriting the standards of *Mobil* and *Exxon*.

[25] ASARCO has not challenged Idaho's taxation of interest and capital gains income other than that attributable to the five corporations discussed in the text. Brief for Appellant 26. We do not intimate views on such matters.

CHIEF JUSTICE BURGER, concurring.*

I join the Court's opinions in both No. 80-2015 and No. 80-1745 in reliance on the Court's express statement that the Court's holdings do not preclude future congressional action in this area. *Ante*, at 328, n. 23.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

The Court today declares that the Due Process Clause of the Constitution forbids a State to tax a proportionate share of the investment income of a nondomiciliary corporation doing business within its borders. In so doing, the Court groundlessly strikes down the eminently reasonable assertion of Idaho's taxing power at issue in this case. Far more dismaying, however, is that the Court's reliance on the Due Process Clause may deprive Congress of the authority necessary to rationalize the joint taxation of interstate commerce by the 50 States.

Today, the taxpayer wins. Yet in the end, today's decision may prove to be a loss for all concerned—interstate businesses themselves, which the Commerce Clause guarantees the opportunity to serve the country's needs unimpeded by a parochial hodgepodge of overlapping and conflicting tax levies; the Nation, which demands a prosperous interstate market; and the States, which deserve fair return for the advantages they afford interstate enterprise. For while this Court has the authority to invalidate a specific state tax, only Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that would guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens. Unfortunately, by apparently stripping Congress of the authority to do the job, the Court delays the day when a uniform system responsive to the needs of all can be fashioned.

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*[This opinion applies also to No. 80-1745, *F. W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico*, *post*, p. 354.]

The Court has strayed "beyond the extremely limited restrictions that the Constitution places" on the taxing power of the States, "inject[ed itself] in a merely negative way into the delicate processes of fiscal policy-making," and regrettably "imprison[ed] the taxing power of the states within formulas that are not compelled by the Constitution." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445 (1940). I respectfully dissent.

I

"Taxes," as Justice Holmes once observed, "are what we pay for civilized society." *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U. S. 87, 100 (1927) (dissenting opinion). A natural corollary of this proposition is that the Due Process Clause permits state taxation if "the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S., at 444. A State thus "is free to pursue its own fiscal policies, unembarrassed by the Constitution," if it "exert[s] its power in relation to opportunities which it has given, to protection which it has afforded, [or] to benefits which it has conferred by the fact of being an orderly, civilized society." *Ibid.*

In applying this fundamental principle to businesses that derive income from more than one State, we repeatedly have declared that a state tax passes constitutional muster unless the taxpayer can show that there is not even "a 'minimal connection' between [its] interstate activities and the taxing State," or a merely "rational relationship between the income attributed to the State and the intrastate values of [its] enterprise." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 436–437 (1980) (quoting *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978)). As the present case demonstrates, however, this oft-repeated formula is more easily stated than applied when a State attempts to tax the net income of an enterprise doing business in many jurisdictions.

The principal difficulty arises because a multijurisdictional business is "an organic system," *Wallace* v. *Hines*, 253 U. S.

66, 69 (1920) (Holmes, J.), whose income cannot sensibly be reduced to the sum of the hypothetical incomes of distinct component parts, each wrenched from the unitary whole and conceptually confined to operations within a single State.[1] With this understanding in mind, for more than half a century we have held that a State is not constitutionally required to tax only that slice of an interstate enterprise operating physically within the State. See, *e. g.*, *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924); *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980). Instead, as we stated only two Terms ago, "[i]t has long been settled that 'the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs,'" *id.*, at 219 (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 460 (1959)), provided only that in each case the resulting tax liability is not "'out of all appropriate proportion to the business transacted'" in the taxing

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[1] For example, if the expenses incurred by a vertically integrated business in manufacturing a product in State A are deducted from the revenues generated by marketing the product in State B, the resulting net income cannot reasonably be allocated either entirely to State A or entirely to State B. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120–121 (1920). Even when state-by-state allocation superficially seems feasible, as in the case of a horizontally integrated, but loosely knit chain of retail stores, "economies of scale" resulting from "functional integration" and "centralization of management," *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 438 (1980), may augment the net income earned by the whole to a value greater than the sum of what could be earned by each of the parts operating separately. See *Butler Bros.* v. *McColgan*, 315 U. S. 501, 508–509 (1942). When this happens, the additional increment in income resulting from the combination cannot be allocated to any single one of the parts on other than an arbitrary basis. See, *e. g.*, *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 221 (1897) (a unitary enterprise has a "value resulting from the combination of the means by which the business [is] carried on [which] exist[s] . . . throughout the entire domain of [its] operation"). The net income of an organic, unitary business, in short, is indivisible.

State itself, 447 U. S., at 220 (quoting *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 135 (1931)).

In short, the "linchpin" of apportioned state taxation is the concept of an organic, unitary business. *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, at 439. The constitutionality of a state tax levied on extraterritorial business operations thus turns on whether the out-of-state business activity can be characterized as a separate business with no in-state contacts or whether instead it is a part of a unitary enterprise doing business in the State. In the case before us, the Court first errs when it attempts to determine whether or not ASARCO's investments were part of ASARCO's unitary nonferrous metals business.

II

ASARCO realized capital gains, dividends, and interest income from its ownership of securities issued by five foreign subsidiaries. The issue for the Court is whether that income was earned by ASARCO's unitary nonferrous metals business, and therefore was subject to Idaho's taxes, or instead was earned by a separate investment business unrelated to ASARCO's operations in Idaho, and therefore was constitutionally exempt from taxation by that State. As always, of course, the State's taxation of the company's income is presumptively constitutional. To overcome that presumption, ASARCO has the "'distinct burden of showing by "clear and cogent evidence"'" that Idaho's scheme "'results in extraterritorial values being taxed.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, *supra*, at 221 (quoting *Butler Bros.* v. *McColgan*, 315 U. S. 501, 507 (1942), in turn quoting *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 688 (1936)).

According to the Court, ASARCO has met this burden by showing that during the relevant tax years its holdings in the five subsidiaries were passive investments not functionally

integrated with ASARCO's nonferrous metals business. On this basis, the Court concludes that ASARCO's holdings were, in effect, part of a separate investment business having too little to do with ASARCO's unitary nonferrous metals business to support apportioned taxation.

Both common sense and business reality dictate a different result. ASARCO, far from showing that its investment holdings were part of an "unrelated,"[2] "discrete business enterprise,"[3] "hav[ing] nothing to do with the activities"[4] of its unitary nonferrous metals business, has failed in at least three ways to bear its "distinct burden" of demonstrating that Idaho's tax was unconstitutionally levied.

A

First, even accepting, *arguendo*, the Court's conclusion that the contested income was derived from passive investments, ASARCO has failed to show that its investment decisionmaking was segregated from its nonferrous metals business. ASARCO cannot deny that the subsidiary companies in which it invested were participants in the nonferrous metals industry, the very industry in which ASARCO played a major operational role. As the Court acknowledges, ASARCO "mine[d], smelt[ed], and refine[d] . . . nonferrous metals such as copper, gold, silver, lead, and zinc," *ante*, at 309, while one of its subsidiaries "engaged in the mining, milling, smelting, and refining of nonferrous metals," *ante*, at 309, n. 2, another engaged "in the same general line of business" as did "ASARCO in the United States," *ibid.*, a third "mine[d] and smelt[ed] copper," *ante*, at 309–310, n. 2, and the last two were important "ASARCO customers," *ante*, at 323, fabricating, respectively, cables and copper wares, *ante*, at 309, n. 2. In short, ASARCO invested not in "unrelated business[es]," such as hotel chains and breweries, but in

[2] *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 439.
[3] *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 224 (1980).
[4] *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 442.

379-676 O—83——12 : QL 3

companies participating in the nonferrous metals markets. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 224 (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S., at 442).

ASARCO invested in these nonferrous metals companies with a well-founded confidence that few other investors could muster, since much of what it had learned in operating its own nonferrous metals business must have been invaluable in evaluating the prospects for other companies engaged in similar businesses and markets worldwide. Put another way, it would have been a perverse act of self-denial for ASARCO to ignore its intimate knowledge of world markets, refining and smelting technology, mining operations, and geological reserves when it decided whether and how to invest in the five companies of concern here. Thus, the investment decisions ASARCO made regarding the securities of these five participants in the nonferrous metals markets undoubtedly depended heavily on ASARCO's knowledge of its own business.

In fact, during the course of this litigation, ASARCO has admitted as much. In the trial court, ASARCO's vice president and comptroller answered questions put to him by ASARCO's counsel as follows:

> "Q. Now, ASARCO has investments in a lot of mining companies, does it not?
>
> "A. Yes.
>
> "Q. Can you tell the court why ASARCO makes investments of this nature?
>
> "A. The ASARCO management utilizes its expertizes *[sic]* in channeling funds into these areas where they are knowledgeable and—most knowledgeable—and hopefully accrue *[sic]* to the benefit of ASARCO stockholders.
>
> "Q. So that essentially ASARCO feels that it can use its expertizes *[sic]* to produce the maximum returns for its shareholders?
>
> "A. That is correct.

"Q. And whereas with other purchases I suppose ASARCO feels that the shareholders can make the investments themselves as well as ASARCO can?

"A. Right." Record 81–82.

Moreover, in its brief to the Supreme Court of Idaho ASARCO flatly stated that "[i]t invests its shareholders' money in businesses in which it has expertise and distributes the investment return in the form of dividends to its shareholders." *Id.*, at 521.

In sum, far from showing by "clear and cogent evidence" that its investment decisions regarding other nonferrous metal suppliers and users were segregated from the resources of information and expertise developed in its own nonferrous metals business, ASARCO itself provided evidence that its investment decisionmaking was part of an indivisible, unitary nonferrous metals business. This alone warrants affirming the Idaho Supreme Court's due process ruling.

B

Second, again assuming, *arguendo*, that the contested investments were in fact passive, ASARCO has failed to show that its holdings were divorced from its management of the financial requirements of its nonferrous metals business. For all we know, ASARCO's investments were triggered by its need to obtain a return on idle financial resources accumulated for the future operation of its own primary business.

ASARCO does not, and could not, contend that all its investment income is *per se* beyond the taxing power of the nondomiciliary States in which it operates. Rather, it concedes that the Due Process Clause permits Idaho to tax, on an apportioned basis, the income ASARCO earned on short-term investments of its working capital.[5] After all, an ap-

[5] ASARCO states that it "has not contested Idaho's right to treat interest income from temporary deposits of [its] working capital funds as

propriate amount of liquid working capital is necessary to the day-to-day operation of a business, and any return earned from its temporary investment is a byproduct of the operation of the business. ASARCO thus admits that Idaho could tax a portion of the income realized from an investment in, say, short-term commercial paper, even though the underlying operations of the issuing companies were far less related to ASARCO's nonferrous metals business than the operations of the five subsidiaries at issue here.

The interim investment of retained earnings prior to their commitment to a major corporate project, however, merely recapitulates on a grander scale the short-term investment of working capital prior to its commitment to the daily financial needs of the company. Just as companies prefer to maintain a cushion of working capital rather than resort to the short-term capital markets on an hourly basis for the money necessary to operate their businesses, many enterprises prefer to acquire the capital necessary for the expansion and replacement of plants and equipment by creating long-term funds, rather than resort to the vagaries of the capital markets. In order to prevent the accumulating capital from sitting idle, such funds are usually invested in financial assets with a degree of liquidity appropriate to the money's intended ultimate use.[6] Any return ASARCO earned on such investments

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apportionable business income derived in the ordinary course of [its] Unitary Business activities." Brief for Appellant 26. See also Tr. of Oral Arg. 6–7.

[6] This process is analogous to the leasing of idle physical assets until they are needed in the business. By analogy to ASARCO's investment of its working capital in short-term securities, for example, a company might lease time on one of its computers to outsiders on an hourly basis in order to keep the computer fully occupied during slack periods. Similarly, in analogy to the interim investment of retained earnings, a company might lease for a term of years the areas of its office buildings into which it intends ultimately to expand. It could hardly be claimed that by so doing the company had opened up a separate and unrelated leasing business. To

plainly would be functionally related to the conduct of its nonferrous metals business and, therefore, taxable by Idaho on an apportioned basis as unitary business income.

Such investment of idle funds, after all, mirrors the borrowing of funds a company lacks. Undoubtedly, ASARCO would be quick to assert that any long-term borrowing recorded on the liability side of its balance sheet is an integral part of its unitary business justifying the deduction of interest expense in the computation of apportionable net income. If so, ASARCO cannot contend that the long-term investments recorded on the asset side of its balance sheet are automatically separate from its unitary business, thereby justifying the exclusion of the revenues received from apportionable net income. The same principles apply whether the money is going in or coming out.

Thus, because investments of ASARCO's working capital are functionally integrated with its unitary nonferrous metals business, and because ASARCO failed to show by "clear and cogent evidence" the facts necessary to distinguish, on a principled basis, its investments in the securities of the five subsidiaries at issue here,[7] the Idaho Supreme Court correctly concluded that apportioned taxation of ASARCO's contested investment income does not violate the Due Process Clause.

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the contrary, the income from such leases would be functionally related to the company's unitary business and, therefore, taxable on an apportioned basis by a State in which the company did business. Accordingly, it is hard to see why a company that rents out idle money rather than idle physical assets should be treated differently under the Due Process Clause, and harder still to see why the Constitution would treat short-term investments of working capital differently than longer-term investments of retained earnings.

[7] Of course, had ASARCO attempted to do so, it might have been able to make such a showing. ASARCO did argue, and the trial court found, that it had "never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues." Record 326.

C

Finally, the Court errs even in its fundamental determination that ASARCO's holdings were passive investments unrelated to ASARCO's operational business. In fact, the disputed investments actively contributed to ASARCO's nonferrous metals business.

To begin with, ASARCO had effective operational control of at least three of the five subsidiaries. ASARCO's commanding 52.7% interest in M. I. M. Holdings, Ltd., uncontestably gave it full control of that company. Although ASARCO did not wield quite the same power over Southern Peru Copper, its 51.5% interest nonetheless gave it unilateral veto power over all corporate decisions, including those supported unanimously by all other shareholders.[8] Finally, in the case of ASARCO Mexicana, the record discloses only that ASARCO had been forced to sell 51% of its initial 100% interest to Mexican nationals, retaining a 49% interest for itself. ASARCO has made no showing that it is not the principal investor in Mexicana and thus able to control the company. In sum, ASARCO undoubtedly was the dominant factor in at least three of the five subsidiaries under consideration here, with the power to use them to advantage in its nonferrous metals business.[9] The Court, however, minimizes the sig-

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[8] Under the management agreement between ASARCO and the other three shareholders of Southern Peru, ASARCO has the right to appoint 6 of the company's 13 directors, the other three shareholders together have the right to appoint another six, and the 13th and final director is appointed by the first 12 directors or by joint action of all the shareholders. Southern Peru's bylaws, which can be changed only by unanimous consent, provide that eight votes are needed to pass any resolution. App. to Juris. Statement 55a; App. 121a.

[9] ASARCO also dominated Revere Copper and General Cable. While ASARCO owned only 34% interests in each company, the remaining shares of each were "widely held," *ante*, at 324, so that ordinarily ASARCO would be assured control of each company and almost never face effective opposition to its wishes.

Prior to the tax years in question, however, the Justice Department brought an antitrust suit against ASARCO related to its holdings in Gen-

nificance of this control, emphasizing that ASARCO did not openly and aggressively assert its control during the tax years in question and concluding that ASARCO's subsidiaries did not contribute to its nonferrous metals business.

The Court's result is hard to understand in view of our decision just two years ago in *Exxon Corp.* v. *Wisconsin Dept. of Revenue*. In summarizing our result in *Exxon*, we asserted that the "important link" establishing the unity of

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eral Cable and Revere Copper. The suit culminated in a consent decree issued in 1967 forbidding ASARCO to sell to General Cable and Revere Copper at prices lower than ASARCO sold to other customers and preventing ASARCO from voting its stock in either company. In 1970, the last of the three tax years at issue here, the decree was modified and "ASARCO was compelled . . . to divest itself of all its General Cable stock." *Ante*, at 324, n. 20.

ASARCO argues that the 1967 consent decree, which was issued before the tax years of concern here, prevented General Cable and Revere Copper from being a part of ASARCO's unitary business. To the contrary, however, the antitrust suit and consent decree strongly suggest that General Cable and Revere Copper were entangled in ASARCO's unitary business, perhaps unlawfully so. On the present record, ASARCO has not borne the burden of showing that the 1967 decree severed enough of the connections between ASARCO and the two subsidiaries to transform ASARCO's holdings from active components of its unitary business to passive investments. At least with respect to General Cable, the modification in 1970 (the last tax year in issue here) of the consent decree so that ASARCO was required to sell its holdings in the company indicates the contrary, since divestiture would scarcely be necessary if the business of the two companies had been unrelated. Moreover, the mere fact that ASARCO traded with General Cable and Revere Copper at market rates does not compel the conclusion that ASARCO's investments in those companies were part of its unitary business. In *Exxon*, for example, we concluded that the fact that "wholesale market values" were assigned "to interdepartmental transfers of products and supplies," 447 U. S., at 225, did not undermine the unitary nature of Exxon's business.

Although I believe that ASARCO's showing was insufficient to establish that General Cable and Revere Copper were not under its control for purposes of determining the constitutional limits of Idaho's taxation, for simplicity in what follows I assume only that ASARCO was a major investor in these two subsidiaries.

Exxon's business "most clearly" was based on two factors. 447 U. S., at 224.

First, we noted that "'placing individual segments under one corporate entity . . . provide[s] greater profits stability'" because "'nonparallel and nonmutual economic factors which may affect one department may be offset by the factors existing in another department.'" *Id.*, at 225 (quoting the testimony of an Exxon senior vice president). ASARCO's ownership of subsidiaries doing business in precisely ASARCO's line of work in two different geographical markets, M. I. M. Holdings in Australia and ASARCO Mexicana in Mexico, undoubtedly provided exactly that sort of advantage; economic conditions in Australia and Mexico do not track those in the United States, so that when the nonferrous metals business is in the doldrums in one country, it may be prospering in another. But, unlike the *Exxon* Court, today's Court is blind to the significance to the "profits stability" of ASARCO's nonferrous metals business of its subsidiaries in unrelated geographical markets.

Second, in *Exxon* we noted that the vertical relationship between the various departments in Exxon's business provided both "an assured supply of raw materials" and an "assured and stable outlet for products" so that Exxon could "minimiz[e]" the "risk of disruptions" "due to [the] supply and demand imbalances that may occur from time to time." *Ibid.* The *Exxon* Court's recognition of the business importance of captive suppliers and customers merely confirmed our earlier decision in *Mobil Oil*, in which we affirmed Vermont's apportioned taxation of the more than $115 million in dividend income Mobil had received from its 10% interest in the Arabian American Oil Co. 445 U. S., at 457, n. 10 (STEVENS, J., dissenting). Mobil's 10% investment, apart from providing handsome dividends, apparently had helped to assure Mobil of supplies of crude oil for its petroleum business. By contrast, the Court today inexplicably invalidates Idaho's taxation of ASARCO's dividend income from its five-fold

greater 51.5% interest in Southern Peru Copper Corp., an investment that evidently helped to assure ASARCO of supplies of unrefined copper, since 35% of the entire copper output of Southern Peru was sold to ASARCO.[10]

Apparently, the Court no longer believes it significant that the subsidiaries in which a parent has major holdings "minimiz[e]" the "risk of disruptions" "due to [the] supply and demand imbalances that may occur from time to time," *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 225, by providing "assured suppl[ies]" and "stable outlet[s]," *ibid.*, unless the subsidiaries are actively managed on a day-to-day basis. The Court evidently would find that ASARCO's subsidiaries were part of ASARCO's unitary business only if ASARCO experienced a "supply and demand imbalanc[e]" sufficiently severe to force it to exercise day-to-day control of its captive subsidiaries. In this regard, the Court's position is akin to the view that a paid-up fire insurance policy is a worthless asset unless smoke is in the air.

In sum, despite ASARCO's failure on each of the three counts just discussed to bear its "distinct burden" of showing that its investments are unrelated to its nonferrous metals business, the Court rules that Idaho cannot tax the investment income at issue here. In so doing, the Court unwisely substitutes for the multifaceted analysis used to determine whether the businesses in *Mobil Oil* and *Exxon* were unitary the oversimplified test of active operational control. The result is that the Court has ignored business advantages to ASARCO more than sufficient to establish that its holdings in its subsidiaries were part of its unitary business. In consequence, the Court wrongly concludes that ASARCO has borne the "distinct burden" of showing that its holdings in the

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[10] Just as inexplicably, the Court reverses Idaho's apportioned tax on ASARCO's dividend income from its 34% interests in Revere Copper & Brass and in General Cable Corp., companies that were "major customers" of ASARCO buying tens of millions of dollars of goods from ASARCO each year.

five affected subsidiaries are not functionally related to the income of its operational nonferrous metals business.[11]

Trying to justify that result, the Court suggests that for it to hold otherwise "would destroy the concept" of a unitary business by expanding the idea until it "becomes no limitation at all" on the power of the States to tax. *Ante*, at 326. In actuality, the Court's decision today shrinks the concept beyond all recognition. Thus it is the Court's holding, not Idaho's tax, that menaces the unitary-business principle. The "linchpin" is loose from the axle.

III

As a natural consequence of its decision that Idaho cannot tax ASARCO's investment income, the Court simultaneously, if implicitly, rules out taxation of the disputed income by any other nondomiciliary State in which ASARCO conducts its nonferrous metals business, absent a special connection between the would-be taxing State and ASARCO's investments.[12] By the process of elimination, then, the Court's holding provides a partial answer to the question of

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[11] The Court suggests that my "perception of some of the facts" necessary to reach this conclusion "differs substantially from the record." *Ante*, at 325, n. 21. In fact, however, my view of the facts differs from neither the record nor, I think, that of the Court. As should be apparent, my disagreement with the Court is based, not on the facts, but on the constitutional significance to be given those facts.

[12] The Court is careful not to extend the reach of its holding to domiciliary States. It states the question presented as "whether the State of Idaho constitutionally may include within the taxable income of a *non*domiciliary parent corporation . . . a portion of intangible income . . . that the parent receives from subsidiary corporations having no other connection with the State." *Ante*, at 308–309 (emphasis added). As its holding, the Court asserts that it "cannot accept . . . a definition of 'unitary business' that would permit *non*domiciliary States to apportion and tax dividends '[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State . . . .'" *Ante*, at 327 (citation omitted, emphasis added).

which State or States the Constitution permits to tax this income. The answer the Court gives, however, demonstrates how ill-advised is the course on which it embarks. By its analysis, the Court leaves open three possible choices regarding which States, if any, may tax ASARCO's contested income. Each of these possibilities suffers from crippling defects, pointing to the conclusion that the Court errs in prohibiting apportioned taxation of investment income by nondomiciliary States.

A

First, there is the disturbing possibility that no State could satisfy the requirements of the Due Process Clause as interpreted today by the Court, so that the contested income would be, in the words of state tax administrators, "nowhere income."[13] If so, today's holding casts a deep shadow on the ability of the States to tax their fair share of the corporate income they help to produce by providing an "orderly, civilized society." Even more disturbing, given such an interpretation, the Court's decision endangers even federal taxation of passive investment income, since the Federal Government's contacts with the income at issue here obviously cannot exceed the sum of the contacts of the various States. Presumably, the Court's opinion should not be read as erecting so high a hurdle to state and federal taxation.

B

Second, there is the possibility that only a domiciliary State or States could tax the disputed income. In *Mobil Oil*, the Court stated that "[t]axation by apportionment *and* taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained."

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[13] See Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401, 403 (1976).

445 U. S., at 444–445 (emphasis added). If so, the converse may also be true: if taxation by apportionment is constitutionally condemned, taxation by allocation to a single situs may be constitutionally preferred. The Court's decision today thus could be read as broadly hinting that a domiciliary State enjoys a preference of constitutional dimension justifying its—and only its—taxation of income such as that derived from ASARCO's investments.

Perhaps such a preference could find some blessing in tradition, but certainly not in logic or in the recent opinions of this Court. In *Mobil Oil* itself, the Court declared:

> "We find no adequate justification . . . for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of 'business situs' or 'commercial domicile' that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maxim *mobilia sequuntur personam*, upon which these fictions of situs are based, 'states a rule without disclosing the reasons for it.' The Court also has recognized that 'the reason for a single place of taxation no longer obtains' when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. . . . Moreover, cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations where the apportionment principle prevails." *Id.*, at 445 (citations omitted).

The Court thus made clear only two years ago that a State of domicile cannot expect automatically to meet the due process requirements for the taxation of investment income. As with a nondomiciliary State, a domiciliary State may tax investment income only if it confers benefits on or affords protection to the investment activity. Mere assertion of the ar-

bitrary legal fiction that intangible property is located at its owner's domicile no longer suffices to repel a reluctant taxpayer's due process attack.

The principal functional basis on which this Court has justified taxation by the commercial domicile, moreover, actually supports the fully apportioned taxation of investment income that today's decision rules out, rather than taxation by allocation to a single situs. In *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193 (1936), for example, we sustained an ad valorem tax on accounts receivable and bank deposits levied by the State in which the taxpayer maintained "the actual seat of its corporate government," *id.*, at 212, for the reason that the intangibles at issue had become "'integral parts of some local business,'" *id.*, at 210 (quoting *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213 (1930)). Thus, other than the arbitrary fiction that intangible property is "located" at the domicile of its owner, the underlying jurisdictional basis for taxation at the commercial domicile is grounded in the fact that intangibles are an "integral part" of the business. This justification supports the principle of apportionment rather than allocation solely to the single domiciliary State. After all, if intangibles are an "integral part" of the unitary business in the domiciliary State, they also are related to the business of the corporation elsewhere. It hardly makes sense to allocate income to the commercial domicile on the theory that business activity at the commercial domicile promotes the unitary business everywhere, and then to ignore those connections and to disregard the claims of the other States in which the unitary business operates. See Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401, 416 (1976).

In short, unless the Court is prepared to abandon the unitary-business principle as applied to investment income and to read into the Constitution the arbitrary legal fiction that intangibles are situated at the domicile of their owner, the

Court will be unable to sustain a domiciliary State's allocation of all passive investment income to itself against due process attack.

C

We thus arrive at the only remaining possibility. The Court's holding today, taken with past decisions, may imply that ASARCO's investments must be treated as though ASARCO were not only running its nonferrous metals business but also running as another, separate business a sort of mutual fund or holding company specializing in the worldwide nonferrous metals industry. The income from this fictitious separate business would then be taxable on an apportioned basis by those States in which the business was carried out, just as ASARCO's unitary nonferrous metals business could be taxed on an apportioned basis by those States in which that business is conducted.

If so, the Constitution apparently requires that a very small tail be permitted to wag a very big dog. For in the case of companies like ASARCO with tens or hundreds of millions of dollars of dividend income generated by a handful of long-term investments, vast differences in state revenues may turn on whether the quarterly dividend checks sent from "passive" subsidiaries are sent to a clerk in a company office in one State rather than another. Surely it is highly anomalous that the Due Process Clause should require the dividend income of a farflung interstate business selectively to be attributed solely to the State or two in which a few minimal securities management functions are carried out, rather than apportioned among all the States whose "civilized society," has made the income-generating wealth of the larger enterprise possible.

Moreover, if such a requirement were judicially imposed it would create potentially staggering practical difficulties for taxpayers, state tax administrators, and, ultimately, the courts. For despite the Court's easy conclusion today that ASARCO's supposedly discrete investment business is dis-

tinct from ASARCO's operational nonferrous metals business, it is unlikely in practice that the two could be so readily disentangled. Imagine, for example, that the dividend checks were received and the management decisions regarding ASARCO's investments were made at ASARCO's corporate headquarters in one State, while the expertise and information relied on to make those decisions were drawn from corporate sources in many States. In apportioning the income of this purportedly separate investment business among the States, the question inescapably would arise as to what limits the Constitution places on how little of the taxable values at ASARCO's headquarters the expertise and information producing States could allocate to ASARCO's investment business as opposed to the theoretically distinct operational nonferrous metals business. Stating the question suffices to show that it reintroduces just the sort of insoluble problem of dividing businesses that the unitary business principle was designed to avoid. Thus, if the Court does not abandon the separate business theory that it endorses today, it merely will have substituted the vexing constitutional problem of how to apportion businesses for today's problem of how to apportion taxes.

In sum, the Court has erred. Without a well-founded constitutional mandate, it has straitjacketed the States' ability to develop fair systems of apportionment, prematurely ending the evolutionary process begun by the Uniform Division of Income for Tax Purposes Act and the Multistate Tax Commission. By limiting the apportionment concept by restrictions not found anywhere in the Constitution, moreover, the Court has committed itself to a path leading to more constitutional problems and greater involvement by this Court in the intricacies of interstate taxation.

IV

The Court's error, moreover, is compounded by its decision to invoke the Due Process Clause as the source of its author-

ity, despite the ready availability of the Commerce Clause.[14] For unlike a Commerce Clause ruling which is susceptible to repair by Congress, today's due process decision may be beyond Congress' power to correct.

This constitutional shortsightedness overlooks the fact that Congress, not this Court, holds the ultimate responsibility for maintaining a healthy system of interstate commerce. Moreover, it is Congress, not this Court, which has the institutional tools to deal with these complex problems. Con-

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[14] This Court's authority to invalidate state legislation because it interferes with interstate commerce is inferred from the Constitution's grant to *Congress* of the authority to regulate interstate commerce. Art. I, § 8, cl. 3. For this reason, Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 44 (1980) (citations omitted). Consistent with this principle, it has long been established that Congress generally has the power to "overrule" a decision of this Court invalidating state legislation on Commerce Clause grounds. Compare *Leisy* v. *Hardin*, 135 U. S. 100 (1890), with *In re Rahrer*, 140 U. S. 545 (1891). By contrast, Congress generally cannot waive a ruling of this Court decided under the Due Process Clause. Accordingly, this Court's "threshold" for invalidating state legislation should be considerably higher under the Due Process Clause than under the Commerce Clause.

In the present case, the Court could have reached its result by relying on the Commerce Clause. Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause. The test under the Commerce Clause is whether the tax "'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'" *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S., at 443 (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977)). In his dissent in *Mobil Oil*, JUSTICE STEVENS explained how a violation of the Due Process Clause could also be a violation of the Commerce Clause: "[I]f, in a particular case, use of an allocation formula has the effect of taxing income earned by an interstate entity outside the State, it could alternatively be said to have the effect of taxing the income earned by that entity inside the State at a rate higher than that used for a comparable, wholly intrastate business, a discrimination that violates the Commerce Clause." 445 U. S., at 452, n. 4.

gress itself is only too aware of the limitations under which the judiciary operates when it attempts to deal with the knotty problems of state taxation of multistate enterprises within a federal system. As the Special Subcommittee on State Taxation of the Committee on the Judiciary of the House of Representatives bluntly put it:

> "[T]he courts have over the years attempted to resolve the numerous and complex problems [of state taxation of interstate commerce] brought before them. . . . [T]heir decisions on State taxation leave much to be desired both in individual cases and as a body of law. The reason for this inadequacy is completely unrelated to the ability or diligence of a particular court or of any particular judge. The inadequacy is entirely institutional.
>
> "The problem arises from the fact that a court deals in absolutes, and in this area an absolute decision in either direction is not likely to be satisfactory. . . . [T]he court is substantially handicapped by its inability to explore fully the nature, the extent, and the impact of the burdens created [by state taxes].
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> "The inherent inadequacy of the judicial process to achieve a full accommodation of the competing demands of the States for taxes and of the national interest in unhindered commerce, is perhaps nowhere more clear than in the apportionment of income for tax purposes. . . . In the typical case of this kind, the tax of only one of the States would be before the court . . . . The court has only the records of the cases before it with only such information as may be necessary to state the facts and consequences in those cases. On this basis, is the court in a position to choose between [competing approaches], striking down all formulas containing one or the other? If so, what standard should it use in deciding which one? Given the adversary system of litigation, how does the court obtain the necessary data on economic burdens and revenue consequences? . . .

"Difficulties also arise from the limitations of the judicial process in prescribing what constitutes adequate jurisdiction to tax. As a question of due process the court can do no more than decide on conceptual grounds . . . whether the quality of the relationship in the case before it is sufficient to sustain the imposition of the tax. . . .

". . . It is no better suited to devise and prescribe general rules setting the optimum level of jurisdiction than it is to impose a uniform apportionment formula. For example, the judicial process does not lend itself to a determination of what level of nexus would strike the most equitable balance between the demands of the States for revenue and the probable burdens of compliance." H. R. Rep. No. 1480, 88th Cong., 2d Sess., 11–12 (1964).

Nor is Congress alone in recognizing the limitations of the judiciary in this field. Many Justices of this Court have acknowledged "the weakness of the judicial process in these tax questions where the total problem . . . reaches us only in installments." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 307 (1944) (Jackson, J., concurring). The Court itself has said: "To introduce a new doctrine of tax apportionment . . . is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States. . . . [C]ertainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship." *Id.*, at 299–300 (opinion of the Court). Surely in a case such as the one before us, Congress, unconfined by "the narrow scope of judicial proceedings," *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 592 (1852) (Taney, C. J., dissenting), is in a better position "in the exercise of its plenary constitutional control over interstate commerce, not only [to] consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but . . .

also on the basis of full exploration of the many aspects of a complicated problem [to] devise a national policy fair alike to the States and our Union." *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 189 (1940) (Black, J., dissenting). But it is just this sort of congressional action which today's due process decision appears to preclude. This Court should not so confidently pre-empt the Congress.

V

In sum, the Court has focused its attention solely on the question whether ASARCO's interests in its subsidiaries represented active investments and concludes they did not. The Court then permits this initial erroneous result to derail its analysis. Instead of continuing, the Court fails to consider the possibility that ASARCO's investment decision-making was not segregated from its operational nonferrous metals business; fails to consider the possibility that ASARCO's investments were simply an interim use of long-term funds accumulated for ultimate use elsewhere in the business; fails to consider the possibility that ruling out apportioned taxation of income earned from intangibles may imply that such income is "nowhere income"; fails to consider the possibility that its ruling may be inconsistent with the unitary-business principle because it suggests that income from intangibles may be taxed only by a domiciliary State; and fails to consider the possibility that it may be as difficult to apportion a business as to apportion income for constitutional purposes. Finally, and most distressingly, the Court fails to consider its own limitations and Congress' constitutional prerogatives. Had the Court given the intricate questions presented by this case the attention they deserve, it might have reached a different result. I respectfully dissent.

F. W. WOOLWORTH CO. *v.* TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

No. 80-1745. Argued April 19, 1982—Decided June 29, 1982

Appellant's principal place of business and commercial domicile are in New York, but it engages in chainstore retailing throughout the United States. Under its income tax laws, New Mexico distinguishes between "business" income, which it apportions between it and other States, and "nonbusiness" income, which it generally allocates to a single State on the basis of commercial domicile. Appellant reported its dividend income from four of its foreign subsidiaries, which engage in chainstore retailing in foreign countries, as "nonbusiness" income, none of which was to be allocated to New Mexico. Similarly, appellant did not report as New Mexico "business" income a sum, commonly known as "gross-up," that it never actually received from its foreign subsidiaries but that the Federal Government (for purposes of calculating appellant's federal foreign tax credit) *deemed* it to have received. On audit, appellee determined that appellant should have included in its apportionable New Mexico income both the dividends and the gross-up figure. Appellant's protest was denied, but appellee's decision was reversed by the New Mexico Court of Appeals. However, the New Mexico Supreme Court in turn reversed, holding that both the dividends and the gross-up figure were apportionable New Mexico income.

Held:

1. New Mexico's tax on a portion of the dividends received by appellant from its foreign subsidiaries fails to meet established due process standards. Pp. 362–372.

(a) The linchpin of apportionability for state income taxation of an interstate enterprise is the "unitary-business principle." Appellant—as owner of all of the stock of three of its subsidiaries and a majority interest in the fourth—potentially has the authority to operate these companies as integrated divisions of a single unitary business. But the *potential* to operate a company as part of a unitary business is not dispositive when, as here, the dividend income from the subsidiaries in fact is derived from unrelated business activity of the subsidiaries, each of which operates a discrete business enterprise. *ASARCO Inc.* v. *Idaho State Tax Comm'n*, *ante*, p. 307; *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425. P. 362.

(b) For due process purposes, the income attributed to a State must be rationally related to values connected with the taxing State. This

limitation is not satisfied merely because the nondomiciliary parent corporation derives some economic benefit from its ownership of stock in another corporation. Pp. 363–364.

(c) None of the factors relevant to a State's right to tax dividends from foreign subsidiaries exists in this case. The record shows that appellant's and its subsidiaries' operations—such as store site selection, advertising, accounting, purchasing, warehousing, and personnel training—were not functionally integrated. And except for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary, there was little or no integration of business activities or centralization of management. Thus, the subsidiaries were not a part of a "unitary business." *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, distinguished. Pp. 364–372.

2. New Mexico's efforts to tax the "gross-up" income also contravenes the Due Process Clause. The "fictitious" gross-up figure is treated for federal foreign tax credit purposes as a dividend in the same manner as a dividend actually received by the domestic corporation from a foreign corporation. In this case the foreign tax credit arose from the taxation by foreign nations of appellant's foreign subsidiaries that had no unitary business relationship with New Mexico. Pp. 372–373.

95 N. M. 519, 624 P. 2d 28, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *ante*, p. 331. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 373.

William L. Goldman argued the cause for appellant. With him on the briefs were *George W. Beatty*, *James A. Riedy*, *Michael D. Bray*, and *Arnold S. Anderson*.

Sara E. Bennett, Special Assistant Attorney General of New Mexico, argued the cause for appellee. With her on the brief were *Denise D. Fort*, Assistant Attorney General, and *Filmore E. Rose*.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Illinois by *Tyrone Fahner*, Attorney General, *Fred H. Montgomery*, Special Assistant Attorney General, and *Lloyd B. Foster;* and for the Multistate Tax Commission et al. by *William D. Dexter; Wilson L. Condon*, Attorney General of Alaska; *J. D. MacFarlane*, Attorney General of Colorado; *Carl R. Ajello*, Attorney General of Connecticut; *Richard S. Gebelein*, Attorney

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the Due Process Clause permits New Mexico to tax a portion of dividends that appellant F. W. Woolworth Co. received from foreign subsidiaries that do no business in New Mexico. We also must decide whether New Mexico may include within Woolworth's apportionable New Mexico income a sum, commonly known as "gross-up," that Woolworth calculated in order to claim a foreign tax credit on its federal income tax.

I

Woolworth's principal place of business and commercial domicile are in New York. It engages in retail business through chains of stores located in the United States, Puerto Rico, and the Virgin Islands. It sells a wide spectrum of merchandise, including dry goods, hardware, small appliances, confections, packaged goods, and fountain items. In the fiscal year ending January 31, 1977, Woolworth's gross domestic sales totalled approximately $2.5 billion, with New Mexico sales amounting to approximately $13 million—or about 0.5% of the gross figure. App. 57a.

Woolworth owns four foreign subsidiaries of relevance to this suit. Three are wholly owned: F. W. Woolworth Gmbh,

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General of Delaware; *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General; *Linley E. Pearson*, Attorney General of Indiana; *Robert T. Stephan*, Attorney General of Kansas; *Stephen H. Sachs*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank K. Kelley*, Attorney General of Michigan; *Warren R. Spannaus*, Attorney General of Minnesota; *John Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Gregory H. Smith*, Attorney General of New Hampshire; *Rufus L. Edmisten*, Attorney General of North Carolina, and *M. C. Banks*, Deputy Attorney General; *Robert O. Welfald*, Attorney General of North Dakota, and *Albert R. Hausauer*, Assistant Attorney General; *Dave Frohnmayer*, Attorney General of Oregon; and *David L. Wilkinson*, Attorney General of Utah.

John J. Easton, Attorney General of Vermont, and *Paul P. Hanlon* filed a brief for the State of Vermont as *amicus curiae*.

in Germany; F. W. Woolworth, Ltd., in Canada; and F. W. Woolworth, S. A. de C. V. Mexico. F. W. Woolworth Co., Ltd., is an English corporation of which Woolworth owns 52.7%, with the remainder held and traded publicly. These four corporations also engage in chainstore retailing.[1] Together they paid Woolworth approximately $39.9 million in dividends during the fiscal year in question.

New Mexico adopted a version of the Uniform Division of Income for Tax Purposes Act in 1965, N. M. Stat. Ann. §§ 7-4-1—7-4-21 (1981), and joined the Multistate Tax Compact in 1967. §§ 7-5-1—7-5-7 (1981). See *ASARCO Inc.* v. *Idaho State Tax Comm'n, ante,* at 311-312; *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U. S. 452 (1978). Consequently the State distinguishes between "business" income,[2] which it apportions between it and other States for tax purposes,[3] and "nonbusiness" income,[4] which it generally

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[1] The English subsidiary operates about 2,000 stores, App. 39a, the Canadian company about 500, *id.*, at 24a, and the Mexican about 12. *Id.*, at 28a. The record does not specify the number of stores the German company owns, but the company may be between the English and Canadian operations in size.

[2] "'[B]usiness income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations . . . ." N. M. Stat. Ann. § 7-4-2(A) (1981).

[3] "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." N. M. Stat. Ann. § 7-4-10 (1981).

"The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period." § 7-4-11.

"The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for com-

[Footnote 4 is on p. 358]

allocates to a single State on the basis of commercial domicile.[5] Woolworth reported its dividend income of $39.9 million from its German, Canadian, Mexican, and English subsidiaries as "nonbusiness" income, none of which was to be allocated to New Mexico. Woolworth also treated as "nonbusiness" income a $1.6 million gain from a hedging transaction in British pounds. This transaction was undertaken for the purpose of insuring the payment of the British subsidiary's dividend against currency fluctuations. See App. 52a-54a. Similarly, Woolworth did not report as New Mexico "business" income $25.5 million of "gross-up" that it never actually received but that the Federal Government (for purposes of calculating Woolworth's federal foreign tax credit pursuant to 26 U. S. C. §§ 78, 901(a), and 902(a)) *deemed* Woolworth to have received from its foreign subsidiaries.[6]

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pensation, and the denominator of which is the total compensation paid everywhere during the tax period." § 7-4-14.

"The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in the state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." § 7-4-16.

[4] "'[N]onbusiness income' means all income other than business income." N. M. Stat. Ann. § 7-4-2(D) (1981).

[5] "Rents and royalties from real or tangible personal property, capital gains, interest, *dividends*, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in Sections 6 through 9 [7-4-6 to 7-4-9 NMSA 1978] of the Uniform Division of Income for Tax Purposes Act." N. M. Stat. Ann. § 7-4-5 (1981) (emphasis added).

"Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state." § 7-4-8.

New Mexico defines "commercial domicile" as "the principal place from which the trade or business of the taxpayer is directed or managed." § 7-4-2(B).

[6] "If a domestic corporation chooses to have the benefits of subpart A of part III of subchapter N (relating to foreign tax credit) for any taxable year, *an amount equal to the taxes deemed to be paid by such corporation under section 902(a)* (relating to credit for corporate stockholder in foreign corporation) . . . for such taxable year *shall be treated for purposes of this*

On audit, the New Mexico Taxation and Revenue Department determined that, under state law, Woolworth should have included in its apportionable New Mexico income the dividends from its four foreign subsidiaries, the foreign exchange gain, and the $25.5 million gross-up figure. These additions increased Woolworth's apportioned New Mexico income from $84,622 to $401,518. App. 69a. The Department denied Woolworth's protest,[7] but this decision was

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title . . . as a dividend received by such domestic corporation from the foreign corporation." 26 U. S. C. § 78 (emphasis added).

"If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall . . . be credited with the . . . taxes deemed to have been paid under sectio[n] 902 . . . ." § 901(a).

"For purposes of this subpart, a domestic corporation which owns at least 10 percent of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income . . . taxes paid or deemed to be paid by such foreign corporation to any foreign country . . . on . . . the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends (determined without regard to section 78) bears to the amount of such accumulated profits in excess of such income . . . taxes (other than those deemed paid)." § 902(a).

Woolworth gives this example: "If a foreign subsidiary of a United States parent earns $100, pays foreign tax of $40, and pays a dividend of $30 out of its after-tax profits of $60, the deemed paid foreign tax credit of the parent under section 902(a) is 30/60 × $40, or $20. The parent includes $50 in dividend income (*i. e.*, the actual dividend of $30 plus $20 of 'gross-up') and claims a foreign tax credit of $20 against the federal income tax on this income." Brief for Appellant 6, n. 4. See 26 CFR §§ 1.78–1, 1.902–1(h), (k) (1982); S. Rep. No. 1881, 87th Cong., 2d Sess., 222–228 (1962); H. R. Rep. No. 1447, 87th Cong., 2d Sess., A79–A84 (1962); 3 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 69.2 (1981).

[7] Only one witness—Woolworth's tax manager—appeared before the Department's hearing examiner. The State introduced as evidence Woolworth's tax return, a notice of assessment, its worksheets, Woolworth's protest, and tax regulations. Woolworth introduced a one-page diagram of its corporate structure. See App. B to Brief for Appellee. The testimony given before the examiner and referred to in this opinion is uncontroverted unless otherwise noted.

The Department's Decision and Order did not mention Woolworth's foreign exchange gain. See App. to Juris. Statement 30a–38a.

reversed on appeal by the New Mexico Court of Appeals. *F. W. Woolworth Co.* v. *Bureau of Revenue*, 95 N. M. 542, 624 P. 2d 51 (1979).

As a matter of state law, the Court of Appeals excluded from apportionable New Mexico income Woolworth's receipt of the dividends at issue. The court stated that "[t]here is no indication that the income from Woolworth's long-standing investments [in its subsidiaries] was used either in taxpayer's unitary domestic business or in its business conducted in New Mexico . . . ." *Id.*, at 545, 624 P. 2d, at 54. With respect to the gross-up issue, the Court of Appeals said that the State's "rigid insistence" on inclusion of this amount "is a refusal to recognize an obviously fictitious income figure, made artificial by the federal reporting requirements for a specific purpose . . . ." *Id.*, at 543–544, 624 P. 2d, at 52–53. The court said that "'[g]ross-up' in fact represents income to taxpayer's foreign subsidiaries [that] is paid out in taxes to foreign governments," *id.*, at 544, 624 P. 2d, at 53, and not income in fact to the parent. The court thus likewise excluded this sum from Woolworth's apportionable New Mexico income.[8]

The New Mexico Supreme Court reversed over one dissent. 95 N. M. 519, 624 P. 2d 28 (1981). On the question whether Woolworth's receipt of dividends from its subsidiaries constituted apportionable New Mexico income, the court observed that, "[r]egrettably, it needs to be said that the State did a very poor job of inquiring into and developing the facts in this case." *Id.*, at 524, 624 P. 2d, at 33. The court nonetheless found substantial evidence to support the findings that the subsidiaries' dividend payments met the State's statutory test for inclusion in Woolworth's apportionable New Mexico income. On the constitutional issue, the court identified the "key question" after our decision in *Mobil Oil*

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[8] The Court of Appeals did not refer to Woolworth's foreign exchange gain.

Corp. v. *Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980), as "whether those dividends were income earned in a unitary business." 95 N. M., at 528, 624 P. 2d, at 37. The court stated:

> "The [dividend] income [from Woolworth's subsidiaries] is obviously related to the mutual activities of the parent and its affiliates. The control over the subsidiaries, the interdependence, the history of the relationships, the placing of the [dividend] money in [Woolworth's] general operating account, all point to functional integration and reveal an underlying unitary business for our purposes here." *Id.*, at 529, 624 P. 2d, at 38.

Respecting the State's inclusion of Woolworth's federal gross-up figure as apportionable state income, the court "deem[ed] it unnecessary to delve into all the intricacies of the federal laws and regulations," but found it sufficient "to say that, since Woolworth decided to use the gross-up option, the income taxes paid by Woolworth's foreign subsidiaries to foreign governments must be deemed to be received as dividends . . . ." *Id.*, at 521–522, 624 P. 2d, at 30–31. "Admittedly, the fictitious gross-up, which the state claims is 'business income' and which Woolworth deliberately acceded to, does not fit the ordinary definition of 'income' . . . ." *Id.*, at 522, 624 P. 2d, at 31. Nevertheless, the court noted that there was no claim and no lower court finding that Woolworth did not "obtain an economic benefit from the gross-up procedure here." *Id.*, at 523, 624 P. 2d, at 32. The court consequently rejected Woolworth's statutory and constitutional challenges to the State's inclusion of the federal gross-up figure in Woolworth's apportionable New Mexico business income.[9]

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[9] The New Mexico Supreme Court also ruled that the Court of Appeals had erred in holding that it was reasonable to conclude that Woolworth had simply passed the foreign dividends through its general treasury to its stockholders, without using the dividends for Woolworth's general corpo-

II

This case was argued in tandem with *ASARCO Inc.* v. *Idaho State Tax Comm'n*, *ante*, p. 307, which also involved dividends and gains from foreign subsidiaries. We have reiterated today in *ASARCO* that "'[t]he "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle."'" *Ante*, at 319, quoting *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 223 (1980), in turn quoting *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, at 439.

Woolworth owns all the stock of three of its dividend payors and a 52.7% majority interest in the fourth. As a result, Woolworth (at least with respect to the three wholly owned companies) elects all of the subsidiaries' directors. It potentially has the authority to operate these companies as integrated divisions of a single unitary business. Our decision in *ASARCO* makes clear, however, that the *potential* to operate a company as part of a unitary business is not dispositive when, looking at "the 'underlying economic realities of a unitary business,'" the dividend income from the subsidiaries *in fact* is "derive[d] from 'unrelated business activity' which constitutes a 'discrete business enterprise.'" *Exxon*, *supra*, at 223–224, quoting *Mobil*, *supra*, at 441, 442, 439. See *ASARCO*, *ante*, at 322–323 (holding that a 52.7%-owned subsidiary is not part of its parent's unitary business).

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rate purposes. The Supreme Court ruled that the burden of proof was on the taxpayer. Consequently, the court held, the State's reasonable inference that Woolworth had used the foreign dividends for its own corporate purposes was supportable in the absence of evidence to the contrary. 95 N. M., at 529, 624 P. 2d, at 38. The court further rejected Woolworth's claim that the apportionment formula should be adjusted if the dividend income were found to be apportionable. *Id.*, at 529–530, 624 P. 2d, at 38–39.

The dissenting justice founded his position on "agree[ment] with the analysis of the Court of Appeals." *Id.*, at 530, 624 P. 2d, at 39.

Neither the majority nor the dissenting opinion discussed Woolworth's foreign exchange gain.

A

The State Supreme Court in important part analyzed this case under a different legal standard. After stating that the existence of a unitary business relationship was the "key question," the court proceeded to resolve this question largely by emphasizing the potentials of the relationship between Woolworth and its subsidiaries:

> "The possession of large assets by subsidiaries is a business advantage of great value to the parent; 'it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.' *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 166 . . . (1911)." 95 N. M., at 529, 624 P. 2d, at 38.

This reliance on the *Flint* case was error. *Flint* upheld a *federal* excise tax levied on corporate income.[10] The States, of course, are subject to limitations on their taxation powers that do not apply to the Federal Government. As relevant here, "the income attributed to [a] State for tax purposes must be rationally related to 'values connected with the taxing State.' *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S. 317, 325." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978). The state court's reasoning would trivialize this due process limitation by holding it satisfied if the income in question "adds to the riches of the corporation . . . ." *Wallace* v. *Hines*, 253 U. S. 66, 70 (1920). Income, from whatever source, always is a "business advantage" to a corporation. Our cases demand more. In particular, they specify that the proper inquiry looks to "the underlying unity or diversity of business enterprise," *Mobil*, *supra*, at 440,

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[10] The tax did *not* apply to a corporation's receipt of dividends from other companies subjected to the tax. 220 U. S., at 144–145.

not to whether the nondomiciliary parent derives some economic benefit—as it virtually always will—from its ownership of stock in another corporation. See *ASARCO*, *ante*, at 325–329.[11]

B

In *Mobil* we emphasized, as relevant to the right of a State to tax dividends from foreign subsidiaries, the question whether "contributions to income [of the subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale." 445 U. S., at 438. If such "factors of profitability" arising "from the operation of the business as a whole" exist and evidence the operation of a unitary business, a State can gain a justification for its tax consideration of value that has no other connection with that State. *Ibid.* We turn now to consider the extent, if any, to which these factors exist in this case.

There was little functional integration. Woolworth's subsidiaries engaged exclusively in the business of retailing—the purchase of wholesale goods for resale to final consumers. This type of business differs significantly from the "highly integrated business" of locating, processing, and marketing a resource (such as petroleum) that we previously have found to constitute a unitary business. *Exxon*, 447 U. S., at 224. See also *id.*, at 226 (describing "a unitary stream of income, of which the income derived from internal transfers of raw materials from exploration and production to refining is a part"); *Mobil*, 445 U. S., at 428. Consistent with this dis-

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[11] The hearing examiner and the New Mexico Supreme Court also thought it significant that Woolworth had commingled its dividends with its general funds and had used them for general corporate operating purposes. See 95 N. M., at 529, 624 P. 2d, at 38; n. 9, *supra*. This analysis likewise subverts the unitary-business limitation. *All* dividend income—irrespective of whether it is generated by a "discrete business enterprise," *Mobil*, 445 U. S., at 439—would become part of a unitary business if the test were whether the corporation commingled dividends from other corporations, whether subsidiaries or not.

tinction, the evidence in this case is that *no* phase of any subsidiary's business was integrated with the parent's. With respect to "who makes the decision for seeing to the merchandise, [store] site selection, advertising and accounting control," the undisputed testimony stated "[e]ach subsidiary performs these functions autonomously and independently of the parent company." App. 12a.[12] "Each subsidiary has a complete accounting department and a financial staff." *Id.*, at 14a. Each had its own outside counsel. App. to Juris. Statement 34a. It further appears that Woolworth engaged in no centralized purchasing, manufacturing, or warehousing of merchandise.[13] The parent had no central personnel train-

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[12] The testimony before the Department's hearing officer, see n. 7, *supra*, focused primarily on the English and German subsidiaries. With respect to the Mexican and Canadian subsidiaries, the evidence was confined to the following:

"Q. Now, I would like to[,] without repeating every question if I may[,] ask a summary question concerning the Canadian and the Mexican subsidiaries, we are talking about decisions concerning merchandise mix, site selection, advertising, accounting, training of personnel, and of those items[,] would you say that there is a similarity between the relationship of the U. S. parent to Canada as there is to the German and the English subsidiaries to the extent to which these things are decentralized?

"A. Yes, there is a distinct similarity or philosophy involved in the ownership of these companies." App. 18a.

The State did not undertake to controvert the implications of this statement, and neither of the courts below found any difference in the relationships between the parent and each of the four subsidiaries. We thus must assume that the relationship between the parent and the Mexican and Canadian subsidiaries paralleled that between the parent and the English and German subsidiaries in material respects.

[13] The New Mexico Supreme Court did state that "[t]here is some flow back and forth of goods" between the parent and the subsidiaries. 95 N. M., at 524, 624 P. 2d, at 33. It cited no evidence in support of this statement. Neither the Department's hearing officer nor the Court of Appeals made such a finding. The testimony in the record was that there were not "any inter-company sales of inventory." App. 13a.

The Woolworth witness also stated that, with respect to certain types of goods manufactured by other of the parent's subsidiaries, he lacked actual knowledge of whether there were intercompany sales. He continued that

ing school for its foreign subsidiaries. *Ibid.* And each subsidiary was responsible for obtaining its own financing from sources other than the parent.[14] In sum, the record is persuasive that Woolworth's operations were not functionally integrated with its subsidiaries.

We now consider the extent to which there was centralization of management or achievement of other economies of scale. It appears that each subsidiary operated as a distinct business enterprise at the level of fulltime management. With one possible exception,[15] none of the subsidiaries' officers during the year in question was a current or former employee of the parent. *Ibid.* The testimony was that the subsidiaries "figure that their operations are independent, autonomous." App. 13a. Woolworth did not "rotate per-

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the idea was "inconceivable to me because of the autonomous operation of the company and the lack of coordination and other facets." *Id.*, at 43a. Upon further questioning, the witness conceded that he did not "really know where [the English subsidiary's managers] buy their merchandise." But he affirmed his knowledge that the English company's sales to and purchases from the parent were "virtually nil." *Id.*, at 44a. When questioned whether Woolworth utilized a central buying office for it and its subsidiaries, the witness replied that it did not. *Id.*, at 14a. No other evidence indicated that the parent and the subsidiaries engaged in any joint manufacturing, purchasing, or warehousing functions. Nor did the New Mexico courts find otherwise.

[14] Woolworth had no outstanding debts from its English subsidiary, App. to Juris. Statement 35a, and it had not reinvested its dividends in that company. App. 51a. The parent had reinvested dividends in the German company, *id.*, at 52a, but the last additional capital contribution by the parent that the witness could recall, *id.*, at 46a, was a $400,000 transfer made after the German company was demolished during World War II. *Id.*, at 30a. See App. to Juris. Statement 35a.

[15] The hearing examiner found that "[i]n the taxable year involved, none of the four subsidiarie[s'] officers were currently or formerly employees of the parent." *Id.*, at 34a. Without explanation, he also later stated that "[a]t least one officer of the Canadian subsidiary [was] also an officer of the [parent]." *Ibid.*

One officer from the Mexican subsidiary was a participant in Woolworth's profit sharing plan. Woolworth paid the employee's share of this plan. *Ibid.*

sonnel or train personnel to operate stores in those countries. There is no exchange of personnel." *Ibid.* There was no "training program that is central to transmit the Woolworth idea of merchandising[,] such as it may be[,] to the foreign subsidiaries." *Id.*, at 15a. The subsidiaries "proceed . . . with their own programs, either formal or informal. They develop their own managers and instruct them in their methods of operation." *Ibid.*

This management decentralization was reflected in the fact that each subsidiary possessed autonomy to determine its own policies respecting its primary activity—retailing. According to the hearing examiner:

> "Each of the four subsidiaries are responsible for determining the size and location of retail stores, the market conditions in their own territory and the mix of items to be sold. The German subsidiary emphasizes soft goods such as dresses and coats. It sells no food. The English subsidiary operates restaurants in its stores and also operates supermarkets. Each subsidiary attempts to cater to local tastes and needs. The inventory of each subsidiary consists, in large part, of home country produced items. This purchase-at-home practice is consistent with the policy of the taxpayer. A number of inventory items are purchased from the Orient or other places but there is no evidence that the subsidiaries purchase, or are required to purchase, inventory items from any particular source." App. to Juris. Statement 33a–34a.

Importantly, the Department's hearing officer found that Woolworth had "no department or section, as such, devoted to overseeing the foreign subsidiary operations." *Id.*, at 34a.[16] Neither the parent corporation nor any of the subsid-

[16] Woolworth had one vice president "who is the liaison man with the smaller foreign subsidiaries," *ibid.*, such as the Spanish and Mexican subsidiaries. App. 50a. The testimony was that this liaison man "from time to time . . . may have contact with the major subsidiaries . . . ." *Ibid.*

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iaries consolidates its tax return with any of the other companies. App. 37a–38a. The tax manager for Woolworth stated that he did not review the subsidiaries' tax returns or consult with them on decisions affecting taxes. *Id.*, at 14a. There was no "policy of the parent that all of the managers of all the operations get together periodically to discuss the overall Woolworth operations." *Id.*, at 35a.[17]

There were some managerial links. Woolworth maintained one or several common directors with some of the subsidiaries.[18] There also was irregular in-person[19] and "frequent" mail, telephone, and teletype communication between the upper echelons of management of the parent and the subsidiaries.[20] App. to Juris. Statement 34a. Decisions about

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[17] The witness replied that "[t]here hasn't been that" in response to the questions of whether all of the managers of all of the operations" ever "get together and talk together about where the company is going or what it is doing or where it should be tomorrow or in ten years from today? Planning for future programs or for future expansion?" *Id.*, at 35a.

[18] The managing director of the English subsidiary sat as one of the parent's 15 directors, and the parent sent one of its officers to participate in meetings of the English board of directors. The state hearing officer also found that "[a]t least one person who is on the Canadian subsidiary is also on the taxpayer's board." App. to Juris. Statement 34a. Cf. App. 41a (at least *three* members of the Canadian board of directors also sat on the parent's board). Although the Department's hearing officer did not make findings in this connection, there was testimony that "some of the directors of Woolworth, the taxpayer, sit on the Board of the Mexican subsidiary . . . ." *Id.*, at 29a.

[19] "It would be on a rare occasion, once a year," that the "managing directors" of the foreign subsidiaries would come to New York. *Id.*, at 34a. "It is only sporadically that the parent company is represented at the [English company's] Board meetings." *Id.*, at 40a. Further, while Woolworth's chief executive officer and other officers would "on occasion" travel to confer with the subsidiaries' managers, it was "hard to discern any pattern of regular monthly visits or quarterly visits." *Id.*, at 35a.

[20] "The exchange of information contacts by the subsidiaries is made by the Chief Executive of the company. The Director of Purchases of the parent company does not confer with the Director of Purchasing of the Canadian company or of the German company." *Id.*, at 37a.

major financial decisions, such as the amount of dividends to be paid by the subsidiaries and the creation of substantial debt, had to be approved by the parent.[21] *Id.*, at 35a. Woolworth's published financial statements, such as its annual reports, were prepared on a consolidated basis.[22] *Ibid.*

We conclude, on the basis of undisputed facts, that the four subsidiaries in question are not a part of a unitary business under the principles articulated in *Mobil* and *Exxon*, and today reiterated in *ASARCO*. Except for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary, there is little or no integration of the business activities or centralization of the management of these five corporations. Woolworth has proved that its situation dif-

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[21] The testimony was that "the Canadian financial people have the right to finance their day-to-day operations and I doubt that they would be required . . . at the level of a million dollars to seek the permission of the parent company. If there was really substantial borrowings going on, I am sure the Canadians before borrowing . . . would obtain permission of the parent company." *Id.*, at 26a. More generally, the witness stated that "[n]ormally, I would think that substantial borrowing, an unusual amount, would necessitate the checking with the principal stockholders or the Board of Directors." *Id.*, at 28a.

[22] The English subsidiary was not included in the consolidated statements. App. to Juris. Statement 35a. Cf. Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42, 52 (1960) ("Central accounting, for instance, may result in some savings, but in most instances the amount is trifling in comparison with the income [involved]. Alone considered, it is too weak a connecting link to bind into one business, what would otherwise, from an operational standpoint, be considered separate businesses").

As noted, there was no centralized tax department and no consolidation of tax returns.

In addition to the links set forth in the text, it is plain that the parent and the four subsidiaries all utilize the same general "F. W. Woolworth" corporate name. There is no record information on the significance of the use of this common name. Neither the Department nor the New Mexico Supreme Court gave any weight to use of a common corporate name when sustaining the tax at issue.

fers from that in *Exxon*, where the corporation's Coordination and Services Management office was found to provide for the asserted unitary business

> "long-range planning for the company, maximization of overall company operations, development of financial policy and procedures, financing of corporate activities, maintenance of the accounting system, legal advice, public relations, labor relations, purchase and sale of raw crude oil and raw materials, and coordination between the refining and other operating functions so as to obtain an optimum short range operating program." 447 U. S., at 211.

In this case the parent company's operations are not interrelated with those of its subsidiaries so that one's "stable" operation is important to the other's "full utilization" of capacity. *Id.*, at 218. See also *id.*, at 225. The Woolworth parent did not provide "many essential corporate services" for the subsidiaries, and there was no "centralized purchasing office . . . whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers." *Id.*, at 224.[23] And it was not the case that "sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters." *Ibid.* See also *Mobil*, 445 U. S., at 428, 435.[24]

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[23] Cf. *Butler Bros.* v. *McColgan*, 315 U. S. 501, 508 (1942).

[24] In *Mobil*, the Court relied upon *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924):

"A British corporation manufactured ale in Great Britain and sold some of it in New York. The corporation objected on due process grounds to New York's imposition of an apportioned franchise tax on the corporation's net income. The Court sustained the tax on the strength of its earlier decision in *Underwood Typewriter Co.* v. *Chamberlain*, [254 U. S. 113 (1920)], where it had upheld a similar tax as applied to a business operating in several of our States. It ruled that the brewer carried on a unitary business, involving 'a series of transactions beginning with the manufacture in Eng-

There is a critical distinction between a retail merchandising business as conducted by Woolworth and the type of multinational business—now so familiar—in which refined, processed, or manufactured products (or parts thereof) may be produced in one or more countries and marketed in various countries, often worldwide.[25] In operations of this character there is a flow of international trade, often an interchange of personnel, and substantial mutual interdependence. The uncontradicted evidence demonstrates that Woolworth's international retail business is not comparable. There is no flow of international business. Nor is there any integration or unitary operation in the sense in which our cases consistently have used these terms.

In *Mobil*, we recognized:

> "[A]ll dividend income received by corporations operating in interstate commerce is [not] necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient *in the taxing State*, due process considerations might well preclude apportionability, because there would be no underlying unitary business." 445 U. S., at 441–442.

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land and ending in sales in New York and other places'. . . . 266 U. S., at 282." *Mobil*, 445 U. S., at 438.

There is no comparable "series of transactions" in this case linking the retail merchandise business of Woolworth's foreign subsidiaries with its business in New Mexico.

[25] See *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 133 (1931) ("Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits"); Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 Nat. Tax J. 487, 496 (1968) ("Manufacturing or purchasing goods in one state and selling in another, and transportation and communication between the states are typical of cases considered unitary"); G. Altman & F. Keesling, Allocation of Income in State Taxation 101–102 (1946).

This is such a case. Each of the foreign subsidiaries at issue operates a "discrete business enterprise," *Mobil*, 445 U. S., at 439, with a notable absence of any "umbrella of centralized management and controlled interaction." *Exxon*, 447 U. S., at 224. New Mexico, in taxing a portion of dividends received from such enterprises, is attempting to reach "extraterritorial values," *Mobil*, *supra*, at 442, wholly unrelated to the business of the Woolworth stores in New Mexico. As a result, a "showing has been made that income unconnected with the unitary business has been used in the" levy of the New Mexico tax. *Butler Bros.* v. *McColgan*, 315 U. S. 501, 509 (1942). We conclude that this tax does not bear the necessary relationship "'to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444.'" *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, 390 U. S. 317, 325, n. 5 (1968), quoting *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174 (1949). New Mexico's tax thus fails to meet established due process standards.

III

We need not be detained by New Mexico's reaching out to tax "gross-up" amounts that even the Supreme Court of New Mexico recognized as "fictitious." 95 N. M., at 522, 624 P. 2d, at 31. The gross-up computation is a figure that the Federal Government "deems" Woolworth to have received for purposes of part of Woolworth's federal foreign tax credit calculation. It "is treated [for this purpose] as a dividend in the same manner as a dividend actually received by the domestic corporation from a foreign corporation." H. R. Rep. No. 1447, 87th Cong., 2d Sess., A83 (1962). See also S. Rep. No. 1881, 87th Cong., 2d Sess., 227 (1962). In this case the foreign tax credit arose from the taxation by foreign nations of Woolworth foreign subsidiaries that had no unitary business relationship with New Mexico. New Mexico's effort to

tax this income "deemed received"—with respect to which New Mexico contributed nothing—also must be held to contravene the Due Process Clause.[26]

IV

The judgment of the Supreme Court of New Mexico is reversed.

It is so ordered.

[For concurring opinion of THE CHIEF JUSTICE, see *ante*, p. 331.]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

The $39.9 million in dividend income at issue in this case was earned by four foreign subsidiaries of F. W. Woolworth Co.: F. W. Woolworth Gmbh (Germany), F. W. Woolworth, Ltd. (Canada), F. W. Woolworth, S. A. de C. V. Mexico (Mexico), and F. W. Woolworth Co., Ltd. (England). F. W. Woolworth Co. wholly owned its German, Canadian, and Mexican subsidiaries, and had a 52.7% interest in its English subsidiary. During the tax year in question the subsidiaries apparently operated somewhat autonomously in their respective markets, but "mail, telephone, and teletype communication between the upper echelons of management of the parent and the subsidiaries" was "'frequent.'" *Ante*, at 368 (footnote omitted) (quoting App. to Juris. Statement 34a). Moreover, "[d]ecisions about major financial decisions, such as the amount of dividends to be paid by the subsidiaries and the creation of substantial debt, had to be approved by the

[26] Woolworth challenges only New Mexico's tax treatment of its dividend and gross-up income. See Juris. Statement i; Brief for Appellant i. We therefore do not consider New Mexico's tax treatment of other items of Woolworth income. In particular, we do not pass upon the proper treatment of Woolworth's foreign exchange gain—a matter that was not considered below. See nn. 7–9, *supra*.

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parent," and "Woolworth's published financial statements, such as its annual reports, were prepared on a consolidated basis." *Ante*, at 368–369 (citations and footnotes omitted).

These controlled subsidiaries, operating in geographically diverse markets in the same line of business as F. W. Woolworth itself, were simply not "unrelated,"[1] "discrete business enterprise[s],"[2] "hav[ing] nothing to do with the activities"[3] of F. W. Woolworth in New Mexico. Because I disagree with the redefinition of the limits of a unitary business adopted today by the Court, and for the reasons expressed in my dissent in No. 80–2015, *ASARCO Inc.* v. *Idaho State Tax Comm'n*, *ante*, p. 331, which was argued in tandem with this case, I respectfully dissent.

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[1] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 439 (1980).

[2] *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 224 (1980).

[3] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, at 442.

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC. v. PENNSYLVANIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-280. Argued March 3, 1982—Decided June 29, 1982*

Respondents—the Commonwealth of Pennsylvania and several black individuals representing a class of racial minorities who are skilled or seek work as operating engineers in the construction industry in Eastern Pennsylvania and Delaware—brought an action in Federal District Court under 42 U. S. C. § 1981, seeking to redress alleged racial discrimination in the operation of an exclusive hiring hall established in collective-bargaining contracts between the local union representing operating engineers and petitioner trade associations and construction industry employers. Respondents also alleged discrimination in the operation of an apprenticeship program established by the union and the trade associations and administered by the Joint Apprenticeship and Training Committee (JATC), half of whose members are appointed by the union and half by the trade associations. Named as defendants were the union and petitioners. The District Court found that although the hiring hall system was neutral on its face, the union in administering the system practiced a pattern of intentional discrimination, and the court also found similar discrimination in the JATC's administration of the apprenticeship program. On the basis of these findings, the court held that the union and the JATC had violated § 1981, and that, although petitioners as a class did not intentionally discriminate against minority workers and were not aware of the union's discriminatory practices, they were nevertheless liable under § 1981 for the purpose of imposing an injunctive remedy. The court reasoned that liability under § 1981 requires no proof of purposeful conduct on any of the defendants' part, but it was sufficient that the employers delegated the hiring procedure to the union and that the union, in effectuating this delegation, intentionally discriminated or, alternatively, produced a discriminatory impact. The

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*Together with No. 81-330, *United Engineers & Constructors, Inc.* v. *Pennsylvania et al.*; No. 81-331, *Contractors Association of Eastern Pennsylvania et al.* v. *Pennsylvania et al.*; No. 81-332, *Glasgow, Inc.* v. *Pennsylvania et al.*; and No. 81-333, *Bechtel Power Corp.* v. *Pennsylvania et al.*, also on certiorari to the same court.

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court concluded that respondents had shown the requisite relationship among the employers, trade associations, and union to render applicable the theory of *respondeat superior*, thus making petitioners liable for the union's discriminatory acts. The Court of Appeals affirmed.

Held:

1. Liability may not be imposed under § 1981 without proof of intentional discrimination. This conclusion is supported by the legislative history. The fact that the prohibitions of § 1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Pp. 382–391.

2. The District Court was unable to find discriminatory intent on petitioners' part, and liability under § 1981 cannot be vicariously imposed on them based on the discriminatory conduct of the union or the JATC. Pp. 391–397.

(a) There is no basis for holding petitioners liable under the doctrine of *respondeat superior*. The union, in operating the hiring hall, performed no function as the agent or servant of petitioner trade associations. Nor can the relationship between petitioner employers and the union be characterized as one between principal and agent without proof of a right to control the union's activities. Such a conception is alien to the fundamental assumption upon which the federal labor laws are structured and was not established by the evidence on which the District Court relied. And there is no evidence that an agency relationship existed between petitioners and the JATC. The fact that the employers fund the JATC does not render the JATC the employers' servant or agent, nor does the fact that the trade associations appoint half of the JATC's members infer a right of the associations to control the JATC. Pp. 391–395.

(b) Nor is there any basis for holding petitioners liable on the ground that § 1981 imposes a "nondelegable duty" on them to see that discrimination does not occur in the selection of their work force. Section 1981 does no more than prohibit petitioners from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract, and was not intended to make them guarantors of the workers' rights against third parties who would infringe them. Pp. 395–397.

3. The District Court had no inherent power under its traditional equitable authority to allocate to petitioners a portion of the costs of the remedial decree, absent a supportable finding of liability upon petitioners' part. Nor does the All Writs Act constitute an independent basis for the injunctive portions of the District Court's order running against petitioners. There was no need to treat petitioners as strangers to the

suit and therefore to rely upon some extraordinary form of procedure or writ to bring them before the court, since they were named as defendants and litigated the issue of injunctive liability. Pp. 397–402.

648 F. 2d 923, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts III and IV of which STEVENS, J., joined. O'CONNOR, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 403. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 405. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 407.

John J. McAleese, Jr., argued the cause for petitioners in Nos. 81–330, 81–331, 81–332, and 81–333. With him on the briefs for petitioners in Nos. 81–331 and 81–332 was *Thomas J. McGoldrick*. *Bernard G. Segal*, *Martin Wald*, and *Nicholas N. Price* filed briefs for petitioner in No. 81–330. *Robert W. Kopp* and *David M. Pellow* filed briefs for petitioner in No. 81–333.

John J. Kester argued the cause for petitioner in No. 81–280. With him on the briefs was *John J. Buckley, Jr.*

Harold I. Goodman argued the cause for respondents in all cases. With him on the brief for individual and class respondents were *Jonathan M. Stein* and *Robert J. Reinstein*. *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Joel M. Ressler*, *Louis J. Rovelli*, and *Margaret Hunting*, Assistant Attorneys General, filed a brief for respondent Commonwealth of Pennsylvania. *Kenneth I. Jonson* filed a brief for respondent Local 542, International Union of Operating Engineers.†

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†Briefs of *amici curiae* urging reversal were filed by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby* for the Equal Employment Advisory Council; by *Anthony J. Obadal* and *Alan D. Cirker* for the National Constructors Association; and by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Nicholas E. Calio* for the Washington Legal Foundation.

Thomas I. Atkins and *Michael H. Sussman* filed a brief for the National Association for the Advancement of Colored People as *amicus curiae* urging affirmance.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents, the Commonwealth of Pennsylvania and the representatives of a class of racial minorities who are skilled or seek work as operating engineers in the construction industry in Eastern Pennsylvania and Delaware, commenced this action under a variety of federal statutes protecting civil rights, including 42 U. S. C. § 1981. The complaint sought to redress racial discrimination in the operation of an exclusive hiring hall established in contracts between Local 542 of the International Union of Operating Engineers and construction industry employers doing business within the Union's jurisdiction. Respondents also alleged discrimination in the operation of an apprenticeship program established by Local 542 and several construction trade associations. Named as defendants were Local 542, the trade associations, the organization charged with administering the trade's apprenticeship program, and a class of approximately 1,400 construction industry employers. Petitioners, the defendant contractors and trade associations, seek review of a judgment granting an injunction against them. The questions we resolve are whether liability under 42 U. S. C. § 1981 requires proof of discriminatory intent and whether, absent such proof, liability can nevertheless be imposed vicariously on the employers and trade associations for the discriminatory conduct of the Union.

I

The hiring hall system that is the focus of this litigation originated in a collective-bargaining agreement negotiated in 1961 by Local 542 and four construction trade associations in the Philadelphia area, three of whom are petitioners in this Court.[1] The agreement was concluded only after a 10-week strike prompted by the resistance of the trade associations to

[1] The petitioner associations are the General Building Contractors Association (GBCA), the Contractors Association of Eastern Pennsylvania (CAEP), and the United Contractors Association (UCA). The fourth

the Union's demand for an exclusive hiring hall.[2] Under the terms of the agreement, the Union was to maintain lists of operating engineers, or would-be engineers, classified according to the extent of their recent construction experience. Signatory employers were contractually obligated to hire operating engineers only from among those referred by the Union from its current lists. Workers affiliated with the Union were barred from seeking work with those employers except through Union referrals. Thus, the collective-bargaining agreement effectively channeled all employment opportunities through the hiring hall. Since 1961 this requirement has been a constant feature of contracts negotiated with Local 542 by the trade associations, as well as of contracts signed with the Union by employers who were not represented by one of those associations in collective bargaining.[3]

Among the means of gaining access to the Union's referral lists is an apprenticeship program established in 1965 by Local 542 and the trade associations. The program, which involves classroom and field training, is administered by the Joint Apprenticeship and Training Committee (JATC), a body of trustees half of whom are appointed by the Union and half by the trade associations. While enrolled in the program, apprentices are referred by the Union for unskilled construction work. Graduates of the program become journeymen operating engineers and are referred for heavy equipment jobs.

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group, the Pennsylvania Excavating Contractors Association, was dissolved in 1972 after the commencement of this action.

[2] A second strike occurred in 1963 when the contractor associations unsuccessfully sought to remove the hiring hall provision from the area collective-bargaining agreement.

[3] The District Court found that "a vast majority of the employers are not and have not been active members of the defendant associations." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 342 (ED Pa. 1978). Nevertheless, the court found that "the negotiations conducted by those bodies have established a standard to which the unaffiliated contractors may conform." *Ibid.*

This action was filed in 1971 by the Commonwealth of Pennsylvania and 12 black plaintiffs representing a proposed class of minority group members residing within the jurisdiction of Local 542. The complaint charged that the Union and the JATC had violated numerous state and federal laws prohibiting employment discrimination, including Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), and 42 U. S. C. § 1981. The complaint alleged that these defendants had engaged in a pattern and practice of racial discrimination, by systematically denying access to the Union's referral lists, and by arbitrarily skewing referrals in favor of white workers, limiting most minority workers who did gain access to the hiring hall to jobs of short hours and low pay. The contractor employers and trade associations were also named as defendants, although the complaint did not allege a Title VII cause of action against them.[4]

The District Court divided the trial into two stages. See *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 348 (ED Pa. 1978). The first stage, from which petitioners appeal, addressed issues of liability; assessment of damages was deferred to a second stage. For purposes of the first phase of the proceedings, the court certified a plaintiff class of minority operating engineers and would-be engineers, as well as a defendant class consisting of all trade associations and employers who had been parties to labor contracts with Local 542. A single employer, petitioner Glasgow, Inc., was certified to represent the defendant subclass of approximately 1,400 contractor employers.[5]

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[4] The complaint did not assert a Title VII cause of action against petitioners because they were not named in the complaint filed by the plaintiffs with the Equal Employment Opportunity Commission, a precondition to suit in federal court. See Brief for Individual and Class Respondents 12, n. 18.

[5] Certification of this class evidently was influenced by the District Court's conclusion that liability could be imposed without regard to individualized issues such as the intent or work-force statistics of the individual employers. See 469 F. Supp., at 384, 414. The court emphasized that the determination of liability in damages could require individualized proof; it

The District Court's opinion in the liability phase of the trial is lengthy. For our purposes, however, the relevant findings and conclusions can be summarized briefly. First, the court found that the hiring hall system established by collective bargaining was neutral on its face. *Id.*, at 342. Indeed, after May 1, 1971, the contracts contained a provision expressly prohibiting employment discrimination on the basis of race, religion, color, or national origin. *Id.*, at 340, and n. 6. But the court found that Local 542, in administering the system, "practiced a pattern of intentional discrimination and that union practices in the overall operation of a hiring hall for operating engineers created substantial racial disparities." *Id.*, at 370. The court made similar findings regarding the JATC's administration of the job-training program. *Id.*, at 384. On the basis of these findings, the District Court held that Local 542 and the JATC had violated Title VII, both because they intentionally discriminated and because they enforced practices that resulted in a disparate racial impact. *Id.*, at 397–399.[6] The court also interpreted 42 U. S. C. § 1981 to permit imposition of liability "on roughly the same basis as a Title VII claim," 469 F. Supp., at 401, and therefore concluded that the Union and the JATC had also violated § 1981. *Id.*, at 399–401.

Turning to petitioners' liability under § 1981, the court found that the plaintiffs had failed to prove "that the associations or contractors viewed simply as a class were actually aware of the union discrimination," *id.*, at 401, and had failed to show "intent to discriminate by the employers as a class," *id.*, at 412. Nevertheless, the court held the employers and the associations liable under § 1981 for the purpose of impos-

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therefore held out the possibility that the defendant class might be decertified in the second stage of the proceedings. *Id.*, at 413, 415, 419–420.

[6] The District Court's legal conclusions addressed only the liability of Local 542. The court explained: "Because of the JATC's participation in the overall intentional discrimination of the union, there is no need to discuss its legal liability separately. The JATC is liable as the union is liable." *Id.*, at 401, n. 52.

ing an injunctive remedy "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known [of the Union's conduct]." *Id.*, at 401. The court reasoned that liability under § 1981 "requires no proof of purposeful conduct on the part of any of the defendants." *Id.*, at 407. Instead, it was sufficient that "(1) the employers delegated an important aspect of their hiring procedure to the union; [and that] (2) the union, in effectuating the delegation, intentionally discriminated or, alternatively, produced a discriminatory impact." *Id.*, at 412. "[P]laintiffs have shown that the requisite relationship exists among employers, associations, and union to render applicable the theory of *respondeat superior*, thus making employers and associations liable injunctively for the discriminatory acts of the union." *Id.*, at 413.[7]

Following an appeal authorized by 28 U. S. C. § 1292(b), Court of Appeals for the Third Circuit, sitting en banc, affirmed the judgment of liability against petitioners by an equally divided vote. 648 F. 2d 923 (1981). We granted certiorari, 454 U. S. 939 (1981), and we now reverse.

II

The District Court held that petitioners had violated 42 U. S. C. § 1981 notwithstanding its finding that, as a class,

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[7] The District Court absolved petitioners of liability under 42 U. S. C. § 1985(3) (1976 ed., Supp. IV), noting that "no per se or vicarious liability theory could be used to hold a class of employers liable for conspiracy to commit the discrimination practiced by the union." 469 F. Supp., at 413. Absent such a theory, the plaintiffs could not prevail because "there was no sufficient proof that as a class the employers agreed to violate equal protection rights or equal privileges and immunities." *Ibid.* Moreover, "[n]ot even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union ha[d] been shown." *Ibid.*

In light of its disposition, the court found it unnecessary to address other causes of action alleged by the plaintiffs. See *id.*, at 386, n. 43.

petitioners did not intentionally discriminate against minority workers and neither knew nor had reason to know of the Union's discriminatory practices. The first question we address, therefore, is whether liability may be imposed under § 1981 without proof of intentional discrimination.[8]

Title 42 U. S. C. § 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

We have traced the evolution of this statute and its compan-

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[8] The District Court concluded, by analogy to Title VII, that a violation of § 1981 could be made out by "proof of disparate impact alone." *Id.*, at 401. The court referred to *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), in which we held that Title VII forbids the use of employment tests that produce a disproportionate racial impact unless the employer shows "a manifest relationship to the employment in question," *id.*, at 432. See *Teamsters* v. *United States*, 431 U. S. 324, 335–336 (1977).

The District Court's holding on this issue is contrary to the holding of every Court of Appeals that has addressed the matter, including that of the Third Circuit in a subsequent case. See *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 633 F. 2d 232, 263–268 (CA2 1980), cert. granted, 454 U. S. 1140 (1982); *Croker* v. *Boeing Co.*, 662 F. 2d 975, 984–989 (CA3 1981) (en banc); *Williams* v. *DeKalb County*, 582 F. 2d 2 (CA5 1978); *Mescall* v. *Burrus*, 603 F. 2d 1266, 1269–1271 (CA7 1979); *Craig* v. *County of Los Angeles*, 626 F. 2d 659, 668 (CA9 1980), cert. denied, 450 U. S. 919 (1981); *Chicano Police Officer's Assn.* v. *Stover*, 552 F. 2d 918, 920–921 (CA10 1977). Two other Circuits have approved a requirement of discriminatory intent in dicta. See *Des Vergnes* v. *Seekonk Water Dist.*, 601 F. 2d 9, 14 (CA1 1979); *Detroit Police Officers' Assn.* v. *Young*, 608 F. 2d 671, 692 (CA6 1979), cert. denied, 452 U. S. 938 (1981). See also *Johnson* v. *Alexander*, 572 F. 2d 1219, 1223–1224 (CA8), cert. denied, 439 U. S. 986 (1978); *Donnell* v. *General Motors Corp.*, 576 F. 2d 1292, 1300 (CA8 1978). But see *Kinsey* v. *First Regional Securities, Inc.*, 181 U. S. App. D. C. 207, 215, n. 22, 557 F. 2d 830, 838, n. 22 (1977).

ion, 42 U. S. C. § 1982,[9] on more than one occasion, see, *e. g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 287–296 (1976); *Runyon* v. *McCrary*, 427 U. S. 160, 168–170 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 422–437 (1968), and we will not repeat the narrative again except in broad outline.

The operative language of both laws apparently originated in § 1 of the Civil Rights Act of 1866, 14 Stat. 27, enacted by Congress shortly after ratification of the Thirteenth Amendment.[10] "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia* v. *Rachel*, 384 U. S. 780, 791 (1966). The same Congress also passed the Joint Resolution that was later adopted as the Fourteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 3148–3149, 3042 (1866). As we explained in *Hurd* v. *Hodge*, 334 U. S. 24, 32–33 (1948) (footnotes omitted):

> "Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment

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[9] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[10] Section 1 of the Act of Apr. 9, 1866, read in part:

"That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States."

Following ratification of the Fourteenth Amendment, Congress passed what has come to be known as the Enforcement Act of 1870, 16 Stat. 140, pursuant to the power conferred by § 5 of the Amendment. Section 16 of that Act contains essentially the language that now appears in § 1981.[11] Indeed, the present codification is derived from § 1977 of the Revised Statutes of 1874, which in turn codified verbatim § 16 of the 1870 Act. Section 16 differed from § 1 of the 1866 Act in at least two respects. First, where § 1 of the 1866 Act extended its guarantees to "citizens, of every race and color," § 16 of the 1870 Act—and § 1981—protects "all persons." See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 675

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[11] "That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void." 16 Stat. 144.

Section 18 of the 1870 Act also re-enacted the 1866 Act and declared that § 16 "shall be enforced according to the provisions of said act." 16 Stat. 144.

(1898). Second, the 1870 Act omitted language contained in the 1866 Act, and eventually codified as § 1982, guaranteeing property rights equivalent to those enjoyed by white citizens. Thus, "[a]lthough the 1866 Act rested only on the Thirteenth Amendment . . . and, indeed, was enacted before the Fourteenth Amendment was formally proposed, . . . the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment." *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431, 439–440, n. 11 (1973). See *Runyon* v. *McCrary*, *supra*, at 168–170, n. 8.

In determining whether § 1981 reaches practices that merely result in a disproportionate impact on a particular class, or instead is limited to conduct motivated by a discriminatory purpose, we must be mindful of the "events and passions of the time" in which the law was forged. *United States* v. *Price*, 383 U. S. 787, 803 (1966). The Civil War had ended in April 1865. The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment and just two weeks before the Secretary of State certified the Amendment's ratification. On January 5, 1866, Senator Trumbull introduced the bill that would become the 1866 Act.[12]

The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen.[13] Most of these laws

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[12] Cong. Globe, 39th Cong., 1st Sess., 129 (1866).

[13] Discussion of the Black Codes occupied a central place in the congressional debates leading to enactment of the 1866 Act. See *id.*, at 588–589 (remarks of Rep. Donnelly); 602 (Sen. Lane); 603 (Sen. Wilson); 1123–1124 (Rep. Cook); 1118–1119 (Rep. Wilson); 1151–1152, 1153 (Rep. Thayer); 1160 (Rep. Windom); 1785 (Sen. Stewart); 1833–1835 (Rep. Lawrence); 1838–1839 (Rep. Clarke). The Codes are described in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 29–44 (1871).

embodied express racial classifications and although others, such as those penalizing vagrancy, were facially neutral, Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery.[14] Senator Trumbull summarized the paramount aims of his bill:

> "Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment." Cong. Globe, 39th Cong., 1st Sess., 474 (1866).

Senator Trumbull emphasized: "This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." *Id.*, at 476 (emphasis in original).

Of course, this Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more than the destruction of state-imposed civil disabilities and discriminatory punishments. We have held that both § 1981 and § 1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 436. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975); *Runyon* v. *McCrary*, 427 U. S., at 168. Nevertheless, the fact that the prohibitions of § 1981

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[14] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., *supra*, at 1124 (Rep. Cook); 1151–1152 (Rep. Thayer); 1159 (Rep. Windom); 1785 (Sen. Stewart); 1839 (Rep. Clarke). See also *Memphis* v. *Greene*, 451 U. S. 100, 131–135 (1981) (WHITE, J., concurring in judgment).

encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relevant opinions are hostile to such an implication. Thus, although we held in *Jones*, *supra*, that § 1982 reaches private action, we explained that § 1 of the 1866 Act "was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute." 392 U. S., at 426 (emphasis on "racially motivated" added). Similarly, in *Runyon* v. *McCrary*, *supra*, we stated that § 1981 would be violated "if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees." 427 U. S., at 170–171.

The immediate evils with which the Thirty-ninth Congress was concerned simply did not include practices that were "neutral on their face, and even neutral in terms of intent," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), but that had the incidental effect of disadvantaging blacks to a greater degree than whites. Congress instead acted to protect the freedmen from intentional discrimination by those whose object was "to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices." Cong. Globe, 39th Cong., 1st Sess., 1839 (1866) (Rep. Clarke). See *Memphis* v. *Greene*, 451 U. S. 100, 131–135 (1981) (WHITE, J., concurring in judgment). The supporters of the bill repeatedly emphasized that the legislation was designed to eradicate blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves. To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern.[15]

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[15] We attach significance to the fact that throughout much of the congressional debates, S. B. 61, which became the 1866 Act, contained an opening declaration that "there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the

Our conclusion that § 1981 reaches only purposeful discrimination is supported by one final observation about its legislative history. As noted earlier, the origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment. The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat-[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd* v. *Hodge*, 334 U. S., at 32.[16] The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close

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United States *on account of race, color, or previous condition of slavery*." See Cong. Globe, 39th Cong., 1st Sess., 474 (1866). This passage had occasioned controversy in both the Senate and the House because of the breadth of the phrase "civil rights and immunities." After the Senate had passed the bill and as debates in the House were drawing to a close, the bill's floor manager, Representative Wilson, introduced an amendment proposed by the House Judiciary Committee, of which he was also the Chairman. That amendment deleted the language quoted above and left the bill as it would read when ultimately enacted. See n. 10, *supra*. Representative Wilson explained that the broad language of the original bill could have been interpreted to encompass the right of suffrage and other political rights. "To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section." Cong. Globe, 39th Cong., 1st Sess., *supra*, at 1367. See *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 292, n. 22 (1976). The deleted language, emphasized above, strongly suggests that Congress was primarily concerned with intentional discrimination. That the passage was removed in an effort to *narrow* the scope of the legislation sharply undercuts the view that the 1866 Act reflects broader concerns.

[16] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., *supra*, at 1294 (Rep. Wilson); *id.* at 2465 (Rep. Thayer).

connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.[17]

With respect to the latter, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264–265 (1977). "[E]ven if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272 (1979). See *Washington* v. *Davis*, 426 U. S. 229 (1976). The same Congress that proposed the Fourteenth Amendment also passed the Civil

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[17] It is true that § 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment. Indeed, we relied on that heritage in holding that Congress could constitutionally enact § 1982, which is also traceable to the 1866 Act, without limiting its reach to "state action." See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 438 (1968). As we have already intimated, however, the fact that Congress acted in the shadow of the Thirteenth Amendment does not demonstrate that Congress sought to eradicate more than purposeful discrimination when it passed the 1866 Act. For example, Congress also enacted 42 U. S. C. § 1985(3) (1976 ed., Supp. IV) in part to implement the commands of the Thirteenth Amendment. See *Griffin* v. *Breckenridge*, 403 U. S. 88, 104–105 (1971). While holding that § 1985(3) does not require state action but also reaches private conspiracies, we have emphasized that a violation of the statute requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*, at 102.

We need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery. See *Memphis* v. *Greene*, 451 U. S., at 125–126. We conclude only that the existence of that Amendment, and the fact that it authorized Congress to enact legislation abolishing the "badges and incidents of slavery," *Civil Rights Cases*, 109 U. S. 3, 20 (1883), do not evidence congressional intent to reach disparate effects in enacting § 1981.

Rights Act of 1866, and the ratification of that Amendment paved the way for the Enforcement Act of 1870. These measures were all products of the same milieu and were directed against the same evils. Although Congress might have charted a different course in enacting the predecessors to § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so.

We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.

III

The District Court held petitioners liable under § 1981 notwithstanding its finding that the plaintiffs had failed to prove intent to discriminate on the part of the employers and associations as a class. In light of our holding that § 1981 can be violated only by intentional discrimination, the District Court's judgment can stand only if liability under § 1981 can properly rest on some ground other than the discriminatory motivation of the petitioners themselves. Both the District Court and respondents have relied on such grounds, but we find them unconvincing.

A

The District Court reasoned that liability could be vicariously imposed upon the employers and associations, based upon the intentional discrimination practiced by Local 542 in its operation of the hiring hall. The court's theory was that petitioners had delegated to the "union hiring hall" the authority to select workers as "the agent for two principals—the union and the contractors, with their respective associations." 469 F. Supp., at 411. Since the hiring hall came into existence only through the agreement of petitioners, and since the exclusive hiring hall was the means by which "the intentional discrimination of the union was able to work its way broadly into the common workforce of operating engineers," *id.*, at 412, the court concluded that "[t]he acts of the union therefore justify imposition of responsibility upon

those employers participating in the original delegation," *ibid.* The effect of this holding, as the court recognized, was to impose a "duty to see that discrimination does not take place in the selection of one's workforce," regardless of where the discrimination originates. *Ibid.*

As applied to the petitioner associations, the District Court's theory is flawed on its own terms. The doctrine of *respondeat superior*, as traditionally conceived and as understood by the District Court, see *id.*, at 411, enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant. See Restatement (Second) of Agency §§ 215–216, 219 (1958) (Restatement); W. Prosser, Law of Torts §§ 69–70 (4th ed. 1971) (Prosser); W. Seavey, Law of Agency § 83 (1964) (Seavey). "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement § 1. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service." *Id.*, § 2. See 2 F. Harper & F. James, Law of Torts § 26.6 (1956) (Harper & James). Local 542, in its operation of the hiring hall, simply performed no function as the agent or servant of the associations. The record demonstrates that the associations themselves do not hire operating engineers, and never have. Their primary purpose is to represent certain employers in contract negotiations with the Union. Even if the doctrine of *respondeat superior* were broadly applicable to suits based on § 1981, therefore, it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship.[18]

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[18] In this case, the associations were held liable because they negotiated an agreement, fair on its face, which was later implemented by another

We have similar difficulty in accepting the application of traditional *respondeat superior* doctrine to the class of contractor employers. In the run of cases, the relationship between an employer and the union that represents its employees simply cannot be accurately characterized as one between principal and agent or master and servant. Indeed, such a conception is alien to the fundamental assumptions upon which the federal labor laws are structured.

At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Restatement § 1. Equally central to the master-servant relation is the master's control over or right to control the physical activities of the servant. See *id.*, § 220; 2 Harper & James § 26.3; Seavey § 84, p. 142. See also *Logue* v. *United States*, 412 U. S. 521, 527 (1973). The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." 469 F. Supp., at 411, n. 61. However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective-bargaining agreement, is not tantamount to a "right to control" the Union. See *Lummus Co.* v. *NLRB*, 119 U. S. App. D. C. 229, 236, 339 F. 2d 728, 735 (1964).[19]

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party in a manner that was not only discriminatory but in violation of the agreement itself *and* in a manner of which the associations were neither aware nor had reason to be aware. Since the associations' only role was as agent for employers whose hiring would actually be governed by the agreement, the District Court's theory presumably would also permit the imposition of liability on the attorneys who actually conducted the contract negotiations. We are unaware of any authority supporting such an extended application of *respondeat superior*.

[19] According to respondents, the District Court's conclusion that petitioners retained the power to control the hiring hall was a finding of fact that cannot be set aside unless clearly erroneous. We disagree. The District Court found that petitioners had the "power to oppose" the Union, a conclusion we do not question. Whether the power to oppose the Union is equivalent to a right of control sufficient to invoke the doctrine of *respondeat superior* is, however, a legal question to which we must devote our independent judgment.

Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.

The District Court's assumptions about the relation between the Union and the class of employers with whom it has contracted also runs counter to the premises on which the federal labor laws have been constructed. While authorizing collective bargaining and providing means of enforcing the resultant contracts, the National Labor Relations Act expressly prohibits employers from compromising the independence of labor unions. See 49 Stat. 452, as amended, 29 U. S. C. § 158(a); 61 Stat. 157, as amended, 29 U. S. C. § 186. The entire process of collective bargaining is structured and regulated on the assumption that "[t]he parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960). See *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967). We have no reason to doubt the validity of that assumption in the instant case.

Respondents also suggest that petitioners can be held vicariously liable for the discriminatory conduct of the JATC. They argue that the JATC is properly viewed as an agent of both Local 542 and the associations, emphasizing that half of the trustees charged with administering the JATC are appointed by the associations and that the JATC is wholly funded by mandatory contributions from the employers. We note initially that the District Court premised petitioners' liability not on the actions of the JATC, but on the discriminatory conduct of the Union. See 469 F. Supp., at 411–413. The record, therefore, contains no findings regarding the relationship between the JATC and petitioners, beyond those noted above, that might support application of *respondeat superior*.

The facts emphasized by respondents, standing alone, are inadequate. That the employers fund the activities of the JATC does not render the JATC the employers' servant or agent any more than an independent contractor is rendered an agent simply because he is compensated by the principal for his services. The employers must also enjoy a right to control the activities of the JATC, and there is no record basis for believing that to be the case. Neither is a right of control inferable merely from the power of the associations to appoint half of the JATC's trustees. It is entirely possible that the trustees, once appointed, owe a fiduciary duty to the JATC and the apprentices enrolled in its programs, rather than to the entities that appointed them. Cf. *NLRB* v. *Amax Coal Co.*, 453 U. S. 322 (1981). On the assumption that *respondeat superior* applies to suits based on § 1981, there is no basis for holding either the employers or the associations liable under that doctrine without evidence that an agency relationship existed at the time the JATC committed the acts on which its own liability was premised.

B

The District Court also justified its result by concluding that § 1981 imposes a "nondelegable duty" on petitioners "to see that discrimination does not take place in the selection of [their] workforce." 469 F. Supp., at 412.[20] The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well being of those persons to whom the duty runs. See Restatement § 214. The duty is not discharged by using care in delegating it to an independent contractor. Conse-

[20] The court relied on Restatement § 214:

"A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty."

quently, the doctrine creates an exception to the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor. See 2 Harper & James § 26.11, pp. 1405–1408; Prosser § 70, p. 467, § 71, p. 470. So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs.

In a sense, to characterize such a duty as "nondelegable" is merely to restate the duty. Thus, in this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them. Cf. *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577–578 (1978) (Title VII); *Rizzo* v. *Goode*, 423 U. S. 362, 376–377 (1976) (42 U. S. C. § 1983).

Our earlier holding that § 1981 reaches only intentional discrimination virtually compels this conclusion. It would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof that the individual plaintiffs did not enjoy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" and that the defendants merely failed to ensure that the plaintiffs enjoyed employment op-

portunities equivalent to that of whites. Such a result would be particularly inappropriate in the case of the associations, who are not engaged in the construction business, do not employ operating engineers, and consequently did not delegate to the Union any hiring functions which they otherwise would have performed themselves. Neither the District Court nor respondents identify anything in the language or legislative history of the statute to support a contrary conclusion.[21]

IV

In a separate portion of their brief, respondents urge several independent bases for the issuance of an injunction against the petitioners and the allocation to them of a portion of the costs of the remedial decree. Respondents first assert that the court had inherent equitable power to allocate remedial costs among all the named defendants. They also rely on the All Writs Act, 28 U. S. C. § 1651(a), as an independent basis for the injunctive portions of the District Court's order

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[21] Respondents also contend that petitioners can be held liable on the theory that the hiring hall was a "joint enterprise" involving petitioners as well as the Union. They point to language in the District Court's opinion holding that "the union hiring hall was the agent for two principals—the union and the contractors, with their respective associations." 469 F. Supp., at 411. Even this theory, however, requires, among other things, the existence of a mutual right of control as between the members of the enterprise. See Restatement § 491; 2 Harper & James § 26.13, p. 1414. For reasons we have already stated, there is no record basis for finding that petitioners had a right to control Local 542 in its administration of the hiring hall. We also doubt the validity of the assumption that the hiring hall is a separate entity, except perhaps as a physical structure. The District Court did not find, and respondents do not assert, that the hiring hall has a separate juridical existence. Indeed, in discussing the operation of the hiring hall, the District Court made clear that it was imposing liability on the basis of *the Union's* conduct. As used in the court's opinion, the phrase "hiring hall" appears to be no more than a shorthand reference for the referral process administered on a day-to-day basis by the Union.

running against petitioners. We shall deal with these contentions in turn.

The District Court in an opinion issued after judgment set forth the basis for its holding that "defendants held injunctively liable solely under a theory of vicarious responsibility are nevertheless liable for 'a share' of the costs under Rule 54(d)." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 507 F. Supp. 1146, 1152 (1980). The District Court framed the inquiry before it as whether a party held vicariously liable to an injunction, but not for damages, might nonetheless have a proportionate share of the costs assessed against it. While this may have been an entirely appropriate frame of reference for the District Court, following its holding that petitioners were vicariously liable and therefore subject to an injunction, it is obviously not the proper frame of reference for our discussion. For the reasons previously stated, we have concluded that petitioners were not properly subject to an injunction on any of the theories set forth by the District Court. The issue before us, therefore, is whether a party not subject to liability for violating the law may nonetheless be assessed a proportionate share of the costs of implementing a decree to assure nondiscriminatory practices on the part of another party which *was* properly enjoined.

We find respondent's arguments based on the traditional equitable authority of courts to be unpersuasive. In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), upon which respondents rely, and which we believe to be the case most closely in point, we expressly noted that the state petitioners had been found guilty of creating at least a portion of the constitutional violation which the order challenged in that case was designed to remedy. *Id.*, at 281–282, 289. Thus our holding there was consistent with our opinion in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), where we explained the relationship between our holding in the first *Milliken* case, *Milliken* v. *Bradley*, 418 U. S. 717 (1974), and our opinion in *Swann* v.

Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971). We read these earlier decisions as recognizing "fundamental limitations on the remedial powers of the federal courts." 425 U. S., at 293. Those powers could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and the extent of that violation. *Id.*, at 293–294. This principle, we held, was not one limited to school desegregation cases, but was instead "premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context." *Id.*, at 294, n. 11.

We think that the principle enunciated in these cases, transposed to the instant factual situation, offers no support for the imposition of injunctive relief against a party found not to have violated any substantive right of respondents. This is not to say that defendants in the position of petitioners might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief to respondents from the discrimination they suffered at the hands of the Union. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 399–400 (1982). But that sort of minor and ancillary relief is not the same, and cannot be the same, as that awarded against a party found to have infringed the statutory rights of persons in the position of respondents.

The order of the District Court, insofar as it runs against petitioners, cannot be regarded as "minor" or "ancillary" in any proper sense of those terms. First, it imposes considerable burdens on the employers and associations. It directs the employers to meet detailed "minority utilization goals" in their hiring, keyed to the number of hours worked. App. to Pet. for Cert. in No. 81–280, p. 236. If they are unable to do so through referrals from Local 542, they are required to hire minority operating engineers who are not affiliated with the

Union. *Ibid.* If the goals are still not satisfied, the employers must recruit and hire unskilled minority workers from the community and provide on-the-job training. *Id.*, at 236–237. The employers are also obligated to make quarterly reports detailing the extent of their compliance with these directives. *Id.*, at 241–242. Finally, the District Court imposed on the employers and the associations a share of the financial cost incidental to enforcement of the remedial decree as a whole. *Id.*, at 252–254. See 507 F. Supp. 1146 (1980). According to petitioners, the expense of the decree in the first year of its 5-year life exceeded $200,000. See Brief for Petitioner in No. 81–280, p. 45, n. 77.

Absent a supportable finding of liability, we see no basis for requiring the employers or the associations to aid either in paying for the cost of the remedial program as a whole or in establishing and administering the training program. Nor is the imposition of minority hiring quotas directly upon petitioners the sort of remedy that may be imposed without regard to a finding of liability. If the Union and the JATC comply with the decree by training and referring minority workers, we see no reason to assume, absent supporting evidence, that the employers will not hire the minority workers referred pursuant to the collective-bargaining agreement, and employ them at wages and hours commensurate with those of nonminority workers. If experience proves otherwise, the District Court will then have more than sufficient grounds for including the employers within the scope of the remedial decree.

To the extent that the remedy properly imposed upon the Union and the JATC requires any adjustment in the collective-bargaining contract between petitioners and the Union, it is entirely appropriate for the District Court to fashion its injunctive remedy to so provide, and to have that remedy run against petitioners as well as the Union and the JATC. But the injunctive decree entered by the District Court as presently drawn treats petitioners as if they had been properly

found liable for the Union's discrimination. A decree containing such provisions, we hold, is beyond the traditional equitable limitations upon the authority of a federal court to formulate such decrees.

Nor does the All Writs Act, 28 U. S. C. § 1651(a), support the extensive liability imposed upon petitioners by the District Court. The District Court did not rely upon this Act, and we think it completely wide of the mark in justifying the relief granted by the District Court. That Act was most recently considered by this Court in *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977), where we said: "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . ." *Id.*, at 172. In *New York Telephone*, we held that the All Writs Act was available to require a third party to assist in the carrying out of a District Court order pertaining to the installation of pen registers, and in doing so we noted that "[t]he order provided that the Company be fully reimbursed at prevailing rates, and compliance with it required minimal effort on the part of the Company and no disruption to its operations." *Id.*, at 175.

An examination of our cases which have relied on the All Writs Act convinces us that respondents are simply barking up the wrong tree when they seek to support the injunctive order of the District Court against petitioners on the basis of the provisions of that Act. There was no need for the District Court to treat petitioners as strangers to this lawsuit, and therefore to rely upon some extraordinary form of process or writ to bring them before the court. Petitioners had been named as defendants by respondents in their complaint, and they litigated the injunctive liability phase of the action before the District Court. Petitioners were parties to the action in every sense of the word, and subject to the jurisdiction of the District Court both as to the imposition of liability

and as to the framing of a remedial decree. The difficulty faced by respondents in supporting the decree of the District Court insofar as it grants affirmative relief and requires payment toward the cost of implementing the decree is not that petitioners would otherwise be strangers to the action. The difficulty lies instead with the fact that on the record before the District Court the petitioners could not properly be held liable to any sort of injunctive relief based on their own conduct.

Thus insofar as respondents' arguments for the imposition of remedial obligations upon petitioners rests upon the assumption that petitioners were properly found liable for the violation of respondents' rights to be free from discrimination, that assumption can no longer stand in view of the conclusions previously set forth in this opinion. Insofar as respondents' assertions are based on some authority of the District Court to impose the sort of obligations which it did upon petitioners even though petitioners could not be held liable on the record before the District Court, we hold that such obligations can be imposed neither under traditional equitable authority of the District Court nor under the All Writs Act.[22]

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[22] Petitioners have raised several objections to the District Court's certification of a defendant class. In light of our disposition, however, we find it unnecessary to reach these issues. It is evident from the District Court's opinion that certification of the defendant class was premised on theories of liability that made individualized questions irrelevant. See n. 5, *supra*. We have now rejected those theories, and we assume that the District Court will reconsider the issue of class certification in the event of a new trial to determine liability.

Petitioners have also questioned the standing of respondent Commonwealth of Pennsylvania to act either on its own behalf or as *parens patriae* in this litigation. We need not reach this issue either. Petitioners have not challenged the standing of the other plaintiffs and, therefore, even if Pennsylvania lacks standing, the District Court possessed Art. III jurisdiction to entertain those common issues presented by all plaintiffs. See *Watt* v. *Energy Action Educational Foundation*, 454 U. S. 151, 160 (1981); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252,

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I concur in the Court's opinion today holding that a cause of action based on 42 U. S. C. § 1981 requires proof of intent to discriminate, that the employers cannot be held vicariously liable for the discrimination practiced by Local 542, and that § 1981 does not impose a "nondelegable duty" on the employers to insure that there is no discrimination in the Union's selection of the work force. I write separately, however, in order to state expressly one of the options open to the District Court on remand, and to elaborate on the Court's comments regarding the scope of the federal courts' equitable power to afford full relief.

I

In determining that the petitioners cannot be held vicariously liable for the discriminatory conduct of the JATC, the Court is careful to note that its holding is based on the failure of the trial court to make "findings regarding the relationship between the JATC and petitioners . . . that might support application of *respondeat superior*." *Ante*, at 394.[1] In particular, because the record contains no findings regarding

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264, n. 9 (1977). Petitioners note that Pennsylvania has sought attorney's fees in its own right, but our judgment has removed the basis for such an award against petitioners until such time as Pennsylvania can again assert status as a prevailing party. Until Pennsylvania obtains relief different from that sought by plaintiffs whose standing has not been questioned, we decline to address the Commonwealth's standing.

[1] The only facts offered by the respondents supporting application of *respondeat superior* are that half of the trustees administering the JATC are appointed by the employer associations, and that the JATC is funded entirely by mandatory employer contributions.

whether the employers maintain some control over the activities of the JATC, either through the employer-appointed trustees or through other means, the doctrine of *respondeat superior* is simply inapplicable.

I would briefly note the limits of the Court's holding. Once this case has been remanded to the District Court, nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*.

II

Regarding the scope of a federal court's equitable powers to afford full relief, I agree with the Court's holding that "a party not subject to liability for violating the law [may not] be assessed a proportionate share of the costs of implementing a decree to assure nondiscriminatory practices on the part of another party which *was* properly enjoined." *Ante*, at 398.[2] I also agree with the Court's ancillary holding that the District Court may not require quarterly reports from the employers detailing their compliance with the court's ill-founded injunction. Of course, since the employers are not liable for general injunctive relief, such reports are unnecessary.

Under the appropriate circumstances, however, I believe other reports properly could be required of the employers, for example, to aid the court by charting the changes resulting from the injunction imposed on the Union and the JATC. Quite recently, in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), this Court held that § 706(g) of Title VII of the Civil Rights Act of 1964 authorizes a federal court to order retroactive seniority relief over the objections of

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[2] In the present cases, the District Court ordered the three employer associations to pay 10% of the costs of remedial relief, and the employer, Glasgow, to pay 5%. Because the cost of relief to date has been approximately $200,000, the petitioners' share of the cost has been $70,000.

a union that was not guilty of discrimination. The Court stated:

> "*Teamsters* v. *United States*, 431 U. S. 324 (1977), . . . makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide 'whether any discriminatees should be awarded additional equitable relief such as retroactive seniority.' *Id.*, at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination. *Id.*, at 356, n. 43." *Id.*, at 400.[3]

As the Court acknowledges today, it is entirely possible that full relief cannot be granted without subjecting the petitioners to some incidental or ancillary provisions of the court's injunctive order. It is thus conceivable, for example, that quarterly reports providing employment statistics necessary for the court to ascertain whether its injunctive decree is being properly implemented could be ordered under the court's equitable powers to effectuate its decree.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

As I noted in my separate opinion in *Runyon* v. *McCrary*, 427 U. S. 160, 189, the Congress that enacted § 1 of the Civil

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[3] In support of this statement, the Court in *Teamsters* cited Rule 19(a)(1) of the Federal Rules of Civil Procedure, which requires a district court to join a person as a party if "in his absence complete relief cannot be accorded among those already parties."

Rights Act of 1866 "intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence." Any violation of that guarantee—whether deliberate, negligent, or purely accidental—would, in my opinion, violate 42 U. S. C. § 1981. The statute itself contains no requirement that an intent to discriminate must be proved.

The Court has broadened the coverage of § 1981 far beyond the scope actually intended by its authors; in essence, the Court has converted a statutory guarantee of equal rights into a grant of equal opportunities. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409; *Runyon* v. *McCrary*, *supra*. Whether or not those decisions faithfully reflect the intent of Congress, the enlarged coverage of the statute "is now an important part of the fabric of our law." *Runyon*, *supra*, at 190 (STEVENS, J., concurring).

Since I do not believe Congress intended § 1981 to have any application at all in the area of employment discrimination generally covered by Title VII of the Civil Rights Act of 1964, an analysis of the motives and intent of the Reconstruction Congress cannot be expected to tell us whether proof of intentional discrimination should be required in the judicially created portion of the statute's coverage. Since Congress required no such proof in the statute it actually enacted, a logician would be comfortable in concluding that no such proof should ever be required. Nevertheless, since that requirement tends to define the entire coverage of § 1981 in a way that better reflects the basic intent of Congress than would a contrary holding, I concur in the conclusion reached by the Court in Part II of its opinion insofar as it relates to the statutory protection of equal opportunity but, perhaps illogically, would reach a different conclusion in a case challenging a denial of a citizen's civil rights.

Accordingly, I join the Court's judgment and Parts III and IV of its opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Today the Court reaches out and decides that 42 U. S. C. § 1981 requires proof of an intent to discriminate—an issue that is not at all necessary to the disposition of this case. Because I find no support for the majority's resolution of this issue, and because I disagree with its disposition of this case even if proof of intent should ordinarily be required, I respectfully dissent.

I

The question whether intent generally should be required in § 1981 actions is at most tangentially related to this case. There was unquestionably intentional discrimination on the part of both the union (Local 542) and the Joint Apprenticeship and Training Committee (JATC), a body, composed of officials from the union and the petitioner contracting associations, which jointly administered the apprenticeship and training program. As a result, the only question that the Court need address today is whether limited injunctive liability may be vicariously imposed upon an employer when the person or entity to whom it delegates a large portion of its hiring decisions intentionally discriminates on the basis of race. However, because the majority has chosen to reach first the more general question whether proof of intent is a prerequisite to recovery in a § 1981 action, I likewise will address this issue first.

Section 1981 provides in unqualified terms:

> "All persons within the jurisdiction of the United States *shall have the same right* in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U. S. C. § 1981.

The plain language does not contain or suggest an intent requirement. A violation of § 1981 is not expressly conditioned on the motivation or intent of any person. The language focuses on the effects of discrimination on the protected class, and not on the intent of the person engaging in discriminatory conduct. Nothing in the statutory language implies that a right denied because of sheer insensitivity, or a pattern of conduct that disproportionately burdens the protected class of persons, is entitled to any less protection than one denied because of racial animus.

The Court attaches no significance to the broad and unqualified language of § 1981. Furthermore, the majority finds no support for its conclusion that intent should be required in the legislative history to § 1 of the 1866 Act, the precursor to § 1981. Instead, in the face of this unqualified language and the broad remedial purpose § 1981 was intended to serve, the majority assumes that Congress intended to restrict the scope of the statute to those situations in which racial animus can be proved on the ground that the legislative history contains no "convincing evidence" to the contrary. *Ante*, at 391. In my view, this approach to statutory construction is not only unsound, it is also contrary to our prior decisions, which have consistently given § 1981 as broad an interpretation as its language permits. See, *e. g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273 (1976); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975); *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431 (1973); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

The fallacy in the Court's approach is that, in construing § 1981 and its legislative history, the Court virtually ignores Congress' broad remedial purposes and our paramount national policy of eradicating racial discrimination and its pernicious effects. When viewed in this light, it is clear that proof of intentional discrimination should not be required in order to find a violation of § 1981.

Although the Thirty-ninth Congress that passed the Civil Rights Act of 1866 did not specifically address the question whether intent should be required, the conclusion is inescapable that the congressional leadership intended to effectuate "the *result* of a change from a centuries old social system based on involuntary labor, with all the notions of racial unsuitability for the performance of anything but menial labor under close supervision, to the free labor system." *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1006 (CA3 1981) (Gibbons, J., with whom Higginbotham and Sloviter, JJ., joined, dissenting in part) (emphasis in original). When this Congress convened, the Thirteenth Amendment had been ratified, abolishing slavery as a legal status. However, it was clear that in reality, Negroes were hardly accorded the employment and other opportunities accorded white persons generally. Thus, this Congress undertook to provide *in fact* the rights and privileges that were available to Negroes in theory. See generally J. tenBroek, The Antislavery Origins of the Fourteenth Amendment 156–180 (1951) (discussing the intent of the Thirty-ninth Congress to ensure to Negroes the *practical* freedom and equality which was already present at law, to reach private, not merely governmental conduct, and to provide affirmative obligations on the government to protect Negroes from unequal treatment). Four separate but related measures were proposed in an effort to accomplish this purpose.[1]

In this general climate, the 1866 Civil Rights Act was not an isolated technical statute dealing with only a narrow subject. Instead, it was an integral part of a broad congressional scheme intended to work a major revolution in the pre-

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[1] These measures included the Civil Rights Act of 1866, passed over President Johnson's veto; the Freedman's Bureau bill, which would have created a federal agency to ensure that a free labor system in which Negroes had equal participation would *in fact* be accomplished, and which commanded a clear majority in Congress, but failed to pass over a Presidential veto; a constitutional amendment sponsored by Representative Bingham but not recommended; and the Fourteenth Amendment.

vailing social order.[2] It is inconceivable that the Congress which enacted this statute would permit this purpose to be thwarted by excluding from the statute private action that concededly creates serious obstacles to the pursuit of job opportunities by Negroes solely because the aggrieved persons could not prove that the actors deliberately intended such a result. Even less conceivable is the notion, embraced by the Court's opinion today, that this Congress intended to absolve employers from even injunctive liability imposed as a result of intentional discrimination practiced by the persons to whom they had delegated their authority to hire employees. See *infra*, at 414–418.

The legislative history demonstrates that the Thirty-ninth Congress intended not merely to provide a remedy for preexisting rights, but to eradicate the "badges of slavery" that remained after the Civil War and the enactment of the Thirteenth Amendment. Congress was acutely aware of the difficulties that federal officials had encountered in effectuating

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[2] As the majority recognizes, *ante*, at 386–387, one of the principal changes Congress hoped to achieve was the elimination of the infamous Black Codes. These included state laws regulating the terms and conditions of employment. In many States, these oppressive laws were facially neutral, literally applying to all laborers without regard to race. The laws prohibited such conduct as refusing to perform work and disobeying an employer, or inducing an employee away from his employer, and many provided for forfeiture of wages if the employee did not fulfill the terms of his employment contract. Other Codes included vagrancy laws, which were vague and broad enough to encompass virtually all Negro adults, and many were facially neutral, applying to white persons as well as to Negroes. See *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1004, n. 5 (CA3 1981) (Gibbons, J., dissenting in part) (citing E. McPherson, Political History of the United States of America During the Period of Reconstruction 30–44 (1871)). The Black Codes were constantly discussed during the debates over the Civil Rights Act of 1866, and Congress clearly intended that the Act would eliminate even those Codes which were facially neutral. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 39–41, 118–125 (1865); *id.*, at 1151–1160, 1838–1839 (1866). See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 390–391 (1978) (separate opinion of MARSHALL, J.).

the change from the system of slavery to a system of free labor even though the legal and constitutional groundwork for this change had already been laid. In the report that formed the working paper for the Joint Committee on Reconstruction and was of central importance to the deliberations of the Thirty-ninth Congress, General Schurz noted:

> "That the result of the free labor experiment made under circumstances so extremely unfavorable should at once be a perfect success, no reasonable person would expect. Nevertheless, a large majority of the southern men with whom I came into contact announced their opinions with so positive an assurance as to produce the impression that their minds were fully made up. In at least nineteen cases of twenty the reply I received to my inquiry about their views on the new system was uniformly this: 'You cannot make the negro work without physical compulsion.' I heard this hundreds of times, heard it wherever I went, heard it in nearly the same words from so many different persons, that at last I came to the conclusion that this is the prevailing sentiment among the southern people. There are exceptions to the rule, but, as far as my information extends, far from enough to affect the rule. In the accompanying documents you will find an abundance of proof in support of this statement. There is hardly a paper relative to the negro question annexed to this report which does not, in some direct or indirect way, corroborate it." S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865), reprinted in The Reconstruction Amendments' Debates 88 (Virginia Comm'n on Constitutional Government, 1967).

Fully aware of this prevailing attitude, the leaders of Congress set about to enact legislation that would ensure to Negroes the opportunity to participate equally in the free labor system by providing an instrument by which they could strike down barriers to their participation, whether those

barriers were erected with the conscious intent to exclude or with callous indifference to exclusionary effects. Congress knew that this attitude could manifest itself in a number of different ways and intended to protect Negro workers against not only flagrant, intentional discrimination, but also against more subtle forms of discrimination which might successfully camouflage the intent to oppress through facially neutral policies. Congressional awareness of the potential role that facially neutral measures might play in impeding the ability of Negroes to enjoy equal job opportunities is also reflected in the working paper which formed the basis for the 1866 Act. Addressing this problem, General Schurz stated:

> "What particular shape the reactionary movement will assume it is at present unnecessary to inquire. There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose . . . ." *Id.*, at 92.

Unfortunately, this awareness seems utterly lacking in the Court's opinion today. In order to hold that § 1981 requires a showing of intent, the majority must assume that the rights guaranteed under § 1981—to make and enforce contracts on the same basis as white persons—can be adequately protected by limiting the statute to cases where the aggrieved person can prove intentional discrimination. In taking this extraordinarily naive view, the Court shuts its eyes to reality, ignoring the manner in which racial discrimination most often infects our society. Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs "on a more sophisticated and subtle level," the effects of which are often as cruel and "devastating as the most crude form of discrimination." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 337 (ED Pa. 1978) (Higginbotham, Circuit Judge, sitting by designation).[3] I think that Judge Higginbotham most accu-

[3] When discussing the scope of the Fifteenth Amendment in 1939, Justice Frankfurter was sensitive to the subtle forms that racial discrimination

rately recognized this problem when he noted that "[t]he facts of the instant case . . . demonstrate the complexity and subtlety of the interrelationship of race, collective bargaining, craft unions, the employment process and that ultimate goal—real jobs." *Ibid.* He further noted that "[a]t the critical level of viable jobs and equal opportunities, there were intentional and persistent efforts to exclude and discourage most of the minorities who, but for their race, would have been considered for entry into the union and for the more lucrative jobs." *Ibid.*

Racial discrimination in all areas, and particularly in the areas of education and employment, is a devastating and reprehensible policy that must be vigilantly pursued and eliminated from our society:

> "Racial discrimination can be the most virulent of strains that infect a society, and the illness in any society so infected can be quantified. Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims. This disease must be recognized and vigorously eliminated wherever it occurs. But racial discrimination takes its most malevolent form when it occurs in employment, for prejudice here not only has an immediate economic effect, it has a fulminating integrant that perpetuates the pestilences of degraded housing, unsatisfactory neighborhood amenities, and unequal education." *Croker* v. *Boeing Co.*, 662 F. 2d, at 1002 (Aldisert, J., with whom Higginbotham, J., joined, dissenting in part).

The purposes behind § 1981, and the profound national policy of blotting out all vestiges of racial discrimination, are no less frustrated when equal opportunities are denied through clev-

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often takes. Writing for the Court in *Lane* v. *Wilson*, 307 U. S. 268, 275, he stated: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Unfortunately, the Court no longer seems sensitive to this reality.

erly masked or merely insensitive practices, where proof of actual intent is nearly impossible to obtain, than when instances of intentional discrimination escape unremedied. For this reason, I cannot accept the Court's glib and unrealistic view that requiring proof of intent in § 1981 actions does not frustrate that statute's purpose of protecting against the devastating effects of racial discrimination in employment.

II

Even if I agreed with the Court that intent must be proved in a § 1981 action, I could not agree with its conclusion that the petitioner contracting associations should be immunized, even from injunctive liability, for the intentional discrimination practiced by the union hall to which they delegated a major portion of their hiring decisions. Under § 1981, minorities have an unqualified right to enter into employment contracts on the same basis as white persons. It is undisputed that in this case, the respondent class was denied this right through intentional discrimination. The fact that the associations chose to delegate a large part of the hiring process to the local union hiring hall, which then engaged in intentional discrimination, does not alter the fact that respondents were denied the right to enter into employment contracts with the associations on the same basis as white persons.

At the very least, § 1981 imposes on employers the obligation to make employment decisions free from racial considerations. The hiring decisions made by the contracting associations in this case were fraught with racial discrimination. Solely because of their race, hundreds of minority operating engineers were totally excluded from the industry and could not enter into employment contracts with any employer. Those minorities allowed into the industry suffered discrimination in referrals, and thus they too were denied the same right as white persons to contract with the contracting associations. Not one of the petitioner contracting associations has ever claimed, nor could they, that minorities had

the same right as white operating engineers to contract for employment.

Instead, the contracting associations attempt to hide behind the veil of ignorance, shifting their responsibility under § 1981 to the very entity which they chose to assist them in making hiring decisions.[4] The suggestion that an employer's responsibility under § 1981 depends upon its own choice of

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[4] Although the District Court held that respondents had not proved that the contracting associations as a class had actual knowledge or had specifically approved of the intentional discrimination, it hardly found them totally blameless in this regard, and it found that the petitioner associations in particular were not innocent. One part of the proof of intentional discrimination by the hiring hall was the fact that Local 542 had intentionally overstated its percentage of minority members to the Federal Government in order to receive federal funds while maintaining an extraordinarily low actual minority percentage. With respect to the petitioner contracting associations, the District Court found:

"Any argument that, because the union alone had primary access to the membership data, the [petitioner] contracting associations . . . were not at least reckless participants in this scheme, I find to be devoid of merit and patently incredible. . . . The prospect of deriving . . . an immediate and substantial financial benefit from the federal coffers allowed them to become willing parties to the scheme by capriciously certifying 'facts' in anticipation of the government's reliance on them: Having sought to enrich their members with substantial profits, it is now too late to cry innocence and cast the blame elsewhere. These were no innocent prognosticators who were misled by the union's scheme to give inaccurate information." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 345 (ED Pa. 1978).

The District Court further found:

"The fact is that the vast majority of individual contractors *never hired* a minority operating engineer; that the [petitioner associations] signed a statement, relevant to federal approval of the 'Affirmative Action Program' . . . , grossly exaggerating minority union membership; and that the gross disparity between the percentage of the minority representation in the labor pool and minority representation in the union along with a gross disparity in hours and wages of minorities as against the minority labor pool percentage is a matter of such broad scope that some or all of the contractors and associations might have had knowledge of it." *Id.*, at 401 (emphasis added).

a hiring agent finds no support in the statute, nor does any other source of law authorize the circumvention of § 1981 that the contracting associations seek here. Their obligation to make employment contracts free from racial discrimination is a nondelegable one—it does not disappear when, as is often the case, the actual employer designates a particular agent to assist in the hiring process. In my view, the fact that the discriminating entity here is a union hiring hall, and not a person or corporation which has a traditional agent-principal relationship with the employer, does not alter this analysis. Cf. *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914 (CA2 1960) (per Swan, J.) (employer cannot escape liability for discrimination against nonunion members by the union hiring hall to which it turns over the task of supplying men for employment), cert. denied, 366 U. S. 909 (1961).

The majority does not really analyze the question whether petitioners should be held injunctively liable because § 1981 imposes upon them a nondelegable duty. Instead the majority argues that, because it has held that § 1981 is intended only to reach intentional discrimination, the statute cannot make employers "guarantors of the workers' rights as against third parties who would infringe them." *Ante*, at 396. This argument does not withstand analysis. The majority does not assert that employers may escape liability under § 1981 by delegating their hiring decisions to a third-party agent. Indeed, in light of the importance attached to the rights § 1981 is intended to safeguard, the duty to abide by this statute must be nondelegable, as the majority apparently recognizes. *Ante*, at 396. Instead, the majority argues that because § 1981 imposes only the duty to refrain from intentional discrimination in hiring, it somehow automatically follows that this duty could not have been violated in this case. However, it was precisely this duty that was violated here. The District Court found, and this Court does not disagree, that the entity to whom the petitioner associations effectively delegated their hiring decisions *intentionally discriminated* against the respondent class on the basis of race in making

these decisions. Even under the Court's own narrow view of the scope of the duty imposed by § 1981, then, the duty was unquestionably violated in this case.

The majority obfuscates the issue by suggesting that the District Court imposed upon the contracting associations an obligation to seek out and eliminate discrimination by unrelated third parties wherever it may occur. In reality, the District Court did nothing more than impose limited injunctive liability upon the associations for violating their nondelegable duty under § 1981 when the union hiring hall, which effectively made hiring decisions for the associations, engaged in intentional discrimination on the basis of race in making these decisions.

By immunizing the employer from the injunctive relief necessary to remedy the intentional discrimination practiced by those through whom the employer makes its hiring decisions, the Court removes the person most necessary to accord full relief—the entity with whom the aggrieved persons will ultimately make a contract. I believe that the District Court appropriately rejected the petitioners' argument when it explained: "With intensity some employers urge that they agreed to the exclusive hiring hall system solely as a matter of economic survival at the end of a destructive ten week strike when the union would not compromise for any other hiring alternative. Yet economic pressures, however strong and harmful they might be, do not create immunity for employers, at least not in [the injunctive] liability phase." 469 F. Supp., at 338.

Section 1981 provides Negroes "the same right" to make contracts as white persons enjoy. In the present case, this unqualified right was violated, and the violation is made no more palatable because the persons who actually made the hiring decisions and referrals, and not the employer itself, engaged in intentional discrimination.[5] The devastating vi-

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[5] I agree with JUSTICE O'CONNOR's observation that nothing in the Court's opinion prevents the District Court on remand from holding the pe-

olation of their rights under § 1981 remains the same and will go at least partially unremedied when the person with whom the ultimate employment contract must be made is immunized from even injunctive relief. I cannot impute to the Congress which enacted § 1981 the intention to reach such an inequitable and nonsensical result. Accordingly, I must dissent.

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titioner associations liable for discrimination practiced by the JATC. Specifically, they may be held liable because the trustees administering the JATC are appointed by the petitioner associations, the JATC is funded by employer contributions, and the associations exercise control over the JATC's actions. I also agree with JUSTICE O'CONNOR that the Court's opinion does not prevent the District Court from requiring petitioners to comply with incidental or ancillary provisions contained in its injunctive order.

Reporter's Note

The next page is purposely numbered 1101. The numbers between 418 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 28, 1982

Appeal Dismissed

No. 81-2062. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 55 N. Y. 2d 11, 432 N. E. 2d 578.

Vacated and Remanded on Appeal

No. 81-634. SHARON STEEL CORP. ET AL. *v.* INSURANCE COMMISSIONER OF NEW HAMPSHIRE ET AL. Appeal from Sup. Ct. N. H. Judgment vacated and case remanded for further consideration in light of *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). Reported below: 121 N. H. 607, 433 A. 2d 1250.

Certiorari Granted—Reversed and Remanded. (See No. 81-593, *ante*, p. 259; and No. 81-1144, *ante*, p. 263.)

Certiorari Granted—Vacated and Remanded

No. 80-1699. PLANTE, COMMISSIONER OF INSTITUTIONS AND AGENCIES OF NEW JERSEY, ET AL. *v.* SCOTT, BY AND THROUGH HIS GUARDIAN, WEINTRAUB. C. A. 3d Cir. Motion of American Psychiatric Association for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Youngberg* v. *Romeo*, 457 U. S. 307 (1982). Reported below: 641 F. 2d 117.

No. 80-6397. GRAHAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 76 App. Div. 2d 228, 431 N. Y. S. 2d 209.

No. 80-6758. MILLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 79 App. Div. 2d 1092, 437 N. Y. S. 2d 954.

No. 81-261. MEACHUM ET AL. *v.* LONGVAL. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Goodwin*, 457 U. S. 368 (1982). Reported below: 651 F. 2d 818.

No. 81-835. IRON ARROW HONOR SOCIETY *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982). JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN dissent. Reported below: 652 F. 2d 445.

No. 81-1134. ASHCROFT, ATTORNEY GENERAL OF MISSOURI *v.* NATIONAL ORGANIZATION FOR WOMEN, INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nixon* v. *Fitzgerald*, 457 U. S. 731, 741-743 (1982). Reported below: 676 F. 2d 702.

No. 81-1580. SANBORN ET AL. *v.* WOLFEL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). See *Butz* v. *Economou*, 438 U. S. 478, 504 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"). Reported below: 666 F. 2d 1005.

No. 81-5871. FORD *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 622 S. W. 2d 915.

No. 81-6225. GILMORE *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 496 Pa. 420, 437 A. 2d 944.

Miscellaneous Orders

No. A-1039. WEIGANG *v.* SMITH, ATTORNEY GENERAL (No. 81-6915); and IN RE WEIGANG (No. 81-6916). Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-1041. MONEX INTERNATIONAL LTD. ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 6th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

No. A-1075. AMERICAN LAUNDRY PRESS CO. ET AL. *v.* OK NYO REXRODE. D. C. Kan. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. 81-1095. MORRIS, WARDEN *v.* SLAPPY. C. A. 9th Cir. [Certiorari granted, 456 U. S. 904.] Motion of National Legal Aid and Defender Association for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81-1114. ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of the Solicitor General for divided argument granted.

No. 81-185. SIMOPOULOS *v.* VIRGINIA. Sup. Ct. Va. [Probable jurisdiction noted, 456 U. S. 988];

No. 81-1255. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. *v.* ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. [Certiorari granted, 456 U. S. 988]; and

No. 81-1623. ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. C. A. 8th Cir. [Certiorari granted, 456 U. S. 988.] Motions of Legal Defense Fund for Unborn Children for leave to file briefs as *amicus curiae* granted. Motions of Alan Ernest to represent children unborn and born alive denied.

No. 81-746. CITY OF AKRON *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and

No. 81-1172. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL. *v.* CITY OF AKRON ET AL. C. A. 6th Cir. [Certiorari granted, 456 U. S. 988.] Motion of Alan Ernest to represent children unborn and born alive denied.

No. 81-1686. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* WESTERN NUCLEAR, INC. C. A. 10th Cir. [Certiorari granted, 456 U. S. 988.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81-6857. IN RE GUICE. Petition for writ of habeas corpus denied.

No. 81-2156. IN RE HOLLAND ET AL.;

No. 81-6771. IN RE KULWIEC; and

No. 81-6873. IN RE SHABAZZ. Petitions for writs of mandamus denied.

Certiorari Granted

No. 81-469. BUSH *v.* LUCAS. C. A. 5th Cir. Certiorari granted. Reported below: 647 F. 2d 573.

No. 81-1314. W. R. GRACE & CO. *v.* LOCAL UNION 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA. C. A. 5th Cir. Certiorari granted. Reported below: 652 F. 2d 1248.

No. 81-1998. PRICE WATERHOUSE *v.* PANZIRER ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 663 F. 2d 365.

No. 81-1335. DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. *v.* FELDMAN ET AL. C. A. D. C. Cir. Motion of Conference of Chief Justices for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 213 U. S. App. D. C. 119, 661 F. 2d 1295.

No. 81-6633. BEARDEN *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 161 Ga. App. 640, 288 S. E. 2d 662.

Certiorari Denied

No. 80-1058. HAMPTON ROADS SHIPPING ASSN. ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 282.

No. 80-1501. SULLIVAN ET AL. *v.* FIRST TENNESSEE BANK N. A. MEMPHIS, EXECUTOR, ET AL.; and

No. 80-1528. SMITH ET AL. *v.* FIRST TENNESSEE BANK N. A. MEMPHIS, EXECUTOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80-6609. WILKERSON *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 398 So. 2d 536.

No. 81-585. HONDO BOATS, INC. *v.* MCCRAINE ET AL. Sup. Ct. La. Certiorari denied. Reported below: 399 So. 2d 163.

No. 81-806. LORD ET AL. *v.* LOCAL UNION NO. 2088, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 646 F. 2d 1057.

No. 81-1526. FELDMAN *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL.; and

No. 81-1537. HICKEY *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 119, 661 F. 2d 1295.

No. 81-1674. ALABAMA *v.* GRADDICK. Sup. Ct. Ala. Certiorari denied. Reported below: 408 So. 2d 548.

No. 81-1689. HUEY *v.* TELEDYNE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 621.

No. 81-1803. CITY OF STAMFORD *v.* IEVA ET AL.; and

No. 81-2056. IEVA *v.* CITY OF STAMFORD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 801.

No. 81-1818. CASARI, DIRECTOR OF THE SECTION OF HOSPITAL AND MEDICAL FACILITIES OF THE NEBRASKA DEPARTMENT OF HEALTH, ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LINCOLN. C. A. 8th Cir. Certiorari denied. Reported below: 667 F. 2d 734.

No. 81-1908. RHEAUME *v.* SAFFELL. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 925.

No. 81-1940. ARTHUR YOUNG & CO. *v.* SUMMER ET AL.;

No. 81-2001. RAYMOND, JAMES & ASSOCIATES, INC. *v.* SUMMER ET AL.; and

No. 81-2060. LAND & LEISURE, INC., ET AL. *v.* SUMMER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 965.

No. 81-1973. IRWIN *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 50 Md. App. 742.

No. 81-1980. ARTHUR TREACHER'S FISH & CHIPS, INC., ET AL. *v.* HORSTMYER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 686.

No. 81-1989. WILSON *v.* WILSON. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 497.

No. 81-1990. OPPENHEIM ET AL. *v.* MOREAU ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 1300.

No. 81-1993. CAPPS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 97 N. M. 453, 641 P. 2d 484.

No. 81-2007. DISTRICT COURT IN AND FOR THE SEVENTEENTH JUDICIAL DISTRICT OF COLORADO ET AL. *v.* MARKS ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 643 P. 2d 741.

No. 81-2010. WILDER *v.* GILMAN PAPER CO. C. A. 11th Cir. Certiorari denied. Reported below: 669 F. 2d 735.

No. 81-2011. PANZIRER *v.* WOLF ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 365.

No. 81-2013. JOHNSON *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1220.

No. 81-2016. RUPPEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 261.

No. 81-2021. FANNON ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 412 So. 2d 475.

No. 81-2024. WIESEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81-2031. WILLIAMS ENTERPRISES, INC. *v.* BINKLEY CO. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1320.

No. 81-2033. ABC CONTAINERLINE, N.V., ET AL. *v.* KINGSTON SHIPPING CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 34.

No. 81-2045. NIEMI *v.* NATIONAL BROADCASTING CO., INC., ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 126 Cal. App. 3d 488, 178 Cal. Rptr. 888.

No. 81-2053. MCGRAW-EDISON CO. *v.* SIKES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 731 and 671 F. 2d 150.

No. 81-2063. SCOTT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81-2091. WILT ET AL., DBA ROY WILT & SON, ET AL. *v.* AETNA INSURANCE CO. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 412 So. 2d 491.

No. 81-2128. MARINELLO ET AL. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 85 App. Div. 2d 663, 445 N. Y. S. 2d 214.

No. 81-2168. ADVANCE ROSS ELECTRONICS CORP. ET AL. *v.* GREEN, TRUSTEE. Ct. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. Reported below: 624 S. W. 2d 316.

No. 81-2172. OPTION ADVISORY SERVICE, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81-2181. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-2204. GOLDFARB ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 975.

No. 81-2194. HOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 616.

No. 81-5509. NORRIS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 998.

No. 81-5725. STEVENS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 96 N. M. 627, 633 P. 2d 1225.

No. 81-6093. THOMPSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 995, 418 N. E. 2d 112.

No. 81-6386. GAULT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 348.

No. 81-6548. DEVINE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 914, 424 N. E. 2d 823.

No. 81-6631. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81-6654. UNITED STATES EX REL. MILLER *v.* MCCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 711.

No. 81-6666. PERRY *v.* PERRY. Ct. App. D. C. Certiorari denied.

No. 81-6677. ROMANO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 81-6679. WEDRA *v.* THOMAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 713.

No. 81-6690. VILLAREAL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-6688. HOGAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 447, 441 A. 2d 1223.

No. 81-6691. SUTAIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 923.

No. 81-6692. HOWELL *v.* STEFFEY. C. A. 10th Cir. Certiorari denied.

No. 81-6694. GLOVER-EL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 535, 430 N. E. 2d 147.

No. 81-6705. HARRIS *v.* HOUSEWRIGHT, WARDEN, ILLINOIS STATE PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 700.

No. 81-6732. REYNOLDS *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 81-6743. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81-6752. JACKSON *v.* LEEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1311.

No. 81-6755. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 664 F. 2d 860.

No. 81-6765. OLSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 185.

No. 81-6769. INGRAM *v.* SMITH, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 81-6780. STINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 675 F. 2d 69.

No. 81-6783. POPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81-6797. ADAMS ET AL. *v.* HOWERTON, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1036.

No. 81-6803. SNYDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 686.

No. 81-6804. NEBEKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-6806. RICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81-6810. TROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1340.

No. 81-6825. QUIROS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-6845. COMBS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 574.

No. 81-6862. TATUM *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 706.

No. 81-879. UNITED STATES *v.* GILLESPIE. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 650 F. 2d 127.

No. 81-1875. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* SPIVEY. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 464.

No. 81-2048. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* MOORE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 670 F. 2d 56.

No. 81-2041. SPENCER, DBA J&M DESIGN CO., ET AL. *v.* AMERICAN CONSULTING ASSN., INC. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 100 Ill. App. 3d 917, 427 N. E. 2d 579.

No. 81-2097. MARISCAL, AS NEXT FRIEND OF MARISCAL *v.* JOHNSON, EXECUTOR. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 620 S. W. 2d 905.

No. 81-5783. FRAZIER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 185 Conn. ——, 440 A. 2d 916.

No. 81-6340. DAWSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 84 App. Div. 2d 957, 444 N. Y. S. 2d 333.

No. 81-6629. ETLIN *v.* ROBB, GOVERNOR OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1309.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case arises from a child custody dispute between private parties. A Virginia trial court awarded petitioner's ex-wife custody of their 3-year-old son and ordered petitioner to pay child support. Petitioner then brought this action under 42 U. S. C. § 1983 against the trial judge, the State Governor, and the State Attorney General. His complaint sought monetary, injunctive, and declaratory relief, premised on allegations that the custody and support award violated the First, Fifth, Thirteenth, and Fourteenth Amendments. The District Court dismissed the suit without prejudice because

the constitutional questions could be addressed in the state-court custody action.

The Court of Appeals for the Fourth Circuit affirmed. 673 F. 2d 1309 (1981). In a brief *per curiam* opinion, the court explained:

> "Under Virginia law, child custody determinations and support orders may be subject to modification at any time. *See* Va. Code Ann. § 16.1–242 (1981 Cum. Supp.); § 20–108 (1975 Repl. Vol.); § 31–17 (1979 Repl. Vol.). Because custody proceedings are considered ongoing proceedings in Virginia, they afford a disappointed litigant, such as [petitioner], an adequate opportunity to present his constitutional claims. *Younger v. Harris*, 401 U. S. 37, 49 (1971). *See Juidice v. Vail*, 430 U. S. 327, 337 (1977). Therefore, it is clear that the doctrine of abstention applies in this instance. *See Moore v. Sims*, 442 U. S. 415 (1979)." App. to Pet. for Cert. A–2.

Petitioner now seeks a writ of certiorari, and presents, as his fourth question, the question of whether the Court of Appeals has properly applied the *Younger* doctrine.[1]

This question is not easily answered because the Fourth Circuit has, in at least two respects, gone beyond our cases in dismissing the action under *Younger* v. *Harris*, 401 U. S. 37 (1971). First, this Court has never applied the *Younger* doctrine to a case where the State was not a party to the pending state proceedings. *Younger* and its early progeny were criminal proceedings, in which, of course, the State is always a party. In *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), the initial application of *Younger* to a civil proceeding, the Court relied heavily on the State's direct participation.

> "*Younger*, however, also rests upon the traditional reluctance of courts of equity, even within a unitary system,

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[1] I agree that review of the three other questions presented in the petition, concerning the merits of his cause and the absence of an automatic right of appeal, is unwarranted.

to interfere with a criminal prosecution. Strictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes . . . ." 420 U. S., at 604.

Accordingly, subsequent extensions of *Younger* in the civil context have occurred only when the State was directly involved in a pending state proceeding.[2] The Fourth Circuit's invocation of *Younger* in this case, a "civil litigation involving private parties," represents a substantial broadening of the doctrine.

Second, the Court of Appeals held that deference was justified despite the fact that there were no ongoing or pending state proceedings in the usual sense. Dismissal of the federal action was deemed appropriate because child custody orders in Virginia are subject to modification at any time and petitioner could follow that avenue in order to raise his constitutional claims. It is clear that, under the Court of Appeals' reasoning, custody proceedings would never be final and petitioner would be forced to attempt to reopen state proceedings before receiving a hearing in federal court on any constitutional grounds. None of our *Younger* decisions contemplates this result, which, in effect, imposes an exhaus-

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[2] See *Juidice* v. *Vail*, 430 U. S. 327 (1977) (civil contempt proceedings); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977) (state civil enforcement action brought by state officials seeking return of fraudulently obtained welfare benefits); *Moore* v. *Sims*, 442 U. S. 415 (1979) (civil proceeding brought by state officials to seize custody of abused children); *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982) (attorney disciplinary proceedings).

tion requirement upon petitioner before he may bring a § 1983 suit in federal court. Assertion of a federal claim under § 1983, as a general matter, need not be preceded by an attempt to vindicate that claim in state court. *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963). Although there are recognized exceptions when "strands of local law are woven into the case" whose resolution should precede consideration by a federal court, *id.*, at 673, this is not suggested to be such a case. Moreover, if it were, the District Court should refrain temporarily from exercising its jurisdiction, but should not dismiss the case outright. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

A case of this type has not previously been thought to fall within the reach of the *Younger* doctrine. Obviously, the extension of *Younger* to pending civil suits between private litigants where the State is not a party is an issue requiring ultimate resolution by this Court. Indeed, the applicability of *Younger* to all civil litigation is a question that has expressly been reserved for another day on no less than four occasions. *Moore* v. *Sims*, 442 U. S. 415, 423, n. 8 (1979); *Trainor* v. *Hernandez*, 431 U. S. 434, 445, n. 8 (1977); *Juidice* v. *Vail*, 430 U. S. 327, 336, n. 13 (1977); *Huffman* v. *Pursue, Ltd.*, *supra*, at 607. Now that the day has arrived with the decision of the Fourth Circuit, I would grant certiorari.

No. 81-6657. BAKER *v.* ZANT. Super. Ct. Ga., Butts County. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 79-6584. IN RE TRAPP ET AL., 456 U. S. 967;

No. 81-155. BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER EDUCATION ET AL. *v.* MISSISSIPPI COUNCIL ON HUMAN RELATIONS ET AL., 456 U. S. 971;

No. 81-1796. COWARD *v.* UNITED STATES, 456 U. S. 946;

No. 81-1814. LAKE CARRIERS' ASSN. ET AL. *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., 456 U. S. 985;

No. 81-5379. SIRECI *v.* FLORIDA, 456 U. S. 984;

No. 81-5562. GILREATH *v.* GEORGIA, 456 U. S. 984;

No. 81-5944. MESSER *v.* FLORIDA, 456 U. S. 984;

No. 81-6285. MATHIS *v.* UNITED STATES, 456 U. S. 992;

No. 81-6371. WADE *v.* UNITED STATES, 456 U. S. 934;

No. 81-6393. AHMED *v.* EIKERENKOETTER, 456 U. S. 979;

No. 81-6440. PASCHAL *v.* FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF EMPLOYMENT SECURITY, ET AL., 456 U. S. 981;

No. 81-6466. WRIGHT *v.* LEIGHTON, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, 456 U. S. 992;

No. 81-6482. CHANEY *v.* WARDEN, MARYLAND PENITENTIARY, 456 U. S. 993;

No. 81-6495. THOMPSON *v.* MORROW ET AL., 456 U. S. 993;

No. 81-6564. COOK *v.* UNITED STATES, 456 U. S. 982;

No. 81-6599. MONTGOMERY *v.* UNITED STATES, 456 U. S. 994; and

No. 81-6667. CAMPBELL *v.* CIVILETTI ET AL., 457 U. S. 1110. Petitions for rehearing denied.

No. 80-1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP., 456 U. S. 556. Motion of American Association of Engineering Societies, Inc., for leave to file a brief as *amicus curiae* denied. Petition for rehearing denied.

No. 79-5932. DOE ET AL. *v.* DELAWARE, 450 U. S. 382 and 451 U. S. 964. Motion for leave to file second petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit for the period September 13, 1982, to September 17, 1982, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

U.S. GOVERNMENT PRINTING OFFICE : 1983 O—379-676 : QL 3

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 458 U. S., Part 2)

ADMIRALTY. See **Constitutional Law.**

ADMISSIONS POLICIES OF UNIVERSITIES BASED ON SEX. See **Constitutional Law.**

ALCOHOLIC BEVERAGES. See **Constitutional Law; Intoxicating Liquors.**

ANTITRUST ACTS. See **Intoxicating Liquors.**

APPLE INDUSTRY. See **Standing to Sue.**

ARTIFACTS FROM SUNKEN VESSELS. See **Constitutional Law.**

AT-LARGE ELECTIONS. See **Constitutional Law.**

BUSING OF STUDENTS. See **Constitutional Law.**

CABLE TELEVISION. See **Constitutional Law.**

CALIFORNIA. See **Constitutional Law; Intoxicating Liquors.**

CHILD CUSTODY. See **Habeas Corpus.**

CONSTITUTIONAL LAW. See also **Habeas Corpus.**

Due process—Regulation of alcoholic beverage importers—Validity of California statute.—A California statute—providing that a licensed importer of alcoholic beverages shall not obtain any brand of distilled spirits unless he is designated as an authorized importer of such brand by brand owner or his agent—does not violate Due Process Clause. Rice v. Norman Williams Co., p. 654.

Eminent domain—Cable television company—Installations on apartment buildings—Taking of landlord's property.—A New York statute requiring a landlord to permit a cable television company to install its facilities upon his property, and prohibiting landlord from demanding payment from company in excess of amount set by a State Commission, constituted a taking of a portion of appellant landlord's property for which she was entitled to just compensation under Fifth and Fourteenth Amendments, where cable television company had installed cables on landlord's apartment building to serve both landlord's tenants and other buildings. Loretto v. Teleprompter Manhattan CATV Corp., p. 419.

Equal protection of the laws—At-large electoral system for county commissioners—Discriminatory intent.—In an action by appellee black citi-

CONSTITUTIONAL LAW—Continued.

zens of Burke County, Ga., alleging that Fourteenth and Fifteenth Amendments were violated by at-large electoral system for county's Board of Commissioners that diluted blacks' voting power, Federal District Court—which held that although state policy behind electoral system was "neutral in origin," policy was being maintained for invidious purposes in violation of appellees' constitutional rights—applied proper standard requiring a detebmination of discriminatory intent; court's findings concerning intentional discrimination were not clearly erroneous, and it properly ordered that county be divided into districts for purposes of electing Commissioners. Rogers v. Lodge, p. 613.

Equal protection of the laws—Regulation of alcoholic beverage importers—Validity of California statute.—A California statute—providing that a licensed importer of alcoholic beverages shall not obtain any brand of distilled spirits unless he is designated as an authorized importer of such brand by brand owner or his agent—does not violate Equal Protection Clause merely because statute discriminates between designated and nondesignated wholesalers. Rice v. Norman Williams Co., p. 654.

Equal protection of the laws—School desegregation—Busing.—Equal Protection Clause was violated by a statewide initiative, passed by electorate, that (1) was drafted to terminate use of mandatory busing for purposes of racial integration of Washington's public schools, (2) prohibited school boards from requiring any student to attend a school other than one nearest or next nearest to student's home, and (3) permitted assignment of a student beyond such schools only for nonintegrative purposes. Washington v. Seattle School Dist. No. 1, p. 457.

Equal protection of the laws—School desegregation—Busing.—Fourteenth Amendment was not violated by amendment to California Constitution providing that state courts shall not order mandatory pupil assignment or busing unless a federal court would be permitted under federal decisional law to do so to remedy a violation of Equal Protection Clause. Crawford v. Los Angeles Board of Ed., p. 527.

Equal protection of the laws—University's admissions policy—Exclusion of males from nursing school.—Policy of petitioner state-supported university of denying otherwise qualified males right to enroll for credit in nursing school violates Equal Protection Clause, and exclusion of males cannot be justified under § 901(a)(5) of Title IX of Education Amendments of 1972, which exempts from § 901(a)'s general prohibition of gender discrimination in federally funded education programs admissions policies of public institutions of undergraduate higher education that traditionally admitted only students of one sex. Mississippi University for Women v. Hogan, p. 718.

States' immunity from suit—Sunken vessel—Ownership of artifacts.—In respondents' *in rem* federal-court action for declaration of title to

CONSTITUTIONAL LAW—Continued.
sunken Spanish galleon that respondents had located off Florida coast and from which respondents had salvaged artifacts under contract with Florida state agency, Court of Appeals' judgment is affirmed insofar as it upheld District Court's determination that Eleventh Amendment did not bar court's seizure of artifacts from state officials' custody, but is reversed insofar as Court of Appeals, in affirming District Court's judgment, adjudicated Florida's claim of ownership of artifacts under salvage contract. Florida Dept. of State v. Treasure Salvors, Inc., p. 670.

COUNTY COMMISSIONERS. See **Constitutional Law.**

CUSTODY OF CHILDREN. See **Habeas Corpus.**

DESEGREGATION OF SCHOOLS. See **Constitutional Law.**

DISCRIMINATION AGAINST BLACKS. See **Constitutional Law.**

DISCRIMINATION AGAINST MEN. See **Constitutional Law.**

DISCRIMINATION AGAINST PUERTO RICANS. See **Standing to Sue.**

DISCRIMINATION BASED ON RACE. See **Constitutional Law; Standing to Sue.**

DISCRIMINATION IN EMPLOYMENT. See **Standing to Sue.**

DISCRIMINATION IN VOTING. See **Constitutional Law.**

DUE PROCESS. See **Constitutional Law.**

EDUCATION AMENDMENTS OF 1972. See **Constitutional Law.**

ELECTIONS. See **Constitutional Law.**

ELEVENTH AMENDMENT. See **Constitutional Law.**

EMINENT DOMAIN. See **Constitutional Law.**

EMPLOYER AND EMPLOYEES. See **Seamen; Standing to Sue.**

EMPLOYMENT DISCRIMINATION. See **Standing to Sue.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law.**

FEDERAL ALCOHOL ADMINISTRATION ACT. See **Intoxicating Liquors.**

FEDERAL-STATE RELATIONS. See **Habeas Corpus; Intoxicating Liquors.**

FIFTEENTH AMENDMENT. See **Constitutional Law.**

FIFTH AMENDMENT. See **Constitutional Law.**

FLORIDA. See **Constitutional Law.**

FOURTEENTH AMENDMENT. See **Constitutional Law.**

GENDER-BASED DISCRIMINATION. See **Constitutional Law.**

GEORGIA. See **Constitutional Law.**

HABEAS CORPUS.

Termination of parental rights—State-court judgment—Federal habeas corpus relief.—Title 28 U. S. C. § 2254(a) does not confer jurisdiction on federal courts to consider petitioner mother's collateral challenge to Pennsylvania state-court judgment terminating mother's parental rights as to her sons whom she had placed in legal custody of respondent county agency, which in turn had placed them in foster homes—mother seeking federal habeas corpus relief for return of her sons to her custody and a declaration of invalidity under Federal Constitution of Pennsylvania statute under which her parental rights were terminated. Lehman v. Lycoming County Children's Services Agency, p. 502.

IMMIGRATION AND NATIONALITY ACT OF 1952. See **Standing to Sue.**

IMPORTERS OF ALCOHOLIC BEVERAGES. See **Constitutional Law; Intoxicating Liquors.**

INTEGRATION OF SCHOOLS. See **Constitutional Law.**

INTOXICATING LIQUORS. See also **Constitutional Law.**

Importers—Authorization to obtain distillers' products—Validity of California statute.—A California statute—providing that a licensed importer of alcoholic beverages shall not obtain any brand of distilled spirits unless he is designated as an authorized importer of such brand by brand owner or his agent—is not invalid on its face as being pre-empted by, and unlawful under, either Sherman Act or § 5(a) of Federal Alcohol Administration Act, which prohibits a distiller or wholesaler from establishing exclusive retail outlets. Rice v. Norman Williams Co., p. 654.

JURISDICTION. See **Habeas Corpus.**

JUST COMPENSATION CLAUSE. See **Constitutional Law.**

LANDLORD'S RIGHT TO COMPENSATION FOR INSTALLATION OF CABLE TELEVISION FACILITIES. See **Constitutional Law.**

LOS ANGELES. See **Constitutional Law.**

MARITIME LAW. See **Seamen.**

MASTER'S LIABILITY FOR SEAMEN'S WAGES. See **Seamen.**

MIGRANT FARMWORKERS. See **Standing to Sue.**

NEW YORK. See **Constitutional Law.**

NURSING SCHOOL'S DISCRIMINATION AGAINST MEN. See **Constitutional Law.**

OWNERSHIP OF ARTIFACTS FROM SUNKEN VESSELS. See **Constitutional Law.**

PARENS PATRIAE SUITS. See **Standing to Sue.**

PARENT AND CHILD. See **Habeas Corpus.**

PENALTY FOR FAILURE TO PAY SEAMEN'S WAGES. See **Seamen.**

PENNSYLVANIA. See **Habeas Corpus.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Intoxicating Liquors.**

PUERTO RICO. See **Standing to Sue.**

RACIAL DISCRIMINATION. See **Constitutional Law; Standing to Sue.**

RIGHT TO VOTE. See **Constitutional Law.**

SALVAGE OF SUNKEN VESSELS. See **Constitutional Law.**

SCHOOL DESEGREGATION. See **Constitutional Law.**

SEAMEN.

Wages—Penalty for delay in payment.—Under 46 U. S. C. § 596—which requires a master or owner of a vessel making coasting or foreign voyages to pay a seaman's unpaid wages within specified periods after his discharge and provides that a master or owner who fails to make payment "without sufficient cause shall pay" seaman a sum equal to two days' pay for each day that payment is delayed—imposition of penalty is mandatory for each day that payment is withheld in violation of § 596, and federal district courts have no discretion to limit period during which penalty is assessed. Griffin v. Oceanic Contractors, Inc., p. 564.

SEATTLE. See **Constitutional Law.**

SEX DISCRIMINATION. See **Constitutional Law.**

SHERMAN ACT. See **Intoxicating Liquors.**

STANDING TO SUE.

Discrimination against Puerto Ricans—Commonwealth's right to sue as parens patriae.—Puerto Rico has *parens patriae* standing to maintain federal-court action against petitioners, persons and companies engaged in apple industry in Virginia, alleging that petitioners had violated federal law by discriminating against Puerto Ricans in favor of foreign laborers with regard to temporary employment of crop pickers. Alfred L. Snapp & Son, Inc. v. Puerto Rico, p. 592.

STATES' IMMUNITY FROM SUIT. See **Constitutional Law.**

STATE UNIVERSITY'S DISCRIMINATION AGAINST MEN. See **Constitutional Law.**

SUNKEN VESSELS. See **Constitutional Law.**

TAKING OF PROPERTY BY INSTALLATION OF CABLE TELEVISION FACILITIES. See **Constitutional Law.**

TELEVISION. See **Constitutional Law.**

TERMINATION OF PARENTAL RIGHTS. See **Habeas Corpus.**

UNIVERSITY'S DISCRIMINATION AGAINST MEN. See **Constitutional Law.**

VESSEL OWNER'S LIABILITY FOR SEAMEN'S WAGES. See **Seamen.**

VESSEL SALVAGE. See **Constitutional Law.**

VOTING RIGHTS. See **Constitutional Law.**

WAGES OF SEAMEN. See **Seamen.**

WAGNER-PEYSER ACT. See **Standing to Sue.**

WASHINGTON. See **Constitutional Law.**

WHOLESALERS OF ALCOHOLIC BEVERAGES. See **Constitutional Law; Intoxicating Liquors.**

WORDS AND PHRASES.

"Person in custody." 28 U. S. C. § 2254(a). Lehman v. Lycoming County Children's Services Agency, p. 502.

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 458 U. S., Parts 1 and 2)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Abbott & Associates, Inc.; Illinois *v.*	1103
ABC Containerline, N.V. *v.* Kingston Shipping Co.	1108
Adams *v.* Howerton	1111
Advance Ross Electronics Corp. *v.* Green	1108
Aetna Ins. Co.; Roy Wilt & Son *v.*	1108
Aetna Ins. Co.; Wilt *v.*	1108
Ahmed *v.* Eikerenkoetter	1116
Akron *v.* Akron Center for Reproductive Health, Inc.	1104
Akron; Akron Center for Reproductive Health, Inc. *v.*	1104
Akron Center for Reproductive Health, Inc. *v.* Akron	1104
Akron Center for Reproductive Health, Inc.; Akron *v.*	1104
Alabama *v.* Graddick	1106
Alfred L. Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Barez	592
American Consulting Assn., Inc.; J & M Design Co. *v.*	1112
American Consulting Assn., Inc.; Spencer *v.*	1112
American Laundry Press Co. *v.* OK NYO Rexrode	1103
American Society of Mechanical Engineers *v.* Hydrolevel Corp.	1116
Andrews *v.* United States	1108
Arthur Treacher's Fish & Chips, Inc. *v.* Horstmyer	1107
Arthur Young & Co. *v.* Summer	1106
ASARCO Inc. *v.* Idaho State Tax Comm'n	307
Ashcroft *v.* National Organization for Women, Inc.	1102

Page

Ashcroft *v.* Planned Parenthood Assn. of Kansas City 1104
Ashcroft; Planned Parenthood Assn. of Kansas City *v.* 1104
Attorney General; Reynolds *v.* 1110
Attorney General; Weigang *v.* 1103
Attorney General of Mich.; Lake Carriers' Assn. *v.* 1116
Attorney General of Mo. *v.* National Organization for Women, Inc. .. 1102
Attorney General of Mo. *v.* Planned Parenthood Assn. of K. C. .. 1104
Attorney General of Mo.; Planned Parenthood Assn. of K. C. *v.* .. 1104
Baker *v.* Zant 1115
Barez; Alfred L. Snapp & Son, Inc. *v.* 613
Bearden *v.* Georgia 1105
Bechtel Power Corp. *v.* Pennsylvania 375
Binkley Co.; Williams Enterprises, Inc. *v.* 1107
Blackburn; Wilkerson *v.* 1105
Board of Ed., Hendrick Hudson Central School Dist. *v.* Rowley .. 176
Board of Ed. of Los Angeles; Crawford *v.* 527
Board of Governors, FRS; Option Advisory Service, Inc. *v.* 1108
Board of Trustees of Insts. of Higher Ed. *v.* Miss. Council on H. R. 1116
Bohemian Distributing Co. *v.* Norman Williams Co. 654
Burlington Northern R. Co.; Tatum *v.* 1111
Bush *v.* Lucas 1104
California; Romano *v.* 1109
California; Villareal *v.* 1109
Campbell *v.* Civiletti 1116
Capps *v.* New Mexico 1107
Casari *v.* First Federal Savings & Loan Assn. of Lincoln 1106
Chaney *v.* Warden 1116
City. See name of city.
Civiletti; Campbell *v.* 1116
Combs *v.* United States 1111
Commissioner; Sutain *v.* 1110
Commissioner of Internal Revenue. See Commissioner.
Commodity Futures Trading Comm'n; Monex International Ltd. *v.* 1103
Commonwealth. See name of Commonwealth.
Connecticut; Frazier *v.* 1112
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania 375
Cook *v.* United States 1116
County. See name of county.
Coward *v.* United States 1116
Crawford *v.* Board of Ed. of Los Angeles 527
Dawson *v.* New York 1112
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 141
Delaware; Doe *v.* 1117
Devine *v.* Illinois 1109

Page

Director of penal or correctional institution. See name or title of director.
District Court of Colo., Seventeenth Judicial Dist. *v.* Marks 1107
District Judge. See U. S. District Judge.
District of Columbia Court of Appeals *v.* Feldman 1105
District of Columbia Court of Appeals; Feldman *v.* 1106
District of Columbia Court of Appeals; Hickey *v.* 1106
Doe *v.* Delaware 1117
Eikerenkoetter; Ahmed *v.* 1116
Electrical Workers; Lord *v.* 1106
Equal Employment Opportunity Comm'n; Ford Motor Co. *v.* 219
Estelle *v.* Moore 1111
Estelle; Norris *v.* 1109
Etlin *v.* Robb 1112
Fannon *v.* Florida 1107
Feldman *v.* District of Columbia Court of Appeals 1106
Feldman; District of Columbia Court of Appeals *v.* 1105
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 141
First Federal Savings & Loan Assn. of Lincoln; Casari *v.* 1106
First Tennessee Bank N. A. Memphis; Smith *v.* 1105
First Tennessee Bank N. A. Memphis; Sullivan *v.* 1105
Florida; Fannon *v.* 1107
Florida; Messer *v.* 1116
Florida; Sireci *v.* 1116
Florida Dept. of Labor and Employment Security; Paschal *v.* 1116
Florida Dept. of State *v.* Treasure Salvors, Inc. 670
Ford *v.* Kentucky 1103
Ford Motor Co. *v.* Equal Employment Opportunity Comm'n 219
Frazier *v.* Connecticut 1112
F. W. Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 354
Gault *v.* United States 1109
General Building Contractors Assn., Inc. *v.* Pennsylvania 375
Georgia; Bearden *v.* 1105
Georgia; Gilreath *v.* 1116
Gillespie; United States *v.* 1111
Gilman Paper Co.; Wilder *v.* 1107
Gilmore *v.* Pennsylvania 1103
Gilreath *v.* Georgia 1116
Glasgow, Inc. *v.* Pennsylvania 375
Glover-El *v.* Illinois 1110
Goldfarb *v.* United States 1108
Governor of Va.; Etlin *v.* 1112
Grace & Co. *v.* Plastic Workers 1105
Graddick; Alabama *v.* 1106

Page
Graham *v.* New York 1101
Green; Advance Ross Electronics Corp. *v.* 1108
Griffin *v.* Oceanic Contractors, Inc. 564
Guice, *In re* 1104
Hampton Roads Shipping Assn. *v.* Longshoremen 1105
Harris *v.* Housewright 1110
Hickey *v.* District of Columbia Court of Appeals 1106
Hogan; Mississippi Univ. for Women *v.* 718
Hogan *v.* Pennsylvania 1110
Holland, *In re* 1104
Hollywood Motor Car Co.; United States *v.* 263
Hondo Boats, Inc. *v.* McCraine 1105
Hood *v.* United States 1109
Horstmyer; Arthur Treacher's Fish & Chips, Inc. *v.* 1107
Housewright; Harris *v.* 1110
Howell *v.* Steffey 1110
Howerton; Adams *v.* 1111
Huey *v.* Teledyne, Inc. 1106
Hydrolevel Corp.; American Society of Mechanical Engineers *v.* 1116
Idaho State Tax Comm'n; ASARCO Inc. *v.* 307
Ieva *v.* Stamford 1106
Ieva; Stamford *v.* 1106
Illinois *v.* Abbott & Associates, Inc. 1103
Illinois; Devine *v.* 1109
Illinois; Glover-El *v.* 1110
Illinois; Thompson *v.* 1109
Ingram *v.* Smith 1110
In re. See name of party.
Insurance Comm'r of N. H.; Sharon Steel Corp. *v.* 1101
International. For labor union, see name of trade.
Iron Arrow Honor Society *v.* Schweiker 1102
Irwin *v.* Montgomery County 1106
Jackson *v.* Leeke 1110
J & M Design Co. *v.* American Consulting Assn., Inc. 1112
Johnson *v.* Johnson 1107
Johnson; Mariscal *v.* 1112
Kelley; Lake Carriers' Assn. *v.* 1116
Kelly *v.* United States 1109
Kentucky; Ford *v.* 1103
Kingston Shipping Co.; ABC Containerline, N.V. *v.* 1108
Kulwiec, *In re* 1104
Labor Union. See name of trade.
Lake Carriers' Assn. *v.* Kelley 1116
Land & Leisure, Inc. *v.* Summer 1106

Page
Leeke; Jackson *v.* 1110
Lehman *v.* Lycoming County Children's Services Agency..... 502
Leighton; Wright *v.* 1116
Local. For labor union, see name of trade.
Lodge; Rogers *v.* 613
Longshoremen; Hampton Roads Shipping Assn. *v.* 1105
Longval; Meachum *v.* 1102
Lord *v.* Electrical Workers 1106
Loretto *v.* Teleprompter Manhattan CATV Corp..... 419
Lucas; Bush *v.* 1104
Lycoming County Children's Services Agency; Lehman *v.* 502
Marathon Pipe Line Co.; Northern Pipeline Construction Co. *v.*... 50
Marathon Pipe Line Co.; United States *v.*..... 50
Marinello *v.* New York City 1108
Mariscal *v.* Johnson..... 1112
Marks; District Court of Colo., Seventeenth Judicial Dist. *v.*..... 1107
Mathis *v.* United States 1116
McCarthy; United States *ex rel.* Miller *v.* 1109
McCraine; Hondo Boats, Inc. *v.* 1105
McGraw-Edison Co. *v.* Sikes..... 1108
Meachum *v.* Longval..... 1102
Messer *v.* Florida 1116
Michigan *v.* Thomas 259
Miller *v.* McCarthy 1109
Miller *v.* New York..... 1102
Miller *v.* United States..... 1110
Mississippi Council on Hum. Rel.; Trustees of Insts. of Higher Ed. *v.* 1116
Mississippi Univ. for Women *v.* Hogan..... 718
Monex International Ltd. *v.* Commodity Futures Trading Comm'n 1103
Montgomery *v.* United States..... 1116
Montgomery County; Irwin *v.* 1106
Moore; Estelle *v.* 1111
Moreau; Oppenheim *v.* 1107
Moreno; Toll *v.* 1
Morris *v.* Slappy 1103
Morrow; Thompson *v.*..... 1116
National Black Police Assn., Inc.; Velde *v.* 591
National Broadcasting Co.; Niemi *v.* 1108
National Organization for Women, Inc.; Ashcroft *v.*..... 1102
Nebeker *v.* United States 1111
Nebraska; South Dakota *v.* 276
New Mexico; Capps *v.* 1107
New Mexico; Stevens *v.*..... 1109
New York; Dawson *v.* 1112

Page
New York; Graham *v.* 1101
New York; Miller *v.* 1102
New York City; Marinello *v.* 1108
New York Shipping Assn. *v.* Waterfront Comm'n of N. Y. Harbor 1101
New York State Chiropractic Assn. *v.* Pireno 119
Niemi *v.* National Broadcasting Co. 1108
Norman Williams Co.; Bohemian Distributing Co. *v.* 654
Norman Williams Co.; Rice *v.* 654
Norman Williams Co.; Wine & Spirits Wholesalers of California *v.* 654
Norris *v.* Estelle 1109
Northern Pipeline Construction Co. *v.* Marathon Pipe Line Co. .. 50
Oceanic Contractors, Inc.; Griffin *v.* 564
Ohio; Scott *v.* 1108
OK NYO Rexrode; American Laundry Press Co. *v.* 1103
Olson *v.* United States 1110
Opperheim *v.* Moreau 1107
Option Advisory Service, Inc. *v.* Board of Governors, FRS 1108
Panzirer; Price Waterhouse *v.* 1105
Panzirer *v.* Wolf 1107
Paschal *v.* Florida Dept. of Labor and Employment Security 1116
Pennsylvania; Bechtel Power Corp. *v.* 375
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 375
Pennsylvania; General Building Contractors Assn., Inc. *v.* 375
Pennsylvania; Gilmore *v.* 1103
Pennsylvania; Glasgow, Inc. *v.* 375
Pennsylvania; Hogan *v.* 1110
Pennsylvania; United Engineers & Constructors, Inc. *v.* 375
Perry *v.* Perry 1109
Pireno; New York State Chiropractic Assn. *v.* 119
Pireno; Union Labor Life Ins. Co. *v.* 119
Planned Parenthood Assn. of Kansas City *v.* Ashcroft 1104
Planned Parenthood Assn. of Kansas City; Ashcroft *v.* 1104
Plante *v.* Scott 1101
Plastic Workers; W. R. Grace & Co. *v.* 1105
Pope *v.* United States 1110
Price Waterhouse *v.* Panzirer 1105
Puerto Rico *ex rel.* Barez; Alfred L. Snapp & Son, Inc. *v.* 592
Quiros *v.* United States 1111
Raymond, James & Associates, Inc. *v.* Summer 1106
Reynolds *v.* Attorney General 1110
Rheaume *v.* Saffell 1106
Rice *v.* Norman Williams Co. 654
Rice *v.* United States 1111

Page
Robb; Etlin *v.* 1112
Rogers *v.* Lodge 613
Romano *v.* California 1109
Rowley; Board of Ed., Hendrick Hudson Central School Dist. *v.* . 176
Roy Wilt & Son *v.* Aetna Ins. Co. 1108
Ruppel *v.* United States 1107
Saffell; Rheaume *v.* 1106
Sanborn *v.* Wolfel 1102
Schweiker; Iron Arrow Honor Society *v.* 1102
Scott *v.* Ohio 1108
Scott; Plante *v.* 1101
Seattle School Dist. No. 1; Washington *v.* 457
Secretary of Health and Human Services; Iron Arrow Honor Soc. *v.* 1102
Secretary of Interior *v.* Western Nuclear, Inc. 1104
Shabazz, *In re* 1104
Sharon Steel Corp. *v.* Insurance Comm'r of N. H. 1101
Sikes; McGraw-Edison Co. *v.* 1108
Simopoulos *v.* Virginia 1104
Sireci *v.* Florida 1116
Slappy; Morris *v.* 1103
Smith *v.* First Tennessee Bank N. A. Memphis 1105
Smith; Ingram *v.* 1110
Smith *v.* United States 1110
Smith; Weigang *v.* 1103
Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Barez 592
Snyder *v.* United States 1111
South Dakota *v.* Nebraska 276
Spencer *v.* American Consulting Assn., Inc. 1112
Spivey; Zant *v.* 1111
Stamford *v.* Ieva 1106
Stamford; Ieva *v.* 1106
State. See name of State.
Steffey; Howell *v.* 1110
Stevens *v.* New Mexico 1109
Stine *v.* United States 1110
Sullivan *v.* First Tennessee Bank N. A. Memphis 1105
Summer; Arthur Young & Co. *v.* 1106
Summer; Land & Leisure, Inc. *v.* 1106
Summer; Raymond, James & Associates, Inc. *v.* 1106
Superintendent of penal or correctional institution. See name or title of superintendent.
Sutain *v.* Commissioner 1110
Tatum *v.* Burlington Northern R. Co. 1111

Page
Taxation and Revenue Dept. of N. M.; F. W. Woolworth Co. *v.* ... 354
Teledyne, Inc.; Huey *v.* ... 1106
Teleprompter Manhattan CATV Corp.; Loretto *v.* ... 419
Thomas; Michigan *v.* ... 259
Thomas; Wedra *v.* ... 1109
Thompson *v.* Illinois ... 1109
Thompson *v.* Morrow ... 1116
Toll *v.* Moreno ... 1
Trapp, *In re* ... 1116
Treacher's Fish & Chips, Inc. *v.* Horstmyer ... 1107
Treasure Salvors, Inc.; Florida Dept. of State *v.* ... 670
Troy *v.* United States ... 1111
Union. For labor union, see name of trade.
Union Labor Life Ins. Co. *v.* Pireno ... 119
United Engineers & Constructors, Inc. *v.* Pennsylvania ... 375
United States. See name of other party.
U. S. District Judge; Wright *v.* ... 1116
United States *ex rel.* Miller *v.* McCarthy ... 1109
Velde *v.* National Black Police Assn., Inc. ... 591
Villareal *v.* California ... 1109
Virginia; Simopoulos *v.* ... 1104
Virginia; Weisen *v.* ... 1107
Wade *v.* United States ... 1116
Warden. See also name of warden.
Warden; Chaney *v.* ... 1116
Washington *v.* Seattle School Dist. No. 1 ... 457
Waterfront Comm'n of New York Harbor; N. Y. Shipping Assn. *v.* 1101
Watt *v.* Western Nuclear, Inc. ... 1104
Wedra *v.* Thomas ... 1109
Weigang, *In re* ... 1103
Weigang *v.* Smith ... 1103
Western Nuclear, Inc.; Watt *v.* ... 1104
Wiesen *v.* Virginia ... 1107
Wilder *v.* Gilman Paper Co. ... 1107
Wilkerson *v.* Blackburn ... 1105
Williams *v.* United States ... 279
Williams Co.; Bohemian Distributing Co. *v.* ... 654
Williams Co.; Rice *v.* ... 654
Williams Co.; Wine & Spirits Wholesalers of California *v.* ... 654
Williams Enterprises, Inc. *v.* Binkley Co. ... 1107
Wilson *v.* Wilson ... 1107
Wilt *v.* Aetna Ins. Co. ... 1108
Wilt & Son *v.* Aetna Ins. Co. ... 1108

Page
Wine & Spirits Wholesalers of California *v.* Norman Williams Co. 654
Wolf; Panzirer *v.* 1107
Wolfel; Sanborn *v.* 1102
Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 354
W. R. Grace & Co. *v.* Plastic Workers 1105
Wright *v.* Leighton 1116
Young & Co. *v.* Summer 1106
Zant; Baker *v.* 1115
Zant *v.* Spivey 1111

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LORETTO v. TELEPROMPTER MANHATTAN CATV CORP. ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 81-244. Argued March 30, 1982—Decided June 30, 1982

A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable. Pursuant to the statute, the Commission ruled that a one-time $1 payment was a reasonable fee. After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants. Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, *inter alia*, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation. Appellee New York City, which had granted the companies an exclusive franchise to provide CATV within certain areas of the city, intervened. Upholding the New York statute, the trial court granted summary judgment to appellees. The Appellate Division of the New York Supreme Court affirmed, and on further appeal the New York Court of Appeals also upheld the statute, holding that it serves the legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting appellant's argument that a physical occupation authorized by government is necessarily a taking, the court further held that the statute did not have an excessive economic impact upon appellant when measured against her aggregate property rights, did not interfere with any reasonable investment-backed expectations, and accordingly did not work a taking of appellant's property.

Held: The New York statute works a taking of a portion of appellant's property for which she is entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. Pp. 425–441.

(a) When the "character of the governmental action," *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124, is a permanent physical occupation of real property, there is a taking to the extent

of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Pp. 426–435.

(b) To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion. And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Pp. 435–438.

(c) Here, the cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall. There is no constitutional difference between a crossover and noncrossover installation, since portions of the installation necessary for both types of installation permanently appropriated appellant's property. The fact that the New York statute applies only to buildings used as rental property does not make it simply a regulation of the use of real property. Physical occupation of one type of property but not another is no less a physical occupation. The New York statute does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and thus cannot be construed as merely granting a tenant a property right as an appurtenance to his leasehold. Application of the physical occupation rule in this case will not have dire consequences for the government's power to adjust landlord-tenant relationships, since it in no way alters the usual analysis governing a State's power to require landlords to comply with building codes. Pp. 438–440.

53 N. Y. 2d 124, 423 N. E. 2d 320, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post*, p. 442.

Michael S. Gruen argued the cause and filed briefs for appellant.

Erwin N. Griswold argued the cause for appellees. With him on the brief for appellees Teleprompter Manhattan

CATV Corp. et al. was *Michael Lesch*. *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner* filed a brief for appellee City of New York.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N. Y. Exec. Law § 828(1) (McKinney Supp. 1981–1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corporation and Teleprompter Manhattan CATV (collectively Teleprompter)[1] permission to install a cable on the building and the exclusive privilege of furnishing cable

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**Michael D. Botwin* and *James J. Bierbower* filed a brief for the National Satellite Cable Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *pro se*, *Shirley Adelson Siegel*, Solicitor General, and *Lawrence J. Logan*, Assistant Attorney General, for the Attorney General of New York; by *Brenda L. Fox*, *James H. Ewalt*, and *Robert St. John Roper* for the National Cable Television Association, Inc.; and by *Stuart Robinowitz* and *Richard A. Rosen* for the New York State Cable Television Association.

[1] Teleprompter Manhattan CATV was formerly a subsidiary, and is now a division, of Teleprompter Corp.

television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

> "On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." *Id.*, at 135, 423 N. E. 2d, at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"—cable lines extending from one building to another in order to reach a new group of tenants.[2] Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line—*i. e.*, one that provided CATV service to appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

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[2] The Court of Appeals defined a "crossover" more comprehensively as occurring:

"[W]hen (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV service, for the purpose of providing service to an adjoining or adjacent building." 53 N. Y. 2d, at 133, n. 6, 423 N. E. 2d, at 323, n. 6.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."[3] The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment

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[3] New York Exec. Law § 828 (McKinney Supp. 1981–1982) provides in part:

"1. No landlord shall

"a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

"i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

"ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

"iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

"b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

"c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not."

is the normal fee to which a landlord is entitled. *In the Matter of Implementation of Section 828 of the Executive Law*, No. 90004, Statement of General Policy (New York State Commission on Cable Television, Jan. 15, 1976) (Statement of General Policy), App. 51–52; Clarification of General Policy (Aug. 27, 1976), App. 68–69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." Statement of General Policy, App. 52.

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief.[4] Appellee the City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of § 828 in both crossover and noncrossover situations. 98 Misc. 2d 944, 415 N. Y. S. 2d 180 (1979). The Appellate Division affirmed without opinion. 73 App. Div. 2d 849, 422 N. Y. S. 2d 550 (1979).

On appeal, the Court of Appeals, over dissent, upheld the statute. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to

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[4] Class-action status was granted in accordance with appellant's request, except that owners of single family dwellings on which a CATV component had been placed were excluded. Notice to the class has been postponed, however, by stipulation.

request payment from the CATV company under § 828(1)(b), at a level determined by the State Cable Commission, only for noncrossovers. The court then ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the $1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the $1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, affords just compensation. We noted probable jurisdiction. 454 U. S. 938 (1981).

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," 53 N. Y. 2d, at 143–144, 423 N. E. 2d, at 329, and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See *Penn Central Transporta-*

tion Co. v. *New York City*, 438 U. S. 104, 127–128 (1978); *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 193 (1928). We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co.* v. *New York City*, *supra*, the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." *Id.*, at 124. But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Ibid.* (citation omitted).

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.[5] As early as 1872, in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635 (1879), the Court held that the city's construc-

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[5] Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:

"At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in original; footnotes omitted).

See also 2 J. Sackman, Nichols' Law of Eminent Domain 6–50, 6–51 (rev. 3d ed. 1980); L. Tribe, American Constitutional Law 460 (1978).

For historical discussions, see 53 N. Y. 2d, at 157–158, 423 N. E. 2d, at 337–338 (Cooke, C. J., dissenting); F. Bosselman, D. Callies, & J. Banta, The Taking Issue 51 (1973); Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 600–601 (1972); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 S. Ct. Rev. 63, 82; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 225 (1931).

tion of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e. g.*, *Pumpelly*, *supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot." 99 U. S., at 642.

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation. See *United States* v. *Lynah*, 188 U. S. 445, 468–470 (1903); *Bedford* v. *United States*, 192 U. S. 217, 225 (1904); *United States* v. *Cress*, 243 U. S. 316, 327–328 (1917); *Sanguinetti* v. *United States*, 264 U. S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 809–810 (1950).

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets. The Court reasoned:

> "The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation

thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. . . . *But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.* It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public. . . .

. . . . .

". . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." *Id.*, at 98–99, 101–102 (emphasis added).[6]

Similarly, in *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that

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[6] The City of New York objects that this case only involved a city's right to charge for use of its streets, and not the power of eminent domain; the city could have excluded the company from any use of its streets. But the physical occupation principle upon which the right to compensation was based has often been cited as authority in eminent domain cases. See, *e. g.*, *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 566–567 (1904); *California* v. *United States*, 395 F. 2d 261, 263, n. 4 (CA9 1968). ' Also, the Court squarely held that insofar as the company relied on a federal statute authorizing its use of post roads, an appropriation of state property would require compensation. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S., at 101.

the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land. See, *e. g.*, *Lovett* v. *West Va. Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196 (1909); *Southwestern Bell Telephone Co.* v. *Webb*, 393 S. W. 2d 117, 121 (Mo. App. 1965). Cf. *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (1922). See generally 2 J. Sackman, Nichols' Law of Eminent Domain § 6.21 (rev. 3d ed. 1980).[7]

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In *United States* v. *Causby*, 328 U. S. 256 (1946), the Court ruled that frequent flights immediately above a landowner's property constituted a taking, comparing such overflights to the quintessential form of a taking:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.*, at 261 (footnote omitted).

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[7] Early commentators viewed a physical occupation of real property as the quintessential deprivation of property. See, *e. g.*, 1 W. Blackstone, Commentaries *139; J. Lewis, A Treatise on the Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property, except in case of necessity . . . , either upon, above or below the surface, and whether temporary or permanent, is a *taking:* as by constructing a ditch through it, passing under it by a tunnel, laying gas, water or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire" (footnote omitted; emphasis in original)); 1 P. Nichols, The Law of Eminent Domain 282 (2d ed. 1917).

As the Court further explained,

> "We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.*, at 264–265.

The Court concluded that the damages to the respondents "were not merely consequential. They were the product of a direct invasion of respondents' domain." *Id.*, at 265–266. See also *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962).

Two wartime takings cases are also instructive. In *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951), the Court unanimously held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking, though members of the Court differed over which losses suffered during the period of Government control were compensable. The plurality had little difficulty concluding that because there had been an "actual taking of possession and control," the taking was as clear as if the Government held full title and ownership. *Id.*, at 116 (plurality opinion of Black, J., with whom Frankfurter, Douglas, and Jackson, JJ., joined; no other Justice challenged this portion of the opinion). In *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958), by contrast, the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations for the purpose of conserving equipment and manpower for use in mines more essential to the war effort. Over dissenting Justice Harlan's complaint that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States," *id.*, at 181, the Court reasoned that "the Government did not oc-

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cupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." *Id.*, at 165–166. The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war.[8] Cf. *YMCA* v. *United States*, 395 U. S. 85, 92 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation").

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

Penn Central Transportation Co. v. *New York City*, as noted above, contains one of the most complete discussions of the Takings Clause. The Court explained that resolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. 438 U. S., at 124. The opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.[9]

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[8] Indeed, although dissenting Justice Harlan would have treated the restriction as if it were a physical occupation, it is significant that he relied on physical appropriation as the paradigm of a taking. See *United States* v. *Central Eureka Mining Co.*, 357 U. S., at 181, 183–184.

[9] The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central*'s reference to a physical invasion "by government," 438 U. S., at 124, and argue that a similar invasion by a private

In *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), the Court held that the Government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on Government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*, at 176. The Court explained:

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation. See *United States* v. *Causby*, 328 U. S. 256, 265 (1946); *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1922)." *Id.*, at 180 (emphasis added).

Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character.[10]

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party should be treated differently. We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. See, *e. g.*, *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (1872). *Penn Central* simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred. 438 U. S., at 124, 128.

[10] See also *Andrus* v. *Allard*, 444 U. S. 51 (1979). That case held that the prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts. "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, it is crucial that appellees retain the rights

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Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. The Court emphasized that the State Constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions. Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.*, at 84.[11]

In short, when the "character of the governmental action," *Penn Central*, 438 U. S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to

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to possess and transport their property, and to donate or devise the protected birds. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.*, at 65–66.

[11] Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, *e. g.*, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), is similarly misplaced. As we recently explained:

"[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Central Hardware Co.*, *supra*, at 545.

whether the action achieves an important public benefit or has only minimal economic impact on the owner.

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, cf. *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979), the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.[12] See *Kaiser Aetna*,

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[12] The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. As *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

The dissent objects that the distinction between a permanent physical occupation and a temporary invasion will not always be clear. *Post*, at 448. This objection is overstated, and in any event is irrelevant to the critical point that a permanent physical occupation *is* unquestionably a taking. In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis.

444 U. S., at 179–180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus* v. *Allard*, *supra*, at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As Part II–A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion. See n. 19, *infra*.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occu-

pied.[13] Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.[14]

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.[15] For that reason, moreover, there is

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[13] In *United States* v. *Causby*, 328 U. S. 256 (1946), the Court approvingly cited *Butler* v. *Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906), holding that ejectment would lie where a telephone wire was strung across the plaintiff's property without touching the soil. The Court quoted the following language:

"'[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.'" 328 U. S., at 265, n. 10, quoting *Butler* v. *Frontier Telephone Co.*, *supra*, at 491–492, 79 N. E. 718.

[14] Although the City of New York has granted an exclusive franchise to Teleprompter, it is not required to do so under state law, see N. Y. Exec. Law § 811 *et seq.* (McKinney Supp. 1981–1982), and future changes in technology may cause the city to reconsider its decision. Indeed, at present some communities apparently grant nonexclusive franchises. Brief for National Satellite Cable Association et al. as *Amici Curiae* 21.

[15] In this case, the Court of Appeals noted testimony preceding the enactment of § 828 that the landlord's interest in excluding cable installation "consists entirely of insisting that some negligible unoccupied space remain unoccupied." 53 N. Y. 2d, at 141, 423 N. E. 2d, at 328 (emphasis omitted). The State Cable Commission referred to the same testimony in establishing a $1 presumptive award. Statement of General Policy, App. 48.

A number of the dissent's arguments—that § 828 "likely increases both the building's resale value and its attractiveness on the rental market,"

less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.[16]

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law applies only to buildings used as rental property, and draws the

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post, at 452, and that appellant might have no alternative use for the cable-occupied space, *post*, at 453–454—may also be relevant to the amount of compensation due. It should be noted, however, that the first argument is speculative and is contradicted by appellant's testimony that she and "the whole block" would be able to sell their buildings for a higher price absent the installation. App. 100.

[16] It is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a "landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States* v. *Causby*, *supra*, at 264.

The dissent asserts that a taking of about one-eighth of a cubic foot of space is not of constitutional significance. *Post*, at 443. The assertion appears to be factually incorrect, since it ignores the two large silver boxes that appellant identified as part of the installation. App. 90; Loretto Affidavit in Support of Motion for Summary Judgment (Apr. 21, 1978), Appellants' Appendix in No. 8300/76 (N. Y. App.), p. 77. Although the record does not reveal their size, appellant states that they are approximately 18" x 12" x 6", Brief for Appellant 6 n.*, and appellees do not dispute this statement. The displaced volume, then, is in excess of 1½ cubic feet. In any event, these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.

conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.[17]

Teleprompter also asserts the related argument that the State has effectively granted a tenant the property right to have a CATV installation placed on the roof of his building, as an appurtenance to the tenant's leasehold. The short answer is that § 828(1)(a) does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and the lower courts did not rest their decisions on this ground.[18] Of course, Teleprompter, not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

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[17] It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

[18] We also decline to hazard an opinion as to the respective rights of the landlord and tenant under state law *prior* to enactment of § 828 to use the space occupied by the cable installation, an issue over which the parties sharply disagree.

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, *e. g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946) (fire regulation); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) (rent control); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922) (emergency housing law); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978).[19]

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[19] If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is, contrary to the dissent, not simply "incidental," *post*, at 450; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The *landlord* would de-

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.[20]

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cide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. App. 83, 95–96, 104. Appellant, who resides in her building, further testified that the cable installation is "ugly." *Id.*, at 99. Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable burden.

[20] In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE WHITE join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[t]here is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594 (1962).[1]

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Ante*, at 426. To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors that a court might ordinarily examine." *Ante*, at 432.

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." Sax, Takings and the Police Power, 74 Yale L. J. 36, 37

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[1] See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses"); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions").

(1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. Despite its concession that "States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails," *ante*, at 440, the Court uses its rule to undercut a carefully considered legislative judgment concerning landlord-tenant relationships. I therefore respectfully dissent.

I

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4" x 4" x 4" metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building. When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred.[2] Appellant did not bring this action until about five years later, demanding 5% of appellee Teleprompter's gross revenues from her building, and claiming that the operation of N. Y. Exec. Law § 828 (McKinney

[2] In January 1968, appellee Teleprompter signed a 5-year installation agreement with the building's previous owner in exchange for a flat fee of $50. Appellee installed both the 30-foot main cable and its 4- to 6-foot "crossover" extension in June 1970. For two years after taking possession of the building and the appurtenant equipment, appellant did not object to the cable's presence. Indeed, despite numerous inspections, appellant had never even noticed the equipment until Teleprompter first began to provide cable television service to one of her tenants. 53 N. Y. 2d 124, 134–135, 423 N. E. 2d 320, 324 (1981). Nor did appellant thereafter ever specifically ask Teleprompter to remove the components from her building. App. 107, 108, 110.

Although the Court alludes to the presence of "two large silver boxes" on appellant's roof, *ante*, at 438, n. 16, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record.

Supp. 1981–1982) "took" her property. The New York Supreme Court, the Appellate Division, and the New York Court of Appeals all rejected that claim, upholding § 828 as a valid exercise of the State's police power.

The Court of Appeals held that

> "the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain TV service in their respective apartments." 53 N. Y. 2d 124, 153, 423 N. E. 2d 320, 335 (1981).

In so ruling, the court applied the multifactor balancing test prescribed by this Court's recent Takings Clause decisions. Those decisions teach that takings questions should be resolved through "essentially ad hoc, factual inquiries," *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979), into "such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980). See 53 N. Y. 2d, at 144–151, 423 N. E. 2d, at 330–334.

The Court of Appeals found, first, that § 828 represented a reasoned legislative effort to arbitrate between the interests of tenants and landlords and to encourage development of an important educational and communications medium.[3] *Id.*, at

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[3] The court found that the state legislature had enacted § 828 to "prohibit gouging and arbitrary action" by "landlords [who] in many instances have imposed extremely onerous fees and conditions on cable access to their buildings." 53 N. Y. 2d, at 141, 423 N. E. 2d, at 328, citing testimony of Joseph C. Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee considering the CATV bill.

Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion upon the landlord's interest, which "consists entirely of insisting that

143–145, 423 N. E. 2d, at 329–330. Moreover, under *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 83–84, the fact that § 828 authorized Teleprompter to make a minor physical intrusion upon appellant's property was in no way determinative of the takings question. 53 N. Y. 2d, at 146–147, 423 N. E. 2d, at 331.[4]

Second, the court concluded that the statute's economic impact on appellant was *de minimis* because § 828 did not affect the fair return on her property. 53 N. Y. 2d, at 148–150, 423 N. E. 2d, at 332–333. Third, the statute did not interfere with appellant's reasonable investment-backed expectations. *Id.*, at 150–151, 423 N. E. 2d, at 333–334. When appellant purchased the building, she was unaware of the existence of the cable. See n. 2, *supra*. Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive. 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336.

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some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." *Ibid.*, citing Regulation of Cable Television by the State of New York, Report to the New York Public Service Commission by Commissioner William K. Jones 207 (1970).

[4] Section 828 carefully regulates the cable television company's physical intrusion onto the landlord's property. If the landlord requests, the company must conform its installations "to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants." N. Y. Exec. Law § 828(1)(a)(i) (McKinney Supp. 1981–1982). Furthermore, the company must "agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities." § 828(1)(a)(iii). Finally, the statute authorizes the landlord to require either "the cable television company or the tenant or a combination thereof [to] bear the entire cost of the installation, operation or removal" of any equipment. § 828(1)(a)(ii).

II

Given that the New York Court of Appeals' straightforward application of this Court's balancing test yielded a finding of no taking, it becomes clear why the Court now constructs a *per se* rule to reverse. The Court can escape the result dictated by our recent takings cases only by resorting to bygone precedents and arguing that "permanent physical occupations" somehow differ qualitatively from all other forms of government regulation.

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted, see *ante*, at 426–435, and jurisprudentially sound, see *ante*, at 435–438. I disagree in both respects. The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided.[5] But if, by chance, they

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[5] The Court properly acknowledges that none of our recent takings decisions have adopted a *per se* test for either temporary physical invasions or permanent physical occupations. See *ante*, at 432–435, and 435, n. 12. While the Court relies on historical dicta to support its *per se* rule, the only holdings it cites fall into two categories: a number of cases involving flooding, *ante*, at 427–428, and *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), cited *ante*, at 428.

In 1950, the Court noted that the first line of cases stands for "the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused," and that those rulings had already "been limited by later decisions in some respects." *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 809–810. Even at the time of its decision, *St. Louis* v. *Western Union Telegraph Co.* addressed only the question "[w]hether the city has power to collect rental for the use of streets and public places" when a private company seeks exclusive use of land whose "use is common to all members of the public, and . . . [is] open equally to citizens of other States with those of the State in which the street is situate." 148 U. S., at 98–99. On its face, that issue is distinct from the question here: whether appellant may extract from Teleprompter a fee for the continuing use of her roof space above and beyond the fee set by statute, namely, "any amount which the commission shall, by regulation, determine to be reasonable." N. Y. Exec. Law § 828(1)(b) (McKinney Supp. 1982).

have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights," *ante*, at 435.

A

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings. Nevertheless, as the Court recognizes, it has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." *Ante*, at 426. See, *e. g.*, *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124–125 (1978); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today—between "temporary physical invasions" and "perma-

nent physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. *Ante*, at 426. Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," *ante*, at 435, n. 12, the Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." *Ante*, at 439. This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Ante*, at 440. Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship.[6] If § 828 authorizes a "permanent" occupation,

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[6] In my view, the fact that § 828 incidentally protects so-called "crossover" wires that do not currently serve tenants, see *ante*, at 422, n. 2, does not affect § 828's fundamental character as a piece of landlord-tenant legislation. As the Court recognizes, *ante*, at 422, crossovers are crucial links in the cable "highway," and represent the simplest and most economical

and thus works a taking "without regard to the public interests that it may serve," then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety.[7]

The Court denies that its theory invalidates these statutes, because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party." *Ante*, at 440. But surely this factor cannot be determinative, since the Court simultaneously recognizes that tem-

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way to provide service to tenants in a group of buildings in close proximity. Like the Court, I find "no constitutional difference between a crossover and a noncrossover installation," *ante*, at 438. Even assuming *arguendo* that the crossover extension in this case works a taking, I would be prepared to hold that the incremental governmental intrusion caused by that 4- to 6-foot wire, which occupies the cubic volume of a child's building block, is a *de minimis* deprivation entitled to no compensation.

[7] See, *e. g.*, N. Y. Mult. Dwell. Law § 35 (McKinney 1974) (requiring entrance doors and lights); § 36 (windows and skylights for public halls and stairs); § 50–a (Supp. 1982) (locks and intercommunication systems); § 50–c (lobby attendants); § 51–a (peepholes); § 51–b (elevator mirrors); § 53 (fire escapes); § 57 (bells and mail receptacles); § 67(3) (fire sprinklers). See also *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946) (upholding constitutionality of New York fire sprinkler provision).

These statutes specify in far greater detail than § 828 what types of physical facilities a New York landlord must provide his tenants and where he must provide them. See, *e. g.*, N. Y. Mult. Dwell. Law § 75 (McKinney 1974) (owners of multiple dwellings must provide "proper appliances to receive and distribute an adequate supply of water," including "a proper sink with running water and with a two-inch waste and trap"); § 35 (owners of multiple dwellings with frontage exceeding 22 feet must provide "at least two lights, one at each side of the entrance way, with an aggregate illumination of one hundred fifty watts or equivalent illumination"); § 50–a(2) (Supp. 1981–1982) (owners of Class A multiple dwellings must provide intercommunication system "located at an automatic self-locking door giving public access to the main entrance hall or lobby").

Apartment building rooftops are not exempted. See § 62 (landlords must place parapet walls and guardrails on their roofs "three feet six inches or more in height above the level of such area").

porary invasions by third parties are not subject to a *per se* rule. Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation. Cf. *ante*, at 440, and n. 19. If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically, see n. 4, *supra*, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court's test, the "third party" problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula—a "physical touching" by a stranger—was satisfied and that § 828 therefore worked a taking.* Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an individual's property has been "physically" touched. It was precisely to avoid "permit[ting] technicalities of form to dictate consequences of substance," *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 181 (1958) (Harlan, J., dissenting), that the Court abandoned a "physical contacts" test in the first place.

Third, the Court's talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "tempo-

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* Indeed, appellant's counsel made precisely this claim at oral argument. Urging the rule which the Court now adopts, appellant's counsel suggested that a taking would result even if appellant owned the cable. "[T]he precise location of the easement [taken by Teleprompter changes] from the surface of the roof to inside the wire. . . . [T]he wire itself is owned by the landlord, but the cable company has the right to pass its signal through the wire without compensation to the landlord, for its commercial benefit." Tr. of Oral Arg. 15.

rary" physical invasions of considerable economic magnitude. See, *e. g.*, *Block* v. *Hirsh*, 256 U. S. 135 (1921) (statute permitting tenants to remain in physical possession of their apartments for two years after the termination of their leases). Moreover, precedents record numerous other "temporary" officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable. See, *e. g.*, *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980) (leafletting and demonstrating in busy shopping center); *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979) (public easement of passage to private pond); *United States* v. *Causby*, 328 U. S. 256 (1946) (noisy airplane flights over private land). While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. *ante*, at 430–431, 432–435.

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *ante*, at 434–435, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule. Cf. n. 8, *supra*. I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings claims into today's "set formula."

B

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property. See *ante*, at

435–438. In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation.

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale. But that claim dissolves after a moment's reflection. If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes. In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist.

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless. As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market.[9]

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings. As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to . . . provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." *Ante*, at 440. Like § 828, these provisions merely ensure tenants access to services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service. See n. 7, *supra*. A landlord's dispositional rights are affected no more ad-

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[9] In her pretrial deposition, appellant conceded not only that owners of other apartment buildings thought that the cable's presence had enhanced the market value of their buildings, App. 102–103, but also that her own tenants would have been upset if the cable connection had been removed. *Id.*, at 107, 108, 110.

versely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions.

The Court also suggests that § 828 unconstitutionally alters appellant's right to control the *use* of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. See Tr. of Oral Arg. 42–43, citing N. Y. Mult. Dwell. Law § 57 (McKinney 1974). If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner's use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property.[10] Appellant freely admitted that she would have

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[10] For this reason, the Court provides no support for its *per se* rule by asserting that the State could not require landlords, without compensation, "to permit third parties to install swimming pools," *ante*, at 436, or vending and washing machines, *ante*, at 439, n. 17, for the convenience of tenants. Presumably, these more intrusive government regulations would create difficult takings problems even under our traditional balancing approach. Depending on the character of the governmental action, its economic impact, and the degree to which it interfered with an owner's reasonable investment-backed expectations, among other things, the Court's hypothetical examples might or might not constitute takings. These examples

had no other use for the cable-occupied space, were Teleprompter's equipment not on her building. See App. 97 (Deposition of Jean A. Loretto).

The Court's third and final argument is that § 828 has deprived appellant of her "power to exclude the occupier from possession and use of the space" occupied by the cable. *Ante*, at 435. This argument has two flaws. First, it unjustifiably assumes that appellant's tenants have no countervailing property interest in permitting Teleprompter to use that space.[11] Second, it suggests that the New York Legislature may not exercise its police power to affect appellant's common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space. But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests. See *Munn* v. *Illinois*, 94 U. S. 113, 134 (1877) ("A person has no property, no vested interest, in any rule of the common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance"); *United States* v. *Causby*, 328 U. S., at 260–261 (In the modern world, "[c]ommon sense revolts at the idea" that legislatures cannot alter common-law ownership rights).

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hardly prove, however, that a permanent physical occupation that works a *de minimis* interference with a private property interest is a taking *per se*.

[11] It is far from clear that, under New York law, appellant's tenants would lack all property interests in the few square inches on the exterior of the building to which Teleprompter's cable and hardware attach. Under modern landlord-tenant law, a residential tenancy is not merely a possessory interest in specified space, but also a contract for the provision of a package of services and facilities necessary and appurtenant to that space. See R. Schoshinski, American Law of Landlord and Tenant § 3:14 (1980). A modern urban tenant's leasehold often includes not only contractual, but also statutory, rights, including the rights to an implied warranty of habitability, rent control, and such services as the landlord is obliged by statute to provide. Cf. n. 7, *supra*.

As the Court of Appeals recognized, § 828 merely deprives appellant of a common-law trespass action against Teleprompter, but only for as long as she uses her building for rental purposes, and as long as Teleprompter maintains its equipment in compliance with the statute. JUSTICE MARSHALL recently and most aptly observed:

> "[Appellant's] claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State . . . . If accepted, that claim would represent a return to the era of *Lochner* v. *New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 93 (concurring opinion).

III

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. See Brief for New York State Cable Television Association as *Amicus Curiae* 6–7 (about 25% of American homes with televisions—approximately 20 million families—currently subscribe to cable television, with the penetration rate expected to double by 1990). The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. See nn. 3 and 4, *supra*. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination.[12] Like Justice Black, I believe that "the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States* v. *Causby*, 328 U. S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

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[12] Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses. See *ante*, at 441. Since the State Cable Television Commission's regulations permit higher than nominal awards if a landlord makes "a special showing of greater damages," App. 52, the concurring opinion in the New York Court of Appeals found that the statute awards just compensation. See 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336 ("[I]t is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury"). If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment.

WASHINGTON ET AL. v. SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-9. Argued March 22, 1982—Decided June 30, 1982

In 1978, appellee Seattle School District No. 1 (District) enacted the so-called Seattle Plan for desegregation of its schools. The plan makes extensive use of mandatory busing. Subsequently, a statewide initiative (Initiative 350) was drafted to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington. The initiative prohibits school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. It sets out a number of broad exceptions to this requirement, however: a student may be assigned beyond his neighborhood school if he requires special educational programs, or if the nearest or next nearest school is overcrowded or unsafe, or if it lacks necessary physical facilities. These exceptions permit school boards to assign students away from their neighborhood schools for virtually all of the non-integrative purposes required by their educational policies. After the initiative was passed at the November 1978 general election, the District, together with two other districts, brought suit against appellant State in Federal District Court, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court held the initiative unconstitutional on the ground, *inter alia*, that it established an impermissible racial classification in violation of *Hunter* v. *Erickson*, 393 U. S. 385, and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY), summarily aff'd, 402 U. S. 935, "because it permits busing for non-racial reasons but forbids it for racial reasons." The court permanently enjoined implementation of the initiative's restrictions. The Court of Appeals affirmed.

Held: Initiative 350 violates the Equal Protection Clause. Pp. 467–487.

(a) When a State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process, its action "places *special* burdens on racial minorities within the governmental process," *Hunter* v. *Erickson*, 393 U. S., at 391, thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395. Such a structuring of the po-

litical process is "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391. Pp. 467–470.

(b) Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle," *Hunter* v. *Erickson*, 393 U. S., at 395, but instead uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities. The initiative worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was committed to the local board's discretion. After passage of Initiative 350, authority over all but one of these areas remained in the local board's hands. By placing power over desegregative busing at the state level, the initiative thus "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F. Supp., at 718. And Initiative 350 works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools by lodging decisionmaking authority over the question at a new and remote level of government. This makes the enactment of racially beneficial legislation uniquely difficult, and therefore imposes direct and undeniable burdens on minority interests. Pp. 470–484.

(c) Contrary to appellants' suggestion, *Hunter* v. *Erickson* was not effectively overruled by *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252. While *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, *Hunter*—like this case—involved an attempt to use explicitly racial criteria to define the community's decisionmaking structure. In so doing, the legislation at issue there directly and invidiously curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4. *Hunter*'s principle—that meaningful and unjustified distinctions based on race are impermissible—is still vital. Pp. 484–487.

633 F. 2d 1338, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 488.

Kenneth O. Eikenberry, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Malachy R. Murphy*, Deputy Attorney General, *Thomas F. Carr*, Senior Assistant Attorney General, and *Timothy R. Malone*, Assistant Attorney General.

Michael W. Hoge argued the cause for appellees. With him on the brief for appellees Seattle School District No. 1 et al. were *Camden M. Hall* and *David J. Burman*. *Phillip L. Burton*, *Frederick L. Noland*, *Thomas A. Lemly*, and *William H. Neukom* filed a brief for appellees American Civil Liberties Union et al. *Ladd Leavens* filed a brief for appellees East Pasco Neighborhood Council et al.*

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

I

A

Seattle School District No. 1 (District), which is largely coterminous with the city of Seattle, Wash., is charged by state law with administering 112 schools and educating approximately 54,000 public school students. About 37% of these

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**Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, and *Richard G. Wilkins* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Henry M. Aronson* for Grant L. Anderson et al.; by *Palmer Smith* for the League of Women Voters of Seattle et al.; by *Jack Greenberg*, *James M. Nabrit III*, and *Bill Lann Lee* for the NAACP Legal Defense and Educational Fund; and by *Judith A. Lonnquist* for the Washington Education Association.

Briefs of *amici curiae* were filed by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon* for the National School Boards Association; and by *William J. Bender* for the Seattle Chapter Japanese American Citizens League.

children are of Negro, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle have created racially imbalanced schools, the District historically has taken steps to alleviate the isolation of minority students; since 1963, it has permitted students to transfer from their neighborhood schools to help cure the District's racial imbalance.[1]

Despite these efforts, the District in 1977 came under increasing pressure to accelerate its program of desegregation.[2] In response, the District's Board of Directors (School Board) enacted a resolution defining "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body." 473 F. Supp. 996, 1006 (WD Wash. 1979). The District resolved to eliminate all such imbalance from the Seattle public schools by the beginning of the 1979–1980 academic year.[3]

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[1] In 1971, the District implemented a program of mandatory reassignments to integrate certain of its middle schools. This prompted an attempt to recall four School Board members who had voted for the program. That attempt narrowly failed. See 473 F. Supp. 996, 1006 (WD Wash. 1979).

[2] Several community organizations threatened legal action if the District did not initiate a more effective integration effort, while the Mayor of Seattle and a number of community leaders, by letter dated May 20, 1977, urged the District to adopt "a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools prior to a Court ordered and mandated desegregation remedy." App. 139.

[3] The District Court found that the actions of the School Board were prompted by its members' "desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race." 473 F. Supp., at 1007.

In September 1977, the District implemented a "magnet" program, designed to alleviate racial isolation by enhancing educational offerings at certain schools, thereby encouraging voluntary student transfers. A "disproportionate amount of the overall movement" inspired by the program was undertaken by Negro students, however, *ibid.*, and racial imbalance in the Seattle schools was found to have actually increased between the 1970–1971 and 1977–1978 academic years. The District therefore concluded that mandatory reassignment of students was necessary if racial isolation in its schools was to be eliminated. Accordingly, in March 1978, the School Board enacted the so-called "Seattle Plan" for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by "pairing" and "triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by "feeding" them from the desegregated elementary schools. App. 142–143. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes. Brief for Appellee Seattle School District No. 1, p. 5.

The desegregation program, implemented in the 1978–1979 academic year, apparently was effective: the District Court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced." 473 F. Supp., at 1007.

B

In late 1977, shortly before the Seattle Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for

Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its founders' opposition to The Seattle Plan," *ibid.*, attempted to enjoin implementation of the Board's mandatory desegregation program through litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration.[4] This proposal, known as Initiative 350, provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student . . . ." See Wash. Rev. Code § 28A.26.010 (1981).[5] The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." See *ibid.* Initiative 350 also specifically proscribed use of seven enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of

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[4] Washington's Constitution reserves to the people of the State "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." Wash. Const., Art. II, § 1. Such initiatives are placed on the ballot upon the petition of 8% of the State's voters registered and voting for governor at the last preceding regular gubernatorial election. § 1(a). If passed by the electorate, an initiative may not be repealed by the state legislature for two years, although it may be amended within two years by a vote of two-thirds of each house of the legislature. § 41. See generally Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175 (1979).

[5] The text of Initiative 350 is now codified as Wash. Rev. Code §§ 28A.26.010–28A.26.900 (1981).

"feeder" schools—that are a part of the Seattle Plan. See § 28A.26.030. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." See § 28A.26.060.

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." 473 F. Supp., at 1009. At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," *id.*, at 1008, and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." *Id.*, at 1010.[6] In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," *id.*, at 1008, and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration. See *id.*, at 1009.

On November 8, 1978, two months after the Seattle Plan went into effect, Initiative 350 passed by a substantial margin, drawing almost 66% of the vote statewide. The initiative failed to attract majority support in two state legislative

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[6] At the beginning of the 1978–1979 academic year, approximately 300,000 of the 769,040 students enrolled in Washington's public schools were bused to school. Ninety-five percent of these students were transported for reasons unrelated to race. 473 F. Supp., at 1002.

districts, both in Seattle. In the city as a whole, however, the initiative passed with some 61% of the vote. Within the month, the District, together with the Tacoma and Pasco School Districts,[7] initiated this suit against the State in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The United States and several community organizations intervened in support of the District;[8] CiVIC intervened on behalf of the defendants.

After a 9-day trial, the District Court made extensive and detailed findings of fact. The court determined that "[t]hose Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live." *Id.*, at 1001. Yet the court found that Initiative 350, if implemented, "will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is," "will make it impossible for Tacoma schools to maintain their present racial balance," and will make "doubtful" the

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[7] Along with Seattle, Tacoma School District No. 10 and Pasco School District No. 1 are the only districts in the State of Washington with comprehensive integration programs, and therefore the three are the only districts affected by Initiative 350. See *id.*, at 1009. Since 1965, Pasco has made use of school closures and a mandatory busing program to overcome the racial isolation caused by segregated housing patterns; if students attended the schools nearest their homes, three of Pasco's seven elementary schools would have a primarily white and three a primarily minority student body. *Id.*, at 1002–1003. The Tacoma School District has made use of school closures, racially controlled enrollment at magnet schools, and voluntary transfers—though not mandatory busing—to enhance racial balance in its schools. *Id.*, at 1003–1004.

[8] Several of the intervenor plaintiffs also alleged that the District had engaged in *de jure* segregation, and therefore was operating an unconstitutional dual school system. The District Court therefore bifurcated the litigation, first addressing the constitutionality of Initiative 350. Because of the court's conclusions on that question, the allegations of *de jure* segregation did not go to trial and have not been addressed by the District Court or by the Court of Appeals.

prospects for integration of the Pasco schools. *Id.*, at 1010; see *id.*, at 1001, 1011. Except for desegregative busing, however, the court found that "almost all of the busing of students currently taking place in [Washington] is permitted by Initiative 350." *Id.*, at 1010. And while the court found that "racial bias . . . is a factor in the opposition to the 'busing' of students to obtain racial balance," *id.*, at 1001, it also found that voters were moved to support Initiative 350 for "a number of reasons," so that "[i]t is impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate." *Id.*, at 1010.

The District Court then held Initiative 350 unconstitutional, for three independent reasons. The court first concluded that the initiative established an impermissible racial classification, in violation of *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), "because it permits busing for non-racial reasons but forbids it for racial reasons." 473 F. Supp., at 1012. The court next held Initiative 350 invalid because "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." *Id.*, at 1013.[9] Finally, the District Court reasoned that Initiative 350 was unconstitutionally overbroad, because in the absence of a

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[9] The District Court acknowledged that it was impossible to determine whether the supporters of Initiative 350 "subjectively [had] a racially discriminatory intent or purpose," because "[a]s to that subjective intent the secret ballot raises an impenetrable barrier." *Id.*, at 1014. The court looked instead to objective factors, noting that it "marked [a] departure from the norm . . . for the autonomy of school boards to be restricted relative to the assignment of students," and that it marked a similar "departure from the procedural norm" for "an administrative decision of a subordinate local unit of government . . . [to be] overridden in a statewide initiative." *Id.*, at 1016. These factors, when coupled with the "racially disproportionate impact of the initiative," its "historical background," and "the sequence of events leading to its adoption," were found to demonstrate that a "racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative." *Ibid.*

court order it barred even school boards that had engaged in *de jure* segregation from taking steps to foster integration.[10] *Id.*, at 1016. The court permanently enjoined implementation of the initiative's restrictions.

On the merits, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, relying entirely on the District Court's first rationale. 633 F. 2d 1338 (1980).[11] By subjecting desegregative student assignments to unique treatment, the Court of Appeals concluded, Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." *Id.*, at 1344. In doing so, the court continued, the initiative "*remove[s]* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools." *Id.*, at 1346 (emphasis in original and footnote omitted). The court found such a result contrary to the principles of *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*. The court acknowledged that the issue would be a different one had a successor school board attempted to rescind the Seattle Plan. Here, however, "a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control." 633 F. 2d, at 1346.[12]

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[10] The District Court noted that school boards that had practiced *de jure* segregation are under an affirmative obligation to eliminate the effects of that practice. *Ibid.* See *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 458–459 (1979).

[11] The Court of Appeals therefore did not address the District Court's alternative finding that Initiative 350 had been adopted for discriminatory reasons, or its conclusion that the initiative was overbroad. 633 F. 2d, at 1342.

[12] After the decision on the merits, the District Court had declined to award attorney's fees to the plaintiff School Districts because the Districts are state-funded entities. App. to Juris. Statement C–1. The Court of

The State and various state officers appealed to this Court. We noted probable jurisdiction to address an issue of significance to our Nation's system of education. 454 U. S. 890 (1981).

II

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. See *White* v. *Regester*, 412 U. S. 755 (1973); *Nixon* v. *Herndon*, 273 U. S. 536 (1927). But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," *Mobile* v. *Bolden*, 446 U. S. 55, 84 (1980) (STEVENS, J., concurring in judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expression in *Hunter* v. *Erickson*, *supra*, a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron City Council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, see 393 U. S., at 390, and n. 6; *id.*, at 393–394, and n. (Harlan, J., concurring), amended the city charter to provide that ordinances regulating real estate transactions "'on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be

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Appeals reversed on this issue, concluding that the District Court had abused its discretion in denying fees. The Court of Appeals determined that the School Districts fell within the language of the attorney's fees statutes, 42 U. S. C. § 1988 and 20 U. S. C. § 3205 (1976 ed., Supp. IV), see n. 31, *infra*, and it reasoned that "[a]s long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes." 633 F. 2d, at 1348.

effective.'" *Id.*, at 387. This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." *Id.*, at 389–390. In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." *Id.*, at 390. But it did differentiate "between those groups who sought the law's protection against racial . . . discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *ibid.*, thus "disadvantag[ing] those who would benefit from laws barring racial . . . discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.*, at 391. In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Ibid.* In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.*, at 389. This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 393 (emphasis added).

Lee v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), offers an application of the *Hunter* doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate *de facto* segregation in New York's schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." *Id.*, at 712.[13]

Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision "[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved." *Id.*, at 719. In the court's view, the statute therefore "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Ibid.* (emphasis in original). This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.*, at 718. This Court affirmed the District Court's judgment without opinion. 402 U. S. 935 (1971).

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in

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[13] As does Initiative 350, the New York statute apparently permitted voluntary student transfers to achieve integration. See n. 16, *infra*.

Hunter, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U. S., at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," *id.*, at 391 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391.

III

We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.

A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing.[14] Proponents of the initiative candidly "represented that there would be no loss of school district flexibility other than in busing for desegregation purposes." 473 F. Supp., at 1008. And, as we have noted, Initiative 350 in fact allows school districts to bus their students "for most, if not all," of the nonintegrative purposes required by their educational policies. *Id.*, at 1010. The Washington electorate surely was aware of this, for it was "assured" by CiVIC officials that "'99% of the school districts in the state'"—those that lacked mandatory integration programs—"would not be affected by the passage of 350." *Id.*, at 1008–1009. It is beyond reasonable dispute, then, that the initiative was enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979).

Even accepting the view that Initiative 350 was enacted for such a purpose, the United States—which has changed its position during the course of this litigation, and now supports the State—maintains that busing for integration, unlike the

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[14] The Court of Appeals accepted the District Court's characterization of the initiative, and even the dissenting judge in the Court of Appeals agreed that Initiative 350 addresses a "racial" problem. 633 F. 2d, at 1353.

fair housing ordinance involved in *Hunter*, is not a peculiarly "racial" issue at all. Brief for United States 17, n. 18. Again, we are not persuaded. It undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting). See *Milliken* v. *Bradley*, 418 U. S. 717, 783 (1974) (MARSHALL, J., dissenting).[15] But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 376–377, and n. 17 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 111, 115 (1979).

In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose. Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full

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[15] Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue. See generally *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39, 312–314 (1978) (opinion of POWELL, J.).

measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education* v. *Penick*, 443 U. S., at 485, n. 5 (POWELL, J., dissenting). *Lee* v. *Nyquist* settles this point, for the Court there accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.[16]

It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. See *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S., at 448–451 (POWELL,

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[16] The United States seeks to distinguish *Lee* by suggesting that the statute there at issue "clearly prohibited" all attempts to ameliorate racial imbalance in the schools, while Initiative 350 permits voluntary desegregation efforts. Brief for United States 25. Even assuming that this distinction would otherwise be of constitutional significance, its premise is not accurate. The legislation challenged in *Lee did* permit voluntary integration efforts, for it expressly exempted from its restrictions "the assignment of a pupil in the manner requested or authorized by his parents or guardian." 318 F. Supp., at 712. Thus, as the District Court in *Lee* noted, the statute "denie[d] appointed officials the power to implement *non-voluntary* programs for the improvement of racial balance." *Id.*, at 715 (emphasis added). The difficulty in *Lee*—as in this case—stemmed from the *Lee* District Court's conclusion that a voluntary program would not serve to integrate the community's schools: "Voluntary plans for achieving racial balance . . . have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would appear that racial isolation is actually increasing." *Ibid.* Thus the statute challenged in *Lee* and Initiative 350 operated in precisely the same way to "deny . . . student[s] the right to attend a fully integrated school." Brief for United States 25.

J., dissenting). But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.

B

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350's proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.[17] In a very obvious sense, the initiative

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[17] JUSTICE POWELL finds *Hunter* completely irrelevant, dismissing it with the conclusory statement that "the political system [of Washington] has *not* been redrawn or altered." *Post*, at 498 (emphasis in original). But the dissent entirely fails to address the relevance of *Hunter* to the reallocation of decisionmaking authority worked by Initiative 350. The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was,

thus "disadvantages those who would benefit from laws barring" *de facto* desegregation "as against those who . . . would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority." *Hunter* v. *Erickson*, 393 U. S., at 391.

The state appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative

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rather, the comparative structural burden placed on the political achievement of minority interests. Thus, in *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While JUSTICE POWELL and the United States find it crucial that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, *Hunter* would have been virtually identical to this case had the Akron charter amendment simply barred the City Council from passing any fair housing ordinance, as Initiative 350 forbids the use of virtually all mandatory desegregation strategies. Surely, however, *Hunter* would not have come out the other way had the charter amendment made *no* provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.

The United States also would note that Initiative 350's "modification of state policy [was] not the result of any unusual political procedure," Brief for United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from *Hunter*, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See 393 U. S., at 387.

amounts to nothing more than an unexceptional example of a State's intervention in its own school system. In effect, they maintain that the State functions as a "super school board," Tr. of Oral Arg. 5, 17, which typically involves itself in all areas of educational policy. And, the argument continues, if the State is the body that usually makes decisions in this area, Initiative 350 worked a simple change in policy rather than a forbidden reallocation of power. Cf. *Crawford* v. *Los Angeles Board of Education*, *post*, p. 527.

This at first glance would seem to be a potent argument, for States traditionally have been accorded the widest latitude in ordering their internal governmental processes, see *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978), and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature. But "insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Hunter* v. *Erickson*, 393 U. S., at 392. The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause. As the Court noted in *Hunter:* "[T]hough Akron might have proceeded by majority vote . . . on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.*, at 392–393.[18] Washington also has chosen

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[18] Despite the force with which it is written, then, JUSTICE POWELL's essay on "the heretofore unquestioned right of a State to structure the decisionmaking authority of its government," *post*, at 493—as well as his observations on a State's right to repeal programs designed to eliminate *de facto* segregation—is largely beside the point. The State's *power* has not

to make use of a more complex governmental structure, and a close examination both of the Washington statutes and of the Court's decisions in related areas convinces us that *Hunter* is fully applicable here.

At the outset, it is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter* and by *Lee*.[19] And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. Like all 50 States, see Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, Washington of course is ultimately responsible for providing education within its borders, see Wash. Const., Art. IX; Wash. Rev. Code § 28A.02.010 (1981); ch. 28A.41 (establishing a uniform school financing system); *Seattle School District No. 1* v. *State*, 90 Wash. 2d 476, 585 P. 2d 71 (1978), and it therefore has set certain procedural requirements and minimum educational standards to be met by each school. See, *e. g.*, §§ 28A.01.010, 28A.01.020 (length of school day and year); ch. 28A.27 (mandatory attendance); ch. 28A.67 (teacher qualifications); ch. 28A.05 and §§ 28A.58.750–28A.58.754 (curriculum). But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," § 28A.02.020, and the responsibility to devise and tailor educational pro-

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been questioned at any point during this litigation. The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests.

[19] The Court noted in *Hunter* that Akron "might have proceeded by majority vote . . . on all its municipal legislation," 393 U. S., at 392; the charter amendment was invalidated because the citizens of Akron did not reserve all power to themselves, but rather distributed it in a nonneutral manner. In *Lee*, of course, the State had unquestioned authority to vest all power over education in state officials.

grams to suit local needs has emphatically been vested in the local school boards.

Thus "each common school district board of directors" is made "accountable for the proper operation of [its] district to the local community and its electorate." § 28A.58.758(1). To this end, each school board is "vested with the *final* responsibility for the setting of policies ensuring quality in the content and extent of its educational program" (emphasis added). *Ibid.* School boards are given responsibility for, among many other things, "[e]stablish[ing] performance criteria" for personnel and programs, for assigning staff "according to board enumerated classroom and program needs," for setting requirements concerning hours of instruction, for establishing curriculum standards "relevant to the particular needs of district students or the unusual characteristics of the district," and for evaluating teaching materials. § 28A.58.758(2). School boards are generally directed to "develop a program identifying student learning objectives for their district[s]," § 28A.58.090; see also § 28A.58.092, to select instructional materials, § 28A.58.103, to stock libraries as they deem necessary, § 28A.58.104, and to initiate a variety of optional programs. See, *e. g.*, §§ 28A.34.010, 28A.35.010, 28A.58.105. School boards, of course, are given broad corporate powers. §§ 28A.58.010, 28A.58.075, 28A.59.180. Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation. § 28A.24.055.

Indeed, the notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's "accountability" to the people of the community for "the educational programs in the school distric[t]." § 28A.58.758(3). And, perhaps most relevant here, before the adoption of Initiative 350 the Washington Supreme Court had found it within the general discretion of

local school authorities to settle problems related to the denial of "equal educational opportunity."[20] *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 453, 495 P. 2d 657, 663 (1972). It therefore had squarely held that a program of desegregative busing was a proper means of furthering the school board's responsibility to "administe[r] the schools in such a way as to provide a sound education for all children." *Id.*, at 456, 495 P. 2d, at 664.[21] See *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *State ex rel. Lukens* v. *Spokane School District No. 81*, 147 Wash. 467, 474, 266 P. 189, 191 (1928).[22]

Given this statutory structure, we have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's

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[20] Indeed, even the State's efforts to help ensure equal opportunity in education and to encourage desegregation are cast in cooperative terms, and are designed to assist school districts in implementing programs of their choosing. See, *e. g.*, Wash. Rev. Code §§ 28A.21.010(3), 28A.21.136(1) and (3) (1981); cf. § 28A.58.245(3).

[21] The Washington Supreme Court noted: "[A]s long as the school board authorized or required students to attend schools geographically situated close to their homes, they had such a right. But the right existed only because it was given to them by the school authorities." 80 Wash. 2d, at 452, 495 P. 2d, at 662.

[22] We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally. Municipalities in Washington have been given broad powers of self-government, see generally Wash. Const., Amdt. 40; Wash. Rev. Code §§ 35.22.020, 35.23.440, 35.27.370, 35.30.010 (1981); Wash. Rev. Code, Tit. 35A (Optional Municipal Code), and Washington courts specifically have held that municipalities have the power to enact antidiscrimination ordinances. See, *e. g.*, *Seattle Newspaper-Web Pressmen's Union Local No. 26* v. *Seattle*, 24 Wash. App. 462, 604 P. 2d 170 (1979). Cf. 5 E. McQuillin, The Law of Municipal Corporations § 19.23, p. 425 (3d rev. ed. 1981).

discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. See *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d, at 459–460, 495 P. 2d, at 666–667. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F. Supp., at 718.[23] The District Court and the Court of Appeals similarly concluded that the initiative restructured the Washington political process, and we see no reason to challenge the determinations of courts familiar with local law. Cf. *Milliken* v. *Bradley*, 418 U. S., at 769 (WHITE, J., dissenting).

That we reach this conclusion should come as no surprise, for when faced with a similar educational scheme in *Milliken*

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[23] Throughout his dissent, JUSTICE POWELL insists that the Court has created a "vested constitutional right to local decisionmaking," *post*, at 498–499, that under our holding "the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own," *post*, at 498, n. 14, and that today's decision somehow raises doubts about "the authority of a State to abolish school boards altogether." *Post*, at 494. See also *post*, at 495, and 498–499, n. 14. These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of decisionmaking. It is evident, then, that the horribles paraded by the dissent, *post*, at 498–499, n. 14—which have nothing to do with the ability of minorities to participate in the process of self-government—are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.

v. *Bradley, supra*,[24] the Court concluded that the actions of a local school board could not be attributed to the State that had created it. We there addressed the Michigan education system, which vests in the State constitutional responsibility for providing education: "'The policy of [Michigan] has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies . . . to carry out the delegated functions given [them] by the legislature.'" *Milliken* v. *Bradley*, 418 U. S., at 794 (MARSHALL, J., dissenting), quoting *School District of City of Lansing* v. *State Board of Education*, 367 Mich. 591, 595, 116 N. W. 2d 866, 868 (1962). See *Milliken* v. *Bradley*, 418 U. S., at 726, n. 5. To fulfill this responsibility, the State of Michigan provided a substantial measure of school district funding, established standards for teacher certification, determined part of the curriculum, set a minimum school term, approved bus routes and textbooks, established disciplinary procedures, and under certain circumstances had the power even to remove local school board members. See 418 U. S., at 795–796 (MARSHALL, J., dissenting). See also *id.*, at 726, n. 5, 727 (describing state controls over education); *id.*, at 768, and n. 4 (WHITE, J., dissenting) (same); *id.*, at 794 (MARSHALL, J., dissenting) (same).

Yet the Court, noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," concluded that the "Michigan educational structure . . . in common with most States, provides for a large measure of local control." *Id.*, at 741–742. Relying on this analysis, the Court determined that a Michigan school board's assignment policies could not be attributed to the State, and therefore declined to permit interdistrict busing as a remedy for one school district's acts of unconstitu-

[24] One *amicus* observes that many States employ a similar educational structure. See Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, App. 1a–10a.

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tional segregation. If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue.

In any event, we believe that the question here is again settled by *Lee*. There, state control of the educational system was fully as complete as it now is in Washington. See generally N. Y. Educ. Law §§ 305, 306, 308–310 (McKinney 1969 and Supp. 1981). The state statute under attack reallocated power over mandatory desegregation in two ways: it transferred authority from the State Commissioner of Education to local elected school boards, and it shifted authority from local appointed school boards to the state legislature.[25] When presented with this restructuring of the political process, the District Court declared that it could "conceive of no more compelling case for the application of the *Hunter* principle." 318 F. Supp., at 719. This Court of course affirmed the District Court's judgment. We see no relevant distinction between this case and *Lee;* indeed, it is difficult to imagine a more precise parallel.[26]

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[25] When authority to initiate desegregation programs was removed from appointed school boards and from state education officials, the only body capable of exercising power over such programs was the state legislature.

[26] The United States makes only one attempt to distinguish *Lee* in this regard: *Lee* is inapposite, the United States maintains, because the statute at issue there "blocked desegregation efforts even by 'a school district subject to a pre-existing order to eliminate segregation in its schools,'" and therefore—purportedly in contrast to Initiative 350—"interfere[d] with the efforts of individual school districts to eliminate de jure segregation." Brief for United States 25, quoting *Lee* v. *Nyquist*, 318 F. Supp., at 715. If by this statement the United States seeks to place the District Court's holding and this Court's affirmance in *Lee* on the ground that the New York statute interfered with Buffalo's attempts to eliminate *de jure* segregation, its submission is simply inaccurate. At the time of the *Lee* litigation, Buffalo had *not* been found guilty of practicing intentional segregation. See *Arthur* v. *Nyquist*, 573 F. 2d 134, 137 (CA2 1978). As the

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To be sure, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford* v. *Los Angeles Board of Education, post,* at 539. See *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526, 531, n. 5 (1979); *Hunter* v. *Erickson,* 393 U. S., at 390, n. 5. As Justice Harlan noted in *Hunter,* the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation "arouses passionate opposition." *Id.,* at 395 (concurring opinion). Had Akron's fair housing ordinance been defeated at a referendum, for example, "Negroes would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." *Id.,* at 394.

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter,* has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." *Id.,* at 396 (emphasis in original). In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes

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United States notes, Buffalo was under a "pre-existing order to eliminate segregation in its schools"—but that order was issued by the New York Commissioner of Education, because he had found Buffalo's schools *de facto* segregated. *Appeal of Dixon,* 4 N. Y. Educ. Dept. Reports 115 (1965). See *Lee* v. *Nyquist,* 318 F. Supp., at 714–715. *Lee* did not concern *de jure* segregation; it is to be explained only as a straightforward application of the *Hunter* doctrine.

used for comparable legislation.[27] This imposes direct and undeniable burdens on minority interests. "If a governmental institution is to be fair, one group cannot always be expected to win," *id.*, at 394; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court. As they read it, *Hunter* applied a simple "disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate-impact approach to equal protection, in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971).

Appellants unquestionably are correct when they suggest that "purposeful discrimination is 'the condition that offends the Constitution,'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971), for the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S., at 239. Thus, when facially neutral legislation is subjected to

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[27] That phenomenon is graphically demonstrated by the circumstances of this litigation. The longstanding desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272. And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.[28]

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford* v. *Los Angeles Board of Education*, *post*, p. 527. But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'"[29] *James* v. *Valtierra*, 402 U. S., at

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[28] The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.

[29] Thus we do not hold, as the dissent implies, *post*, at 494, that the State's attempt to repeal a desegregation program creates a racial classification, while "identical action" by the Seattle School Board does not. It is

141, quoting *Hunter* v. *Erickson*, 393 U. S., at 391. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).[30]

Hunter recognized the considerations addressed above, and it therefore rested on a principle that has been vital for over a century—that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." 393 U. S., at 391. Just such distinctions infected the reallocation of decisionmaking authority considered in *Hunter*, for minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups "from effective participation in the political proces[s]." *Mobile* v. *Bolden*, 446 U. S., at 94 (WHITE, J., dissenting). Certainly, a state requirement that "desegregation or antidiscrimination laws," *Crawford* v. *Los Angeles Board of Education*, *post*, at 539, and only such

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the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan.

[30] We also note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation. When political institutions are more generally restructured, as JUSTICE BRENNAN has noted in another context, "[t]he very breadth of [the] scheme . . . negates any suggestion" of improper purpose. *Walz* v. *Tax Comm'n*, 397 U. S. 664, 689 (1970) (concurring opinion).

laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," *ibid.*, be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in *Hunter*—and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle.

V

In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[31]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[31] Appellants also challenge the Court of Appeals' award of attorney's fees to the School District plaintiffs, see n. 12, *supra*, arguing that state-funded entities are not eligible to receive such awards from the State. In our view, this contention is without merit. The Districts are plainly parties covered by the language of the fees statutes. See 42 U. S. C. § 1988 (1976 ed., Supp. IV) ("In any action . . . to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs") (emphasis added); 20 U. S. C. § 3205 (1976 ed., Supp. IV) ("Upon the entry of a final order by a court of the United States against a . . . State . . . for failure to comply with . . . the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion . . . may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs") (emphasis added). Nothing in the history of the statutes suggests that this language was meant to exclude

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The people of the State of Washington, by a two-to-one vote, have adopted a neighborhood school policy. The policy is binding on local school districts but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of a neighborhood school policy by *local* school districts would be unconstitutional. Rather, it holds that the adoption of such a

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state-funded entities. To the contrary, the Courts of Appeals have held with substantial unanimity that publicly funded legal services organizations may be awarded fees. See, *e. g.*, *Dennis* v. *Chang*, 611 F. 2d 1302 (CA9 1980); *Holley* v. *Lavine*, 605 F. 2d 638 (CA2 1979), cert. denied *sub nom. Blum* v. *Holley*, 446 U. S. 913 (1980); *Lund* v. *Affleck*, 587 F. 2d 75 (CA1 1978). And when it enacted § 1988, Congress cited with approval a decision awarding fees to a state-funded organization. See H. R. Rep. No. 94-1558, p. 8, n. 16 (1976) (citing *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281 (CA6 1974). In any event, the underlying congressional policies are served by awarding fees in cases such as the one before us: no matter what the source of their funds, school boards have limited budgets, and allowing them fees "encourage[s] compliance with and enforcement of the civil rights laws." *Dennis* v. *Chang*, 611 F. 2d, at 1306. See *id.*, at 1306-1307. While appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment. We see no reason to disturb the judgment of the Court of Appeals on this point.

[1] Throughout this dissent, I use the term "mandatory busing" to refer to busing—or mandatory student reassignments—for the purpose of achieving racial integration.

policy at the *state* level—rather than at the local level—violates the Equal Protection Clause of the Fourteenth Amendment.

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes* v. *Superior Court*, 339 U. S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to decide matters of concern to the State at the state, rather than local, level of government.

I

At the November 1978 general election, the voters of the State adopted Initiative 350 by a two-to-one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev. Code § 28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next

[2] The Initiative passed by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts—one predominantly black and one predominantly white.

nearest school; or if the nearby schools are overcrowded, unsafe, or lacking in physical facilities. *Ibid.*

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students." § 28A.26.050. Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." § 28A.26.060.[3]

This suit was filed in United States District Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[4] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the po-

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[3] Unlike the constitutional amendment at issue in *Crawford* v. *Los Angeles Board of Education*, *post*, p. 527, Initiative 350 places no limits on the state courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution—although not by the Fourteenth Amendment of the Federal Constitution—Initiative 350 would not hinder a State from enforcing its Constitution.

[4] Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial integration in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp. 996, 1002 (WD Wash. 1979). In addition to school closings, the Tacoma integration plan relies upon voluntary techniques—magnet schools and voluntary transfers.

litical process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d 1338, 1344 (CA9 1980).[5]

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State *must* choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. *Regents of University of California* v. *Bakke*, 438 U. S. 265 (1978).

In particular, a neighborhood school policy and a decision *not* to assign students on the basis of their race, does not offend the Fourteenth Amendment.[6] The Court has never

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[5] Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason—*e. g.*, for racial integration—are not the same as for another—*e. g.*, to avoid safety hazards. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion. These alternative holdings were not addressed by the Court of Appeals majority. Nor are they relied upon by the Court today. Accordingly, they are not discussed in this dissent.

[6] See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for

held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 24 (1971); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 417 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation. Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. *Ibid.* And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon school boards or States to maintain integration. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

Moreover, it is a well-established principle that the States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978).[7] The Constitution does not dictate to the States a

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judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39 (1978) (opinion of POWELL, J.); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 240–250 (1973) (POWELL, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979).

[7] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." *Luther* v. *Borden*, 7 How. 1, 47 (1849). See *Community Communications Co.* v.

particular division of authority between legislature and judiciary or between state and local governing bodies. It does not define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the state or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "plac[e] *special* burdens on racial minorities within the governmental process." *Hunter* v. *Erickson*, 393 U. S., at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the state level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government. In this case, by

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Boulder, 455 U. S. 40, 53–54 (1982); *Sailors* v. *Board of Education*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States* v. *Kagama*, 118 U. S. 375, 379 (1886) (under the Constitution, sovereign authority resides either with the States or the Federal Government, and "[t]here exist . . . but these two").

Initiative 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of state or federal courts to remedy constitutional violations. And if such a policy had been adopted by any of the School Districts in this litigation there could have been no question that the policy was constitutional.[8]

The issue here arises only because the Seattle School District—in the absence of a then-established State policy—chose to adopt race-specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and canceled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature nor the people of the State of Washington could alter what the District had decided.

The Court argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme state authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful state policy. And in the State of Washington, a neighborhood school policy would have been lawful.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race-specific program that arguably benefits racial minorities. Once such a program is adopted,

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[8] The Court consistently has held "that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford* v. *Los Angeles Board of Education*, *post*, at 538.

only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever pre-empt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

This is certainly not a case where a State—in moving to change a locally adopted policy—has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "'ethnic and racial diversity in the classroom.'" *Ante*, at 472, quoting *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting).[9]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," *Hunter* v.

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[9] The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in state action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater racial imbalance in the schools. See *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting).

Erickson, supra, at 391, such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race—or with integration in the schools—must henceforth be submitted to a referendum of the people. Cf. *Hunter* v. *Erickson, supra*. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation. *Ante*, at 474.

The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.[10]

IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See *ante*, at 470. Its authority for

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[10] Cf. *James* v. *Valtierra*, 402 U. S. 137, 142 (1971) ("[O]f course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people").

this holding is said to be *Hunter* v. *Erickson*, *supra*.[11] In *Hunter* the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U. S., at 389–390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." *Id.*, at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." *Ibid.*

Nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a burden on racial minorities,[12] it simply does not place unique political obstacles in the way of racial minorities. In this case, unlike in

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[11] The Court also relies at certain critical points in its discussion on the summary affirmance in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970), summarily aff'd, 402 U. S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel* v. *Williams*, 457 U. S. 55, 64, n. 13 (1982).

[12] It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See *Crawford* v. *Los Angeles Board of Education*, *post*, at 545, n. 32. As the Court indicates, the busing question is complex and is best resolved by the political process. *Ante*, at 474.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court-ordered reassignments. It permits school districts to order school closings for purposes of racial balance. § 28A.26.030. And it permits school districts to order a student to attend the "next nearest"—rather than nearest—school to promote racial integration.

Hunter, the political system has *not* been redrawn or altered. The authority of the State over the public school system, acting through initiative or the legislature, is plenary. Thus, the State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any school district in the State.[13]

Hunter, therefore, is simply irrelevant. It is the *Court* that by its decision today disrupts the normal course of State government.[14] Under its unprecedented theory of a vested

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[13] The Court repeatedly states that the effect of Initiative 350 is "to redraw decisionmaking authority over racial matters—*and only over racial matters*—in such a way as to place *comparative* burdens on minorities." *Ante*, at 475, n. 17 (emphasis added). But the decision by the State to exercise its authority over the schools and over racial matters in the schools does not place a comparative burden on racial minorities. In *Hunter*, as we have understood it, "fair housing legislation *alone* was subject to an automatic referendum requirement." *Gordon* v. *Lance*, 403 U. S. 1, 5 (1971) (emphasis added). By contrast, Initiative 350 merely places mandatory busing among the much larger group of matters—covering race relations, administration of the schools, and a variety of other matters—addressed at the state level. See n. 15, *infra*. Racial minorities, if indeed they are burdened by Initiative 350, are not *comparatively* burdened. In this respect, they are in the same position as any other group of persons who are disadvantaged by regulations drawn at the State level.

[14] The Court's decision intrudes deeply into normal state decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university system, and the board of

constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multiracial society where, as in this case, the local school board has acted first.[15]

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regents might be powerless to intervene despite their greater authority under state law.

After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

[15] Even accepting the dubious notion that a State must demonstrate some past control over public schooling or race relations before now intervening in these matters, *ante*, at 477, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is unpersuasive. The Court's own discussion indicates the comprehensive character of the State's activity. The Common School Provisions of the State's Code of Laws are nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Wash. Const., Art. IX, § 2; *Seattle School District No. 1* v. *State*, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978). In light of the wide range of regulation of the public schools by the State, it is wholly unclear what degree of prior concern or control by the State would satisfy the Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See Wash. Rev. Code § 49.60.010 *et seq.* (1981). Article IX, § 1, of the State Constitution specifically prohibits discrimination in public schools: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race-conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have

V

We are not asked to decide the wisdom of a state policy that limits the ability of local school districts to adopt—on their own volition—mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State—exercising its sovereign authority over all subordinate agencies—should be free to reject this debatable restriction on liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the unresolved questions resulting from extensive mandatory busing.[16] The Constitution does not dictate to the States at what level of government de-

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thought that the state court *could* have rendered such a decision without violating the Federal Constitution.

[16] Responding to this dissent, the Court denies that its opinion limits the authority of the people of the State of Washington and the legislature to control or regulate school boards. It further states that "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." *Ante*, at 480, n. 23. These are puzzling statements that seem entirely at odds with much of the text of the Court's opinion. It will be surprising if officials of the State of Washington—with the one exception mentioned below—will have any clear idea as to what the State now lawfully may do.

The Court does say that "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan." *Ante*, at 485–486, n. 29. Apparently the Court is saying that, despite what else may be said in its opinion, the people of the State—or the state legislature—may repeal the *Seattle Plan*, even though neither the people nor the legislature validly may prescribe statewide standards. I perceive no logic in—and certainly no constitutional basis for—a distinction between repealing the Seattle Plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for purpose of integration than in the plan of a single school board.

cisions affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.[17]

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[17] As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—*is* the best qualified agency of a state government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. See *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S., at 438–448 (POWELL, J., dissenting). But this case does not present a question of educational policy or even the merits of busing for racial integration. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies.

LEHMAN ON BEHALF OF HER CHILDREN, LEHMAN ET AL. *v.* LYCOMING COUNTY CHILDREN'S SERVICES AGENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2177. Argued March 30, 1982—Decided June 30, 1982

Petitioner voluntarily placed her three sons in the legal custody of respondent county agency, which in turn placed them in foster homes. Thereafter, a Pennsylvania state court terminated petitioner's parental rights with respect to her sons because of parental incapacity, and the Pennsylvania Supreme Court affirmed. Petitioner then filed an action in Federal District Court, seeking a writ of habeas corpus under 28 U. S. C. § 2254(a), which requires a district court to entertain an application for such a writ in behalf "of a person in custody" pursuant to a state-court judgment in alleged violation of the Federal Constitution. She requested a declaration of the invalidity of the Pennsylvania statute under which her parental rights were terminated and an order releasing her sons to her custody. The District Court dismissed the petition on the ground that respondent's custody over petitioner's sons was not the type of custody to which § 2254(a) may be addressed. The Court of Appeals affirmed.

Held: Section 2254(a) does not confer jurisdiction on federal courts to consider collateral challenges to state-court judgments involuntarily terminating parental rights. Pp. 508–516.

(a) Although the scope of the federal writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the writ has not been considered a generally available federal remedy for every violation of federal rights. The writ's availability has been limited to challenges to state-court judgments in situations where, as a result of a state-court criminal conviction, a petitioner has suffered substantial restraints not shared by the public generally, and the petitioner has been found to be "in custody" within the meaning of § 2254(a). Here, petitioner's children are not in the "custody" of the State in the way in which this term has been used in determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. They suffer no restraint on liberty not shared by the public generally, cf. *Jones* v. *Cunningham*, 371 U. S. 236; *Hensley* v. *Municipal Court*, 411 U. S. 345, nor

do they suffer "collateral consequences" sufficient to outweigh the need for finality, cf. *Carafas* v. *LaVallee*, 391 U. S. 234. To extend the federal writ to challenges to state child-custody decisions based on alleged constitutional defects collateral to the actual custody decision would be an unprecedented expansion of the jurisdiction of the federal courts. Pp. 508–512.

(b) Federalism and the exceptional need for finality in child-custody disputes also argue strongly against the grant of the writ here. Extended uncertainty for the children would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions. Pp. 512–514.

(c) Habeas corpus has been used in child-custody cases in many States and in England, and 28 U. S. C. § 2255, authorizing federal-court collateral review of federal decisions, *could* be construed to include the type of custody to which petitioner's children are subject. But reliance on what may be appropriate *within* the federal system or *within* a state system is of little force where, as in this case, a *state judgment* is attacked collaterally in a *federal* court. Petitioner would have the federal judicial system entertain a writ that is not time-barred to challenge collaterally a final judgment entered in a state judicial system. Pp. 514–515.

648 F. 2d 135, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 516.

Martin Guggenheim argued the cause for petitioner. With him on the brief was *Burt Neuborne*.

Charles F. Greevy III argued the cause and filed a brief for respondent.

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether the habeas corpus statute, 28 U. S. C. § 2254, confers jurisdiction on the federal courts to consider collateral challenges to state-court judgments involuntarily terminating parental rights.

I

The facts of this case are described in detail in *In re William L.*, 477 Pa. 322, 383 A. 2d 1228, cert. denied *sub nom.*

Lehman v. *Lycoming County Children's Services*, 439 U. S. 880 (1978), the Pennsylvania Supreme Court decision terminating the parental rights of petitioner Marjorie Lehman with respect to three sons born in 1963, 1965, and 1969.[1] In 1971, Ms. Lehman discovered that she was pregnant again. Because of housing and other problems related to the care of her sons, Ms. Lehman voluntarily placed them in the legal custody of the Lycoming County Children's Services Agency, and it placed them in foster homes.

Although Ms. Lehman visited her sons monthly, she did not request their return until 1974. At that point, the Lycoming County Children's Services Agency initiated parental termination proceedings. In those proceedings, the Orphan's Court Division of the Lycoming County Court of Common Pleas heard testimony from Agency caseworkers, a psychologist, nutrition aides, petitioner, and the three sons.[2] The judge concluded: "[I]t is absolutely clear to the court that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied."[3] *In re Lehman*, Nos. 2986, 2987, and 2988, p. 4 (Ct. Common Pleas, Lycoming County, Pa., June 3, 1976).[4] The court therefore

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[1] Petitioner has never been married. The fathers to these sons voluntarily have relinquished their parental rights in state-court proceedings.

[2] There was no evidence that any of the sons wanted to return to their mother. See Tr. 82, 117–118, 122–125, 127–129.

[3] It has now been over a decade since the sons were removed from the custody of their mother. Frank, the oldest, is now 18, and the case is moot with respect to him since he is free to seek adoption by anyone, including his natural mother. See Tr. of Oral Arg. 25–26. The other two sons, Bill and Mark, are now 12 and 16 respectively.

[4] The judge relied on the Pennsylvania statute which provides, in relevant part:

deciared that petitioner's parental rights respecting the three sons were terminated.

The Pennsylvania Supreme Court affirmed the termination order based on "parental incapacity, which does not involve parental misconduct." *In re William L., supra*, at 331, 383 A. 2d, at 1232. It held that the legislature's power to protect the physical and emotional needs of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of parental misconduct. The court stressed that, "[i]n the instant cases, the basis for termination is several years of demonstrated parental incapacity . . . ." *Ibid.* It also held that the statute was not unconstitutionally vague either on its face or as applied.

Petitioner sought this Court's review in a petition for certiorari rather than by appeal.[5] We denied the petition. *Lehman* v. *Lycoming County Children's Services*, 439 U. S. 880 (1978). Petitioner then filed the instant proceeding on January 16, 1979, in the United States District Court for the Middle District of Pennsylvania, seeking a writ of habeas cor-

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"The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

. . . .

"(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent." 23 Pa. Cons. Stat. § 2511(a) (1980).

[5] This decision appeared to have been a strategic one, making possible, in the event this Court did not grant plenary review, the filing of a habeas corpus petition in federal district court without any problem of res judicata on the federal issues as a result of this Court's summary affirmance or dismissal of the appeal for want of a substantial federal question. At oral argument, however, petitioner's lawyer also explained that he was confused as to whether he could appeal both the facial attack on the statute and the challenge to the statute as applied, and had therefore chosen the more conservative route of seeking a petition for a writ of certiorari on both issues. See Tr. Oral Arg. 21–22.

pus pursuant to 28 U. S. C. §§ 2241 and 2254. Petitioner requested (i) a declaration of the invalidity of the Pennsylvania statute under which her parental rights were terminated; (ii) a declaration that petitioner was the legal parent of the children; and (iii) an order releasing the children to her custody unless within 60 days an appropriate state court judicially determined that the best interest of the children required that temporary custody remain with the State.

The District Court dismissed the petition without a hearing. Relying primarily on *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103 (CA1 1978), the court concluded that "the custody maintained by the Respondent over the three Lehman children is not that type of custody to which the federal habeas corpus remedy may be addressed." *Lehman* v. *Lycoming County Children's Services Agency*, Civ. No. 79-65 (MD Pa. 1979), reprinted in App. to Pet. for Cert. 135a, 147a.

Sitting en banc, the Court of Appeals for the Third Circuit affirmed the District Court's order of dismissal by a divided vote of six to four. 648 F. 2d 135 (1981). No majority opinion was written. A plurality of four, in an opinion written by Judge Garth, concluded that "disputes of the nature addressed here and which essentially involve no more than the question of who shall raise a child to maturity, do not implicate the federal interest in personal liberty sufficiently to warrant the extension of federal habeas corpus." *Id.*, at 146. In support of this conclusion, Judge Garth reasoned that "[i]t is not the liberty interest of the children that is sought to be protected in such a case, but only the right of the particular parent to raise them." *Id.*, at 140 (footnote omitted).

A second plurality of four, in an opinion written by Judge Adams wrote that it "would appear to be both unwise and impolitic for the federal courts to uncover a whole new font of jurisdiction. . . ." *Id.*, at 151. He would have disposed of the case on the ground that Ms. Lehman did not have stand-

ing to assert a habeas corpus action on behalf of her children. See *id.*, at 151–155. This view was based on the conclusion that once a parent's rights have been terminated in a state proceeding, a parent is no longer presumed to represent the interest of the child. See *id.*, at 153–154.[6]

The question presented to this Court can be stated more fully as whether federal habeas corpus jurisdiction, under § 2254, may be invoked to challenge the constitutionality of a state statute under which a State has obtained custody of children and has terminated involuntarily the parental rights of their natural parent. As this is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided,[7] we granted certiorari. 454 U. S. 813 (1981). We now affirm.

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[6] Chief Judge Seitz filed a separate opinion concurring in the judgment. He found the case "most difficult," noting that "the literal statutory requirements for exercise of section 2254 federal habeas corpus jurisdiction can be said to be satisfied." 648 F. 2d, at 155. But he nevertheless concurred in the result because habeas corpus has never been used to challenge state child-custody decisions, and "such a major departure from traditional uses of federal habeas corpus to challenge state-court judgments" should "await a congressional directive on the matter." *Id.*, at 156.

Judge Rosenn, joined by two other judges, dissented. He stressed that "[t]he total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions." *Id.*, at 163. Judge Gibbons also filed a dissenting opinion, arguing that there was federal subject-matter jurisdiction and that habeas corpus should be an available remedy because a decision terminating parental rights has ongoing effects. *Id.*, at 177.

[7] The federal courts have split on this issue. Only one court other than the Court of Appeals for the Third Circuit has addressed the question in a full opinion; in *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103 (1978), the Court of Appeals for the First Circuit held that habeas corpus could not be used to avoid the finality of prior state-court child-custody proceedings, with a rationale much like Judge Garth's in the instant case. Other federal courts have assumed—without full analysis—that habeas jurisdiction lies. See *Davis* v. *Page*, 640 F. 2d 599, 602 (CA5 1981) (en banc); *Rowell* v. *Oesterle*, 626 F. 2d 437 (CA5 1980).

II

A

Petitioner seeks habeas corpus collateral review by a federal court of the Pennsylvania decision. Her application was filed under 28 U. S. C. § 2254(a):

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Although the language of § 2254(a), especially in light of § 2241, suggests that habeas corpus is available only to challenge the convictions of prisoners actually in the physical custody of the State,[8] three modern cases have extended it to other situations involving challenges to state-court decisions.[9]

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[8] See 28 U. S. C. § 2241 (empowering federal judges to grant such writs; subsection (c) provides that "[t]he writ of habeas corpus shall not extend to a *prisoner* unless . . .") (emphasis added); see also 28 U. S. C. § 2254(b) ("An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall . . . be granted unless [state remedies have not been exhausted or are not available, or there are] circumstances rendering such process ineffective to protect the rights of the *prisoner*") (emphasis added).

[9] When habeas corpus is made available by a federal court to challenge custody by *federal* entities, federalism concerns are not implicated. The only relevant question then is what federal remedy may be available. The grant of habeas relief in such instances—*e. g.*, *Strait* v. *Laird*, 406 U. S. 341 (1972) (inactive Army Reserve member allowed to bring habeas petition to challenge his military obligation); *Brownell* v. *Tom We Shung*, 352 U. S. 180, 182–184 (1956) (alien allowed to use habeas to challenge his exclusion from the United States)—is not precedent for the use of federal habeas to challenge judgments of state courts. As Judge Garth noted in his decision below: "[T]he writ assumes even more profound implications when its operation cuts across the federal and state judicial systems. In this latter context, the writ empowers a single federal judge to overrule deter-

The first of these cases is *Jones* v. *Cunningham*, 371 U. S. 236 (1963), in which the Court allowed a parolee to challenge his conviction by a habeas petition. The Court considered the parolee in "custody" for purposes of § 2254(b) because "the custody and control of the Parole Board involve significant restraints on petitioner's liberty . . . which are in addition to those imposed by the State upon the public generally." 371 U. S., at 242. And in *Carafas* v. *LaVallee*, 391 U. S. 234 (1968), the Court allowed the writ in a challenge to a state-court judgment even though the prisoner, incarcerated at the time the writ was filed, had finished serving his sentence during the proceedings. The custody requirement had, of course, been met at the time the writ was filed, and the case was not moot because Carafas was subject to "'collateral consequences'" as a result of his conviction, *id.*, at 237, and "is suffering, and will continue to suffer, serious disabilities . . . ." *Id.*, at 239. Most recently, in *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), the Court allowed the writ to be used to challenge a state-court conviction even though the defendant had been released on his own recognizance after sentencing but prior to the commencement of his incarceration. The Court held that the defendant was in the custody of the State for purposes of § 2254(b) because he was "subject to restraints 'not shared by the public generally,'" 411 U. S., at 351 (citation omitted)—indeed, his arrest was imminent.[10]

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minations of federal issues which have been adjudicated by the highest court of a state." 648 F. 2d, at 139.

Jurisdiction to challenge both state and federal judgments is conferred by § 2241. But § 2254, conferring general jurisdiction to consider collateral attacks on state judgments, has no relevance to *federal* habeas proceedings, challenging federal custody of nonprisoners. Thus, federal decisions made pursuant to § 2241 constitute no authority for the claim of jurisdiction under § 2254 in this case.

[10] In *Hensley*, the State would have placed the petitioner behind bars, but was prevented by a stay entered by the state trial court that subse-

Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights. Instead, past decisions have limited the writ's availability to challenges to state-court judgments in situations where—as a result of a state-court criminal conviction—a petitioner has suffered substantial restraints not shared by the public generally. In addition, in each of these cases the Court considered whether the habeas petitioner was "in custody" within the meaning of § 2254.[11]

Ms. Lehman argues that her sons are involuntarily in the custody of the State for purposes of § 2254 because they are in foster homes pursuant to an order issued by a state court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to state-court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the "custody" of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situa-

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quently was extended by two Justices of this Court. 411 U. S., at 351. Thus, although *Hensley* held the writ to be available in a case in which there was no actual custody in a state penal institution at the time the writ was filed, the extension was in the context of a person who had a strong claim to be treated as a prisoner for jurisdictional purposes.

[11] See *Hensley*, 411 U. S., at 345 ("This case requires us to determine whether a person released on his own recognizance is 'in custody' within the meaning of the federal habeas corpus statute . . ."); *Carafas* v. *LaVallee*, 391 U. S., at 238 (similar); *Jones* v. *Cunningham*, 371 U. S., at 236 (similar).

tion of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley* and *Jones*, and they suffer no "collateral consequences"—like those in *Carafas*—sufficient to outweigh the need for finality. The "custody" of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas.[12] Ms. Lehman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.[13]

Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody.[14] Indeed, in two cases, the Court refused to allow the writ in such instances. *Matters* v. *Ryan*, 249 U. S. 375 (1919); *In re Burrus*, 136 U. S. 586 (1890). These decisions rest on the absence of a federal question, but the opinions suggest that federal habeas corpus is not available to challenge child custody. Moreover,

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[12] We express no view as to the availability of federal habeas when a child is actually confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to a court order.

[13] At the hearing before the Pennsylvania trial court, petitioner's lawyer actually stated "[t]his is not a custody proceeding . . . ." Tr. 67.

[14] The Court has considered constitutional challenges to custody or parental-rights proceedings, but these cases have reached the Court on direct review of the final state-court decision, not on federal habeas. See, *e. g.*, *Santosky* v. *Kramer*, 455 U. S. 745 (1982).

JUSTICE BLACKMUN's dissenting opinion states that the legislative history, though admittedly sparse, supports its interpretation of the scope of § 2254 because "[t]he codification of the writ into federal law indicates no congressional intent to contract its common-law scope." See *post*, at 518. But the dissenting opinion cites no legislative history relevant to state-court custody decisions. Moreover, for at least 100 years after passage of the statute in 1867, the writ was not used in child-custody cases. This history strongly suggests that the extension of federal habeas corpus to state custody cases was never contemplated by Congress, nor understood by the Bar to have been an available remedy.

federal courts consistently have shown special solicitude for state interests "in the field of family and family-property arrangements." *United States* v. *Yazell*, 382 U. S. 341, 352 (1966). Under these circumstances, extending the federal writ to challenges to state child-custody decisions—challenges based on alleged constitutional defects collateral to the actual custody decision—would be an unprecedented expansion of the jurisdiction of the lower federal courts.[15]

B

Federalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition.[16] The writ of habeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims. Because of this tension between the State's interest in finality and the asserted federal interest, federal courts properly have been reluctant to extend the

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[15] Petitioner maintains that the approval of habeas jurisdiction in this case may be limited. She suggests that it could be available only when the State takes the child away from its natural parents, but not when the State simply determines custody in a routine intrafamily dispute. It is not apparent that such distinctions are possible, either in legal theory or as a practical matter. The circumstances of custody vary widely, though in each disputed case the child is in the custody of one person—over the objections of someone else—by order of a state court. We see no principled basis for distinguishing between the claim of a natural parent and the claim of grandparents or even the claim of an unrelated person who has been given legal custody that is challenged by a third party. Moreover, the arguments of res judicata and federalism apply with equal force in every collateral attack on a state custody decision in a federal court.

[16] The dissent suggests that comity and federalism concerns cannot inform a court's construction of a statute in determining a question of jurisdiction over certain kinds of cases. *Post*, at 522–523. But in *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U. S. 100 (1981), precisely those concerns lead this Court to conclude that 42 U. S. C. § 1983 does not confer jurisdiction on the federal courts to hear suits for tax refunds when state law provides an adequate remedy.

writ beyond its historic purpose. As Judge Campbell noted in *Sylvander* v. *New England Home for Little Wanderers:*

> "Federal habeas involves a substantial thrust by the federal system into the sphere normally reserved to the states and hence a change in the federal-state balance. This is so because the federal habeas remedy, as recently fashioned, offers a federal forum regardless of what state proceedings have already taken place and in effect allows a single federal district judge to overrule the judgment of the highest state court, unfettered by the constraints of collateral estoppel and res judicata." 584 F. 2d, at 1111–1112.[17]

The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents,

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[17] In his decision below, Judge Garth expressed similar views:

"While the ability to avoid *res judicata* is an extraordinary characteristic of habeas when the relitigation takes place within the same judicial system—that is, when a state court entertains the writ on behalf of a person in custody pursuant to the judgment of a court of that same state—the writ assumes even more profound implications when its operation cuts across the federal and state judicial systems. [T]he assumption of habeas jurisdiction by a federal court on behalf of a party complaining of a judgment rendered against him by a state court, represents an unparalleled assertion of federal authority over the state judicial system. Such an intrusion upon state judicial authority deeply implicates the principles of comity and may impair the smooth workings of our federal system.

"The awesome power of the writ to avoid *res judicata*, and its implications for our federalism, demand that its use be confined to its proper role: the preservation of individual liberty and the relief from unlawful custody." 648 F. 2d, at 139.

especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions.[18]

III

Petitioner argues that habeas corpus should be available to her because it has been used as a procedure in child-custody cases in various States and in England. She notes that, in *Jones* v. *Cunningham*, 371 U. S., at 238–240, the Court indicated that in construing the habeas statute, reference may be made to the common law and to practices in the States and in England. It is true that habeas has been used in child-custody cases in England and in many of the States. See *id.*, at 239–240, and nn. 8, 12, and 13, citing *Ford* v. *Ford*, 371 U. S. 187 (1962); *Boardman* v. *Boardman*, 135 Conn. 124, 138, 62 A. 2d 521, 528 (1948); *Ex parte Swall*, 36 Nev. 171, 174, 134 P. 96, 97 (1913); *Ex parte M'Clellan*, 1 Dowl. 81 (K. B. 1831); *Earl of Westmeath* v. *Countess of Westmeath*, as set out in reporter's footnote in *Lyons* v. *Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821). As these cases illustrate, the term "custody" in 28 U. S. C. § 2255—authorizing federal-court collateral review of federal decisions—could be construed to include the type of custody the Lehman children are subject to, since they are in foster homes pursuant to court orders. But reliance on what may be appropriate *within* the federal system or *within* a state system is of little force where—as in this case—a *state judgment* is attacked collaterally in a *federal* court. It is one thing to use a proceeding called "habeas corpus" in resolving child-custody disputes within a single system obligated to resolve such disputes.

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[18] There is also the danger that "if litigation expenses mount, social workers and charitable organizations . . . may well become less willing to seek placements for children over their parents' objections, whether rational or irrational, even though in their honest judgment the child's best interests demand it." *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d, at 1112.

The question in such a case may be which procedure is most appropriate. The system is free to set time limits on the bringing of such actions as well as to impose other requirements to ensure finality and a speedy resolution of disputes in cases involving child custody or termination of parental rights. In this case, however, petitioner would have the federal judicial system entertain a writ that is not time-barred to challenge collaterally a final judgment entered in a state judicial system. In *Sylvander* v. *New England Home for Little Wanderers*, the Court of Appeals for the First Circuit gave a compelling answer to this argument:

> "Federal habeas when applied to persons under state control is a procedure of unique potency within the federal-state framework, having far different and more far-reaching consequences than a state's utilization of habeas within its own system. State utilization of habeas to test the legal custody of a child is part of the fabric of its reserved jurisdiction over child custody matters. If a habeas remedy were not provided, some other procedure would be needed to effectuate the state's substantive interest in these relationships. It is purely a matter of procedural detail whether the remedy is called 'habeas' or something else. The federal government, however, has no parallel substantive interest in child custody matters that federal habeas would serve. The sole federal interest is in the constitutional issues collateral to such disputes. At bottom, the question is whether these constitutional issues can be adequately raised through the usual channels—appeal, certiorari and the civil rights statutes—or whether the vehicle of federal habeas, with its unique features, is required." 584 F. 2d, at 1111.

IV

The considerations in a child-custody case are quite different from those present in any prior case in which this Court has sustained federal-court jurisdiction under § 2254. The

federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.[19] Congress has indicated no intention that the reach of § 2254 encompass a claim like that of petitioner. We therefore hold that § 2254 does not confer federal-court jurisdiction. The decision below, affirming the denial of a writ of habeas corpus, therefore is affirmed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Although I can sympathize with what the Court seeks to accomplish in this case today, I cannot reconcile myself to its holding that "§ 2254 does not confer federal-court jurisdiction," *ante*, this page, to consider collateral challenges to state-court judgments involuntarily terminating parental rights. In my view, the literal statutory requisites for the exercise of § 2254 federal habeas corpus jurisdiction are satisfied here—in particular, the requirement that petitioner's children must be "in custody." Because I believe the Court could have achieved much the same practical result in this area without decreeing a complete withdrawal of federal jurisdiction, I respectfully dissent.

I

Justice Black, speaking for a unanimous Court in *Jones* v. *Cunningham*, 371 U. S. 236, 243 (1963), observed that the

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[19] In *Hensley*, this Court observed:

"The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." 411 U. S., at 351.

federal writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy."

> "While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country." *Id.*, at 238.

Even a brief historical examination of common-law usages teaches two lessons: first, for centuries, the English and American common-law courts have had the undisputed *power* to issue writs of habeas corpus ordering the release of children from unlawful custody; and, second, those courts have exercised broad *discretion* in deciding whether or not to invoke that power in a given case. English common-law courts traditionally were authorized to order the release of minor children from unlawful custody.[1] Relying on the English tradition, American state courts very early asserted their own power to issue common-law habeas writs in child-custody matters. See generally Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 270–274 (1965).

While acknowledging that "habeas has been used in child-custody cases in England and in many of the States," *ante*, at 514, the Court suggests that a state court derives its authority

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[1] In *King* v. *Delaval*, 3 Burr. 1434, 1436–1437, 97 Eng. Rep. 913, 914 (K. B. 1763), Lord Mansfield declared:

"In cases of writs of habeas corpus directed to private persons 'to bring up infants,' the Court is bound, ex debito justitiae, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them.

. . . . .

"The true rule is, 'that the Court are to judge upon the circumstances of the particular case; and to give their directions accordingly.'"

to issue a writ of habeas corpus in such disputes not from the common law, but from "'the fabric of its reserved jurisdiction over child custody matters.'" *Ante*, at 515, quoting *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103, 1111 (CA1 1978). While such a conclusion is not illogical, it is surely ahistorical. Contrary to the Court's suggestion, it is *not* "'purely a matter of procedural detail whether the [state] remedy is called "habeas" or something else.'" *Ibid.* A state court's traditional power to issue a writ of habeas corpus to free a confined child always has been derived directly from the nature of the writ, not from any reserved jurisdiction over child-custody matters.[2]

The codification of the writ into federal law indicates no congressional intent to contract its common-law scope. The sparse legislative history of the predecessor statute to 28 U. S. C. § 2254, the Habeas Corpus Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385, gave "no indication whatever that the bill intended to change the general *nature* of the classical habeas jurisdiction." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 476–477 (1963) (emphasis in original).[3] Nor, since

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[2] See, *e. g.*, R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 454–521 (1858); W. Church, A Treatise of the Writ of Habeas Corpus 555–557 (1886); L. Hochheimer, A Treatise on the Law Relating to the Custody of Infants 156–162 (1887); H. Clark, The Law of Domestic Relations in the United States 578–580 (1968); Bantz, Habeas Corpus—Custody of Infant, 15 Cent. L. J. 281, 281–282 (1882) (footnote omitted) (The writ "is granted on the application of the parent, guardian or master to inquire into the legality of the restraint of the child, ward, etc.; and its object is, not to enforce a right of custody, but to remove unlawful restraint"); Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent. L. J. 385, 388 (1903) ("Whenever the parent seeks to recover a child from any third person, the approved remedy is *habeas corpus*"); Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 273 (1965).

[3] To the contrary, the legislators plainly intended to enact "a bill of the largest liberty" that would not "restrain the writ of *habeas corpus* at all" and would "enable the courts of the United States to enforce the *freedom*

that time, has this Court ever held that the congressional purpose originally underlying the statute barred use of the federal writ to free children from unlawful state custody.[4] The Court's more recent precedents have firmly established § 2254's "in custody" requirement as its most flexible element, stressing that the test of "custody" is not present physical restraint, but whether "there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones* v. *Cunningham*, 371 U. S., at 240.

Today the Court bows in the direction of this historical precedent only by leaving open the possible availability of federal habeas if a child is actually confined in a state institution, rather than in the custody of a foster parent pursuant to a court order.[5] *Ante*, at 511, n. 12. At the same time, how-

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of the wife and children of soldiers of the United States, and *also to enforce the liberty of all persons.*" Cong. Globe, 39th Cong., 1st Sess., 4151 (1866) (remarks of Rep. Lawrence) (emphasis added).

[4] In *Wales* v. *Whitney*, 114 U. S. 564 (1885), which early delineated the forms of "custody" subject to the writ, the Court stated:

"There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of *habeas corpus*, which is necessary to sustain the writ. . . . Wives restrained by husbands, *children withheld from the proper parent or guardian*, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*." *Id.*, at 571 (emphasis added).

In *In re Burrus*, 136 U. S. 586 (1890), and *Matters* v. *Ryan*, 249 U. S. 375 (1919), this Court refused to permit the federal writ to be used in private child-custody disputes, stating in dictum that matters of family law are reserved for the States. As the Court correctly notes, however, *ante*, at 511–512, those cases dismissed habeas petitions for want of federal-question jurisdiction, and thus did not generally deny the federal courts power to issue writs of habeas corpus in child-custody cases.

[5] Notwithstanding their conclusions that federal habeas "jurisdiction" does not lie in child-custody cases, neither plurality opinion in the Court of

ever, the Court presents three reasons why federal courts lack "jurisdiction" to issue writs of federal habeas corpus to release children from the latter form of state custody. Not one of these reasons is sufficient to erect a *jurisdictional*, as opposed to a prudential, bar to federal habeas relief.[6]

First, the Court restrictively reads *Jones* v. *Cunningham*, *supra*; *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); and *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), and deems those three cases to involve only substantial and unusual restraints suffered by individuals "as a result of a state-court *criminal conviction*." *Ante*, at 510 (emphasis added). Yet those decisions plainly drew no distinction between crim-

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Appeals was willing to foreclose a federal court's power to issue the writ to secure a child's release from state custody under extreme circumstances. See 648 F. 2d 135, 144 (CA3 1981) (en banc) (Garth, J., announcing the judgment of the court) ("'Were [the Lehman boys] *incarcerated* in a state home, or were there other issues making this truly a struggle for liberty by one imprisoned under the aegis of the state,' the writ might well be available") (citation omitted; emphasis in original); *id.*, at 152, n. 35 (Adams, J., concurring) ("Should the children be in state custody against their will, it is even possible that habeas would be an appropriate vehicle for the legal attack"). See also *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103, 1113 (CA1 1978) (leaving open the possibility that federal habeas corpus might be available to free a child from state custody).

[6] I disagree with the Court's announcement that "no principled basis" would exist for limiting the approval of federal habeas jurisdiction in child-custody disputes. *Ante*, at 512, n. 15. When, as in this case, the State both initiates the challenged judicial proceedings *and* remains the ongoing legal custodian of the child, subject to state-court order, the state action is plainly sufficient to create "custody in violation of the Constitution . . . of the United States" for § 2254 purposes.

Intrafamily disputes, however, are ordinarily privately initiated and result in private custody. If a child's natural parents disputed custody, and a state court awarded custody to one of them, a legitimate question would arise whether that person "may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982). See also *Dennis* v. *Sparks*, 449 U. S. 24, 28 (1980) ("Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a . . . joint actor with the judge").

inal and civil detention. To the contrary, they declared in unusually broad and expansive language that the habeas writ must be widely available "as a remedy for severe restraints on individual liberty." *Hensley* v. *Municipal Court*, 411 U. S., at 351.[7] Indeed, for its interpretation of the statutory "custody" requirement, *Jones* itself expressly relied on the fact that at common law, English courts had "permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were 'not under imprisonment, restraint, or duress of any kind.'" 371 U. S., at 239, citing *Earl of Westmeath* v. *Countess of Westmeath*, as set out in a reporter's footnote in *Lyons* v. *Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821).

Second, the Court argues that children living with foster parents somehow are not in the State's "custody" because "they suffer no unusual restraints not imposed on other children." *Ante*, at 511. Yet because unadopted children whose ties with their natural parents have been severed are wards of the State, the State decides where they will live, reserves the right to move them to new physical settings at will, and consents to their marriage, their enlistment in the Armed Forces, as well as all major decisions regarding medical, psychiatric, and surgical treatment. See Tr. of Oral Arg. 7 and 18, citing 23 Pa. Cons. Stat. § 2521(c) (1980).

This Court has found the statutory concept of "custody" broad enough to confer jurisdiction on federal courts to hear

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[7] See *Jones* v. *Cunningham*, 371 U. S., at 243 (the "grand purpose" of the writ is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty"); *Carafas* v. *LaVallee*, 391 U. S., at 238 (the "province" of the writ "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person"); *Hensley* v. *Municipal Court*, 411 U. S., at 350 ("[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. . . . That same theme has indelibly marked our construction of the statute's custody requirement").

and determine habeas applications from petitioners who have freely traveled across state borders while released on their own recognizance, *Hensley* v. *Municipal Court*, *supra*, and who are on unattached, inactive Army Reserve duty, *Strait* v. *Laird*, 406 U. S. 341 (1972). Under these precedents, I have difficulty finding that minor children, who as State wards are fully subject to state-court custody orders, are not sufficiently and peculiarly restrained to be deemed "in custody" for the purposes of the habeas corpus statute. Cf. *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 501 (1973) (opinion concurring in result); *Hensley* v. *Municipal Court*, 411 U. S., at 353 (opinion concurring in result). Equally important, "[w]ith respect to the argument, that some force or improper restraint must be used, in order to authorize the Court in removing an infant from the custody of any one," historical authorities show that "it is not necessary that any force or restraint should exist on the part of the person having the custody of the infant towards it." *Ex parte M'Clellan*, 1 Dowl. 81, 84 (K. B. 1831) (Patteson, J.). Accord: R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 455 (1858); W. Church, A Treatise of the Writ of Habeas Corpus 555 (1886).

Third, the Court asserts that "[f]ederalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition." *Ante*, at 512. While I am fully sensitive to these concerns, once again I cannot understand how they deprive federal courts of statutory *jurisdiction* to entertain habeas petitions. Although the Court's decisions involving collateral attack by state prisoners against state criminal convictions have recognized similar federalism and finality concerns, they have never held that those interests erect jurisdictional bars to relief. To the contrary, the Court has carefully separated the question whether federal courts have the power to issue a writ of habeas corpus from the question whether "in some circumstances considerations of comity and concerns for the

orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Francis* v. *Henderson*, 425 U. S. 536, 539 (1976). See also *Stone* v. *Powell*, 428 U. S. 465, 478, n. 11, and 495, n. 37 (1976) ("Our decision does not mean that the federal court lacks jurisdiction over such a claim . . ."); *Fay* v. *Noia*, 372 U. S. 391, 425–426 (1963).

II

As a matter of history and precedent, then, "[t]here can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this. . . . The issue . . . goes rather to the appropriate exercise of that power." *Francis* v. *Henderson*, 425 U. S., at 538–539. Cf. 648 F. 2d 135, 155 (CA3 1981) (en banc) (Seitz, C. J., concurring). In my view, the difficult discretionary question in this case is whether, 11 years after petitioner voluntarily relinquished her sons to state custody and 4 years after the involuntary termination of her parental rights was affirmed on direct appeal, she remains a proper "next friend" to apply for the federal habeas writ on behalf of her natural children.

As amended in 1948, the federal habeas statute permits a third-party application for habeas relief only if it is "signed and verified by the person for whose relief it is intended or *by someone acting in his behalf*." 28 U. S. C. § 2242 (emphasis added). "But one who so signs and verifies does not thereby become the applicant"; the person under detention remains the real party in interest. *Nash ex rel. Hashimoto* v. *MacArthur*, 87 U. S. App. D. C. 268, 270, 184 F. 2d 606, 608 (1950), cert. denied, 342 U. S. 838 (1951). For that reason, the "next friend" application has been uncommonly granted, see *Weber* v. *Garza*, 570 F. 2d 511, 513–514 (CA5 1978); *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (CA2 1921); *United States ex rel. Funaro* v. *Watchorn*, 164 F. 152, 153 (CC SDNY 1908), and has not been made available automatically even to the natural parents of a habeas

petitioner. See, *e. g.*, *Evans* v. *Bennett*, 467 F. Supp. 1108, 1110 (SD Ala. 1979). Cf. *Gilmore* v. *Utah*, 429 U. S. 1012, 1013–1014 (1976) (BURGER, C. J., concurring).

Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights. American common-law courts, however, soon relied on Lord Mansfield's language in *King* v. *Delaval*, see n. 1, *supra*, to resolve custody disputes initiated by way of a habeas writ in a manner best adapted to serve the welfare of the child. See Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev., at 270 and 274. Thus, the American common-law rule came to be that "the parent stands in court as the real party in interest, upon his natural right of parent; but he is liable to be defeated by his own wrongdoing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent." Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent. L. J. 385, 389 (1903).

Similarly, the federal courts have interpreted the writ as being available only to serve the best interest of the child. "'When a party comes here, using the privilege of acting on the behalf and as the next friend of infants, it is his bounden duty to show that he really acts for the benefit of the infants, and not to promote purposes of his own.'" *King* v. *McLean Asylum of Massachusetts General Hospital*, 64 F. 331, 356 (CA1 1894), quoting *Sale* v. *Sale*, 1 Beav. 586, 587, 48 Eng. Rep. 1068, 1069 (1839). "[I]n such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements." *New York Foundling Hospital* v. *Gatti*, 203 U. S. 429, 439 (1906).[8]

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[8] Presiding over *United States* v. *Green*, 26 F. Cas. 30 (No. 15,256) (CC RI 1824), Justice Story concluded:

"[T]he right of the father to have the custody of his infant child . . . is not on account of any absolute right of the father, but for the benefit of the

Against this historical background, then, I find most telling the Court's observation that "Ms. Lehman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights." *Ante*, at 511. As the Court notes, the record reveals no evidence that any of the sons wanted to return to their natural mother. See *ante*, at 504, n. 2. Moreover, in filing her federal habeas petition, petitioner expressly did not seek to disturb the state trial court's factual findings. See Brief for Petitioner 6. Those findings made "absolutely clear . . . that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, [petitioner] is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied." *In re William L.*, 477 Pa. 322, 345, 383 A. 2d 1228, 1239–1240, cert. denied *sub nom. Lehman* v. *Lycoming County Children's Services*, 439 U. S. 880 (1978).

On such a record, I believe that the District Court could have found, as a discretionary matter, that petitioner had not made a sufficient showing that she acted in the interests of the children to warrant issuing her the writ as their "next friend."[9] Indeed, I believe that the common-law habeas

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infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant in the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real permanent interests of the infant; and if the infant be of sufficient discretion it will also consult its personal wishes. . . . It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody." *Id.*, at 31–32.

[9] Petitioner's colorable claim that her own constitutional rights were infringed would not have entitled her automatically to serve as a "next friend." As Judge Adams' concurring opinion in the Court of Appeals observed:

"Even if we assume that the statute under which the termination occurred, and which survived attack in the state courts, is unconstitutional, it is

corpus tradition would have supported recognition of broad district court discretion to withhold the writ in all but the most extraordinary cases, where the district court had strong reason to believe both that the conditions of the child's confinement unconstitutionally constrained that child's liberty, and that release of the child to his natural parent very likely would serve the child's best interest.

Such a ruling would not have been inconsistent with the Court's decision today, which expressly bases denial of habeas relief on a need to reserve the federal writ "for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns." *Ante*, at 516. Indeed, I cannot understand why the Court's explicit balancing approach yields a strict *jurisdictional* bar. A discretionary limit would have allowed the writ to issue only in those very rare cases that demanded its unique "capacity to . . . cut through barriers of form and procedural mazes." *Harris* v. *Nelson*, 394 U. S. 286, 291 (1969). Because the Court overrides contrary history and precedent to find that habeas jurisdiction does not lie, I dissent.

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highly possible that Mrs. Lehman, in challenging the statute ostensibly on behalf of the children, may actually be asserting an interest that derogates from the child's interest. That is, the child's interest in a sound family environment that the state statute was intended to protect may not be properly represented by the parent's demand for family unity. . . . [W]hat is questionable here is her right to resort to a habeas petition, which can be framed only on behalf of her children." 648 F. 2d, at 154 (footnote omitted).

I disagree, however, with Judge Adams' conclusion that petitioner lacks "standing to assert [a federal habeas] action on behalf of the three children." *Id.*, at 155. As Judge Rosenn correctly responded in dissent, petitioner plainly has standing in a constitutional sense to challenge the violation of her own rights. The question here, however, is whether "Ms. Lehman may not be the best—or even a proper—relator in this action." *Id.*, at 156, n. 2. Cf. *id.*, at 154, n. 47 (Adams, J., concurring).

CRAWFORD ET AL. v. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 81-38. Argued March 22, 1982—Decided June 30, 1982

In a California state-court action seeking desegregation of the schools in the Los Angeles Unified School District (District), the trial court, in 1970, found *de jure* segregation in violation of both the State and Federal Constitutions and ordered the District to prepare a desegregation plan. The California Supreme Court affirmed, but based its decision solely upon the Equal Protection Clause of the State Constitution, which bars *de facto* as well as *de jure* segregation. On remand, the trial court approved a desegregation plan that included substantial mandatory pupil reassignment and busing. While the trial court was considering alternative new plans in 1979, the voters of California ratified an amendment (Proposition I) to the State Constitution which provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The trial court denied the District's request to halt all mandatory reassignment and busing, holding that Proposition I was not applicable in light of the court's 1970 finding of *de jure* segregation in violation of the Fourteenth Amendment. The court then ordered implementation of a revised plan that again included substantial mandatory pupil reassignment and busing. The California Court of Appeal reversed, concluding that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation. The Court of Appeal also held that Proposition I was constitutional under the Fourteenth Amendment and barred that part of the plan requiring mandatory student reassignment and busing.

Held: Proposition I does not violate the Fourteenth Amendment. Pp. 535-545.

(a) This Court's decisions will not support the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede. Such an interpretation of that Amendment would be destructive of a State's democratic processes and of its ability to experiment in dealing with the problems of a heterogeneous population. Proposition I does not embody, expressly or implicitly, a racial classification.

The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification. Pp. 535–540.

(b) Proposition I cannot be characterized as something more than a mere repeal. *Hunter* v. *Erickson*, 393 U. S. 385, distinguished. The State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment. Nor does Proposition I allocate governmental or judicial power on the basis of a discriminatory principle. A "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas. It was constitutional for the people of the State to determine that the Fourteenth Amendment's standard was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I. Pp. 540–542.

(c) Even if it could be assumed that Proposition I had a disproportionate adverse effect on racial minorities, there is no reason to differ with the state appellate court's conclusion that Proposition I in fact was not enacted with a discriminatory purpose. The purposes of the Proposition—chief among them the educational benefits of neighborhood schooling—are legitimate, nondiscriminatory objectives, and the state court characterized the claim of discriminatory intent on the part of millions of voters as but "pure speculation." Pp. 543–545.

113 Cal. App. 3d 633, 170 Cal. Rptr. 495, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 545. MARSHALL, J., filed a dissenting opinion, *post*, p. 547.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Fred Okrand*, *Mark D. Rosenbaum*, *Mary Ellen Gale*, *Bruce J. Ennis*, *E. Richard Larson*, and *Paul Hoffman*.

G. William Shea argued the cause for respondents. With him on the brief for respondent Board of Education of City of Los Angeles were *Peter W. James*, *David T. Peterson*, *Michael M. Johnson* and *Jerry F. Halverson*. *Cliff Fridkis* filed a brief for respondent Bustop, Inc.

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging affirmance. With him on the

brief were *Assistant Attorney General Reynolds, Deputy Solicitor General Wallace*, and *Richard G. Wilkins*.*

JUSTICE POWELL delivered the opinion of the Court.

An amendment to the California Constitution provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The question for our decision is whether this provision is itself in violation of the Fourteenth Amendment.

I

This litigation began almost 20 years ago in 1963, when minority students attending school in the Los Angeles Unified School District (District) filed a class action in state court

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*Briefs of *amici curiae* urging reversal were filed by *Steven Shiffrin* for the African American Education Commission et al.; by *Louis E. Wolcher, Mark N. Aaronson, Vilma S. Martinez, Peter Roos, William L. Robinson*, and *Norman J. Chachkin* for the Lawyers' Committee for Civil Rights Under Law et al.; and by *Alan G. Marer, William T. Keogh*, and *Joseph Cotchett* for Margaret Tinsley et al.

Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian*, Attorney General, *Willard A. Shank*, Chief Assistant Attorney General, *Richard D. Martland*, Assistant Attorney General, and *Geoffrey L. Graybill*, Deputy Attorney General, for the State of California; by *Anthony D. Blankley* for Congresswoman Bobbi Fieldler; and by *G. Kip Edwards*, and *Michael D. Torpey* for the Palo Alto Unified School District.

Briefs of *amici curiae* were filed by *John H. Larson, James W. Briggs, Allan B. McKittrick*, and *Steven J. Carnevale* for the County of Los Angeles; by *Leonard Sacks*, for State Senator Alan Robbins; by *Thomas F. Casey III* for the Belmont School District et al.; by *Penn Foote* for the California Teachers Association; by *Robert H. Finch* for the Citizens Legal Defense Alliance, Inc.; by *Myron D. Alexander* for the League of Women Voters of California; by *John McTernan* and *George Slaff* for the Members of the Bar of the State of California; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

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seeking desegregation of the District's schools.[1] The case went to trial some five years later, and in 1970 the trial court issued an opinion finding that the District was substantially segregated in violation of the State and Federal Constitutions. The court ordered the District to prepare a desegregation plan for immediate use. App. 139.

On the District's appeal, the California Supreme Court affirmed, but on a different basis. *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 551 P. 2d 28 (1976). While the trial court had found *de jure* segregation in violation of the Fourteenth Amendment of the United States Constitution, see App. 117, 120–121, the California Supreme Court based its affirmance solely upon the Equal Protection Clause of the State Constitution.[2] The court explained that under the California Constitution "state school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be

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[1] In 1980 the District included 562 schools with 650,000 students in an area of 711 square miles. In 1968 when the case went to trial, the District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980 the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other. See 113 Cal. App. 3d 633, 642, 170 Cal. Rptr. 495, 501 (1981).

[2] "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature. We shall explain, however, that we do not rest our decision on this characterization because we continue to adhere to our conclusion in [*Jackson* v. *Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P. 2d 878 (1963)] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.'" *Crawford* v. *Board of Education*, 17 Cal. 3d, at 285, 551 P. 2d, at 30. The court explained that federal cases were not controlling:

"In focusing primarily on . . . federal decisions . . . defendant ignores a significant line of California decisions, decisions which authoritatively establish that in this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." *Id.*, at 290, 551 P. 2d, at 33–34.

de facto or de jure in origin." 17 Cal. 3d, at 290, 551 P. 2d, at 34. The court remanded to the trial court for preparation of a "reasonably feasible" plan for school desegregation. *Id.*, at 310, 551 P. 2d, at 48.[3]

On remand, the trial court rejected the District's mostly voluntary desegregation plan but ultimately approved a second plan that included substantial mandatory school reassignment and transportation—"busing"—on a racial and ethnic basis.[4] The plan was put into effect in the fall of 1978, but after one year's experience, all parties to the litigation were dissatisfied. See 113 Cal. App. 3d 633, 636, 170 Cal. Rptr. 495, 497 (1981). Although the plan continued in operation, the trial court began considering alternatives in October 1979.

In November 1979 the voters of the State of California ratified Proposition I, an amendment to the Due Process and

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[3] In stating general principles to guide the trial court on remand, the State Supreme Court discussed the "busing" question: "While critics have sometimes attempted to obscure the issue, court decisions time and time again emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. . . . [I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.*, at 309, 551 P. 2d, at 47. It noted as well that a state court should not intervene to speed the desegregation process so long as the school board takes "reasonably feasible steps to alleviate school segregation," *id.*, at 305, 551 P. 2d, at 45, and that "a court cannot properly issue a 'busing' order so long as a school district continues to meet its constitutional obligations." *Id.*, at 310, 551 P. 2d, at 48.

[4] The plan provided for the mandatory reassignment of approximately 40,000 students in the fourth through eighth grades. Some of these children were bused over long distances requiring daily round-trip bus rides of as long as two to four hours. In addition, the plan provided for the voluntary transfer of some 30,000 students.

Respondent Bustop, Inc., unsuccessfully sought to stay implementation of the plan. See *Bustop, Inc.* v. *Board of Education*, 439 U. S. 1380 (1978) (REHNQUIST, J., in chambers); *Bustop, Inc.* v. *Board of Education*, 439 U. S. 1384 (1978) (POWELL, J., in chambers).

Equal Protection Clauses of the State Constitution.[5] Proposition I conforms the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment:

> "[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause . . . ."[6]

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[5] Proposition I was placed before the voters following a two-thirds vote of each house of the state legislature. Cal. Const., Art. 18, § 1. The State Senate approved the Proposition by a vote of 28 to 6, the State Assembly by a vote of 62 to 17. The voters favored the Proposition by a vote of 2,433,312 (68.6%) to 1,112,923 (31.4%). The Proposition received a majority of the vote in each of the State's 58 counties and in 79 of the State's 80 assembly districts. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3–4, 43–49.

[6] Proposition I added a lengthy proviso to Art. 1, § 7(a), of the California Constitution. Following passage of Proposition I, § 7 now provides, in relevant part:

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States

Following approval of Proposition I, the District asked the Superior Court to halt all mandatory reassignment and busing of pupils. App. 185. On May 19, 1980, the court denied the District's application. The court reasoned that Proposition I was of no effect in this case in light of the court's 1970 finding of *de jure* segregation by the District in violation of the Fourteenth Amendment. Shortly thereafter, the court ordered implementation of a revised desegregation plan, one that again substantially relied upon mandatory pupil reassignment and transportation.[7]

The California Court of Appeal reversed. 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1981). The court found that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation.[8] Thus, Proposition I

Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

. . . . .

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

"In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

[7] The Superior Court ordered the immediate implementation of the revised plan. The District was unsuccessful in its effort to gain a stay of the plan pending appeal. See *Board of Education* v. *Superior Court*, 448 U. S. 1343 (1980) (REHNQUIST, J., in chambers).

[8] "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the

was applicable to the trial court's desegregation plan and would bar that part of the plan requiring mandatory student reassignment and transportation. Moreover, the court concluded that Proposition I was constitutional under the Fourteenth Amendment. *Id.*, at 654, 170 Cal. Rptr., at 509. The court found no obligation on the part of the State to retain a greater remedy at state law against racial segregation than was provided by the Federal Constitution. *Ibid.* The court rejected the claim that Proposition I was adopted with a discriminatory purpose. *Id.*, at 654–655, 170 Cal. Rptr., at 509.[9]

Determining Proposition I to be applicable and constitutional, the Court of Appeal vacated the orders entered by the Superior Court. The California Supreme Court denied hearing. App. to Pet. for Cert. 73a.[10] We granted certiorari. 454 U. S. 892 (1981).

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findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to *de jure* segregation in violation of the Fourteenth Amendment. . . . But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements." 113 Cal. App. 3d, at 645–646, 170 Cal. Rptr., at 503.

[9] The Court of Appeal also rejected the claim that Proposition I deprived minority children of a "vested right" to desegregated education in violation of due process. See *id.*, at 655–656, 170 Cal. Rptr., at 509–510. Petitioners no longer advance this claim.

[10] On March 16, 1981, the District directed that mandatory pupil reassignment under the Superior Court's revised plan be terminated on April 20, 1981. On that date, parents of children who had been reassigned were given the option of returning their children to neighborhood schools. According to respondent Board of Education, approximately 7,000 pupils took this option of whom 4,300 were minority students. Brief for Respondent Board of Education 10.

The state courts refused to enjoin termination of the plan. On April 17, 1980, however, the United States District Court for the Central District of California issued a temporary restraining order preventing termination of the plan. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 513 F. Supp. 717 (CD Cal. 1981). The District Court found that there was

II

We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede.[11] We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.

Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it. Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state-law obligation to

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a "fair chance" that intentional segregation by the District could be demonstrated. *Id.*, at 720. The District Court's order was vacated on the following day by the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District* v. *District Court*, 650 F. 2d 1004 (1981). On remand the District Court denied the District's motion to dismiss. This ruling has been certified for interlocutory appeal. See Brief for Respondent Board of Education 10, n. 4.

On September 10, 1981, the Superior Court approved a new, voluntary desegregation plan.

[11] Respondent Bustop, Inc., argues that far from doing "more" than the Fourteenth Amendment requires, the State actually violated the Amendment by assigning students on the basis of race when such assignments were not necessary to remedy a federal constitutional violation. See Brief for Respondent Bustop, Inc., 10–18. We do not reach this contention.

take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.[12]

Nonetheless, petitioners contend that Proposition I is unconstitutional on its face. They argue that Proposition I employs an "explicit racial classification" and imposes a "race-specific" burden on minorities seeking to vindicate state-created rights. By limiting the power of state courts to enforce the state-created right to desegregated schools, petitioners contend, Proposition I creates a "dual court system" that discriminates on the basis of race.[13] They emphasize that other state-created rights may be vindicated by the state courts without limitation on remedies. Petitioners argue that the "dual court system" created by Proposition I is unconstitutional unless supported by a compelling state interest.

We would agree that if Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest. "A racial classification, regardless of purported motivation, is presumptively invalid

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[12] In this respect this case differs from the situation presented in *Washington* v. *Seattle School District No. 1*, *ante*, p. 457.

In an opinion delivered after Proposition I was enacted, the California Supreme Court stated that "the amendment neither releases school districts from their state constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation." *McKinny* v. *Oxnard Union High School District Board of Trustees*, 31 Cal. 3d 79, 92–93, 642 P. 2d 460, 467 (1982). Moreover, the Proposition only limits state courts when enforcing the State Constitution. Thus, the Proposition would not bar state-court enforcement of state *statutes* requiring busing for desegregation or for any other purpose. Cf. *Brown* v. *Califano*, 201 U. S. App. D. C. 235, 244, 627 F. 2d 1221, 1230 (1980) (legislation limiting power of federal agency to require busing by local school boards held constitutional in view of the "effective avenues for desegregation" left open by the legislation).

[13] "[I]t is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case." Brief for Petitioners 48.

and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979). See *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). But Proposition I does not embody a racial classification.[14] It neither says nor implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards.[15] Indeed, even if Proposition I had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.[16] In addition, this Court previously has held that even when a neutral law has a dis-

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[14] In *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court invalidated a city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." *Id.*, at 391. In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in *Hunter* are missing. See *infra*.

[15] A neighborhood school policy in itself does not offend the Fourteenth Amendment. See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes"). Cf. 20 U. S. C. § 1701: "(a) The Congress declares it to be the policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and (2) the neighborhood is the appropriate basis for determining public school assignments."

[16] In the Los Angeles School District, white students are now the racial minority, see n. 1, *supra*. Similarly, in Los Angeles County, racial minorities, including those of Spanish origin, constitute the majority of the population. See U. S. Dept. of Commerce, 1980 Census of Population and Housing, California, Advance Reports 6 (Mar. 1981).

proportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.[17]

Similarly, the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.[18] This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place. In *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406, 414 (1977), we found that the school board's mere repudiation of an earlier resolution calling for desegregation did not violate the Fourteenth Amendment.[19] In *Reitman* v. *Mulkey*, 387 U. S. 369, 376 (1967), and again in *Hunter* v. *Erickson*, 393 U. S. 385, 390, n. 5 (1969), we were careful to note that the laws under review did more than "mere[ly] repeal" existing antidiscrimination legislation.[20]

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[17] See *Washington* v. *Davis*, 426 U. S. 229, 238–248 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977); *James* v. *Valtierra*, 402 U. S. 137, 141 (1971).

[18] Proposition I is not limited to busing for the purpose of racial desegregation. It applies neutrally to "pupil school assignment or pupil transportation" in general. Even so, it is clear that court-ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of Proposition I.

[19] See *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S., at 531, n. 5 ("Racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment").

[20] In *Hunter* we noted that "we do not hold that mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment." 393 U. S., at 390, n. 5. In *Reitman* the Court held that California Proposition 14 was unconstitutional under the Fourteenth Amendment not because it repealed two pieces of antidiscrimination legislation, but because the Proposition involved the State in private racial discrimination: "Here

In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.[21]

Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities.[22] Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects.[23] Yet these would be the results of requiring a State

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we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." 387 U. S., at 380–381.

[21] Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason. See *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

[22] See *Palmer* v. *Thompson*, 403 U. S. 217, 228 (1971) ("To hold . . . that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped . . . would plainly discourage the expansion and enlargement of needed services in the long run") (BURGER, C. J., concurring); *Reitman* v. *Mulkey*, *supra*, at 395 ("Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable") (Harlan, J., dissenting).

[23] In his dissenting opinion in *Reitman* v. *Mulkey*, *supra*, at 395, Justice Harlan remarked upon the need for legislative flexibility when dealing with the "delicate and troublesome problems of race relations." He noted:

"The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and

to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people.

III

Petitioners seek to avoid the force of the foregoing considerations by arguing that Proposition I is not a "mere repeal." Relying primarily on the decision in *Hunter* v. *Erickson*, *supra*, they contend that Proposition I does not simply repeal a state-created right but fundamentally alters the judicial system so that "those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court."[24] We do not view *Hunter* as controlling here, nor are we persuaded by petitioners' characterization of Proposition I as something more than a mere repeal.

In *Hunter* the Akron city charter had been amended by the voters to provide that no ordinance regulating real estate on the basis of race, color, religion, or national origin could take effect until approved by a referendum. As a result of the charter amendment, a fair housing ordinance, adopted by the City Council at an earlier date, was no longer effective. In holding the charter amendment invalid under the Fourteenth Amendment, the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The

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compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum." 387 U. S., at 395–396.

[24] Tr. of Oral Arg. 6. See *id.*, at 7–8 ("The fact that a state may be free to remove a right or remove a duty, does not mean that it has the same freedom to leave the right in place but simply, in a discriminatory way we argue, provide less than full judicial remedy").

amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U. S., at 389–390. Thus, whereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle.[25] As such, the charter amendment placed an impermissible, "special burde[n] on racial minorities within the governmental process." *Id.*, at 391.[26]

Hunter involved more than a "mere repeal" of the fair housing ordinance; persons seeking antidiscrimination housing laws—presumptively racial minorities—were "singled out for mandatory referendums while no other group . . . face[d] that obstacle." *James* v. *Valtierra*, 402 U. S. 137, 142 (1971). By contrast, even on the assumption that racial minorities benefitted from the busing required by state law, Proposition I is less than a "repeal" of the California Equal Protection Clause. As noted above, after Proposition I, the State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment.

Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the

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[25] "In the case before us . . . the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 393 U. S., at 395 (Harlan, J., concurring).

[26] The *Hunter* Court noted that although "the law on its face treats Negro and white, Jew and gentile in an identical manner," *id.*, at 391, a charter amendment making it more difficult to pass antidiscrimination legislation could only disadvantage racial minorities in the governmental process.

same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). Remedies appropriate in one area of legislation may not be desirable in another. The remedies available for violation of the antitrust laws, for example, are different than those available for violation of the Civil Rights Acts. Yet a "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas.[27] Surely it was constitutional for the California Supreme Court to caution that although "in some circumstances busing will be an appropriate and useful element in a desegregation plan," in other circumstances "its 'costs,' both in financial and educational terms, will render its use inadvisable." See n. 3, *supra*. It was equally constitutional for the people of the State to determine that the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I.[28]

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.

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[27] Petitioners contend that Proposition I only restricts busing for the purpose of racial discrimination. The Proposition is neutral on its face, however, and respondents—as well as the State in its *amicus* brief—take issue with petitioners' interpretation of the provision.

[28] Similarly, a "dual constitution" is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others. Nor is a "dual executive branch" created when an agency is given enforcement powers in one area but not in another. Cf. *Brown* v. *Califano*, 201 U. S. App. D. C. 235, 627 F. 2d 1221 (1980) (upholding federal legislation prohibiting a federal executive agency, but not local school officials or federal courts, from requiring busing).

IV

The California Court of Appeal also rejected petitioners' claim that Proposition I, if facially valid, was nonetheless unconstitutional because enacted with a discriminatory purpose. The court reasoned that the purposes of the Proposition were well stated in the Proposition itself.[29] Voters may have been motivated by any of these purposes, chief among them the educational benefits of neighborhood schooling. The court found that voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem. See n. 1, *supra*. It characterized petitioners' claim of discriminatory intent on the part of millions of voters as but "pure speculation." 113 Cal. App. 3d, at 655, 170 Cal. Rptr., at 509.

In *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), the Court considered the constitutionality of another California Proposition. In that case, the California Supreme Court had concluded that the Proposition was unconstitutional because it gave the State's approval to private racial discrimination. This Court agreed, deferring to the findings made by the California court. The Court noted that the California court was "armed . . . with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate." *Id.*, at 378. Similarly, in this case,

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[29] The Proposition contains its own statement of purpose:

"[T]he Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment."

again involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court.[30]

Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose. In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides "an 'important starting point.'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266 (1977).

Proposition I in no way purports to limit the power of state courts to remedy the effects of intentional segregation with its accompanying stigma. The benefits of neighborhood schooling are racially neutral. This manifestly is true in Los Angeles where over 75% of the public school body is composed of groups viewed as racial minorities. See nn. 1 and 16, *supra*. Moreover, the Proposition simply removes one means of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.[31]

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[30] Cf. *Washington* v. *Davis*, 426 U. S., at 253 ("The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts") (STEVENS, J., concurring).

[31] In *Brown* v. *Califano*, *supra*, the Court of Appeals found that a federal statute preventing the Department of Health, Education, and Welfare (HEW) from requiring busing "to a school other than the school which is nearest the student's home," 42 U. S. C. § 2000d, was not unconstitutional. HEW retained authority to encourage school districts to desegregate through other means, and the enforcement powers of the Department of Justice were left untouched. The court therefore concluded that the limits on HEW's ability to order mandatory busing did not have a discriminatory

Even if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose. See 113 Cal. App. 3d, at 654–655, 170 Cal. Rptr., at 509. In this case the Proposition was approved by an overwhelming majority of the electorate.[32] It received support from members of all races.[33] The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate.

Accordingly the judgment of the California Court of Appeal is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I write separately to address what I believe are the critical distinctions between this case and *Washington* v. *Seattle School District No. 1*, *ante*, p. 457.

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effect. And, having done so, it refused to inquire into legislative motivation: "Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." 201 U. S. App. D. C., at 248, 627 F. 2d, at 1234 (footnote omitted).

[32] Cf. *Washington* v. *Davis*, *supra*, at 253 (STEVENS, J., concurring) ("It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it").

[33] Proposition I received support from 73.9% of the voters in Los Angeles County which has a "minority" population—including persons of Spanish origin—of over 50%. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3. See n. 16, *supra*. By contrast, the Proposition received its smallest percentage of the vote in Humboldt and Marin Counties which are nearly all-white in composition.

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The Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws. Thus the Court has found particularly pernicious those classifications that threaten the ability of minorities to involve themselves in the process of self-government, for if laws are not drawn within a "just framework," *Hunter* v. *Erickson*, 393 U. S. 385, 393 (1969) (Harlan, J., concurring), it is unlikely that they will be drawn on just principles.

The Court's conclusion in *Seattle* followed inexorably from these considerations. In that case the statewide electorate reallocated decisionmaking authority to "'mak[e] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *Washington* v. *Seattle School District No. 1*, *ante*, at 470 (emphasis in original), quoting *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). The Court found such a political structure impermissible, recognizing that if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be "relegated, by state fiat, in a most basic way to second-class status." *Plyler* v. *Doe*, 457 U. S. 202, 233 (1982) (BLACKMUN, J., concurring).

In my view, something significantly different is involved in this case. State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the State's political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy. Indeed, ruling for petition-

ers on a *Hunter* theory seemingly would mean that statutory affirmative-action or antidiscrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity.

In short, the people of California—the same "entity" that put in place the State Constitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable. The "political process or the decisionmaking mechanism used to *address* racially conscious legislation" has not been "singled out for peculiar and disadvantageous treatment," *Washington* v. *Seattle School District No. 1*, *ante*, at 485 (emphasis in original), for those political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected by Proposition I. And I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judiciary's ability to enforce that right—"'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" *Ante*, at 486, quoting *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4.

Because I find *Seattle* distinguishable from this case, I join the opinion and judgment of the Court.

JUSTICE MARSHALL, dissenting.

The Court today addresses two state constitutional amendments, each of which is admittedly designed to substantially curtail, if not eliminate, the use of mandatory student assignment or transportation as a remedy for *de facto* segregation. In *Washington* v. *Seattle School District No. 1*, *ante*, p. 457 *(Seattle)*, the Court concludes that Washington's Initiative 350, which effectively prevents school boards from ordering mandatory school assignment in the absence of a finding of *de jure* segregation within the meaning of the Fourteenth Amendment, is unconstitutional because "it uses the racial nature of an issue to define the governmental decisionmaking

structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, *ante*, at 470. Inexplicably, the Court simultaneously concludes that California's Proposition I, which effectively prevents a state court from ordering the same mandatory remedies in the absence of a finding of *de jure* segregation, *is* constitutional because "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Ante*, at 542. Because I fail to see how a fundamental redefinition of the governmental decisionmaking structure with respect to the same racial issue can be unconstitutional when the State seeks to remove the authority from local school boards, yet constitutional when the State attempts to achieve the same result by limiting the power of its courts, I must dissent from the Court's decision to uphold Proposition I.

I

In order to understand fully the implications of the Court's action today, it is necessary to place the facts concerning the adoption of Proposition I in their proper context. Nearly two decades ago, a unanimous California Supreme Court declared that "[t]he segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 880, 382 P. 2d 878, 880–881 (1963). Recognizing that the "right to an equal opportunity for education and the harmful consequences of segregation" do not differ according to the *cause* of racial isolation, the California Supreme Court declined to adopt the distinction between *de facto* and *de jure* segregation engrafted by this Court on the Fourteenth Amendment. *Id.*,

at 881, 382 P. 2d, at 881–882. Instead, the court clearly held that "school boards [must] take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id.*, at 881, 382 P. 2d, at 882.

As the California Supreme Court subsequently explained, the duty established in *Jackson* does not require that "each school in a district . . . reflect the racial composition of the district as a whole." *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 302, 551 P. 2d 28, 42 (1976) *(Crawford I)*. Rather, it is sufficient that school authorities "take reasonable and feasible steps to eliminate *segregated* schools, i. e., schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience." *Id.*, at 303, 551 P. 2d, at 43 (emphasis in original). Moreover, the California courts have made clear that the primary responsibility for implementing this state constitutional duty lies with local school boards. "[S]o long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation, and its harmful consequences, . . . the judiciary should [not] intervene in the desegregation process." *Id.*, at 305–306, 551 P. 2d, at 45. If, however, a school board neglects or refuses to implement meaningful programs designed to bring about an end to racial isolation in the public schools, "the court is left with no alternative but to intervene to protect the constitutional rights of minority children." *Id.*, at 307, 551 P. 2d, at 45. When judicial intervention is necessary, the court "may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate the harmful consequences of school segregation in the district." *Id.*, at 307, 551 P. 2d, at 46. Moreover, "once a school board defaults in its constitutional task, the court, in

devising a remedial order, is not precluded from requiring the busing of children as part of a reasonably feasible desegregation plan." *Id.*, at 310, 551 P. 2d, at 48.

Like so many other decisions protecting the rights of minorities, California's decision to eradicate the evils of segregation regardless of cause has not been a popular one. In the nearly two decades since the State Supreme Court's decision in *Jackson*, there have been repeated attempts to restrain school boards and courts from enforcing this constitutional guarantee by means of mandatory student transfers or assignments. In 1970, shortly after the San Francisco Unified School District voluntarily adopted a desegregation plan involving mandatory student assignment, the California Legislature enacted Education Code § 1009.5, Cal. Educ. Code Ann. § 1909.5, currently codified at Cal. Educ. Code Ann. § 35350 (West 1978), which provides that "[n]o governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." In *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937, 479 P. 2d 669 (1971), the California Supreme Court interpreted this provision only to bar a school district from compelling students, without parental consent, to use means of transportation furnished by the district. Construing the statute to prohibit nonconsensual assignment of students for the purpose of eradicating *de jure* or *de facto* segregation, the court concluded, would clearly violate both the State and the Federal Constitution by "exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools." *Id.*, at 943, 479 P. 2d, at 671.

The very next year, opponents of mandatory student assignment for the purpose of achieving racial balance again attempted to eviscerate the state constitutional guarantee recognized in *Jackson*. Proposition 21, which was enacted by referendum in November 1972, stated that "[n]o public school

student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." Predictably, the California Supreme Court struck down Proposition 21 "for the same reasons set forth by us in *Johnson*." *Santa Barbara School District* v. *Superior Court*, 13 Cal. 3d 315, 324, 530 P. 2d 605, 613 (1975).

Finally, in 1979, the people of California enacted Proposition I. That Proposition, like all of the previous initiatives, effectively deprived California courts of the ability to enforce the state constitutional guarantee that minority children will not attend racially isolated schools by use of what may be "the sole and exclusive means of eliminating racial segregation in the schools," *San Francisco Unified School District* v. *Johnson*, *supra*, at 943, 479 P. 2d, at 671, mandatory student assignment and transfer. Unlike the earlier attempts to accomplish this objective, however, Proposition I does not purport to prevent mandatory assignments and transfers when such measures are predicated on a violation of the Federal Constitution. Therefore, the only question presented by this case is whether the fact that mandatory transfers may still be made to vindicate federal constitutional rights saves this initiative from the constitutional infirmity presented in the previous attempts to accomplish this same objective. In my view, the recitation of the obvious—that a state constitutional amendment does not override federal constitutional guarantees—cannot work to deprive minority children in California of their federally protected right to the equal protection of the laws.

II

A

In *Seattle*, the Court exhaustively set out the relevant principles that control the present inquiry. We there found that a series of precedents, exemplified by *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), establish that the Fourteenth Amendment

prohibits a State from allocating "governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, *ante*, at 470 (emphasis in original). We concluded that "state action of this kind . . . 'places *special* burdens on racial minorities within the governmental process' . . . thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *Ibid.* (emphasis in original), quoting *Hunter* v. *Erickson*, *supra*, at 391, 395 (Harlan, J., concurring).

It is therefore necessary to determine whether Proposition I works a "nonneutral" reallocation of governmental power on the basis of the racial nature of the decision. This determination is also informed by our decision in *Seattle*. In that case we were presented with a statewide initiative which effectively precluded local school boards from ordering mandatory student assignment or transfer except where required to remedy a constitutional violation. We concluded that the initiative violated the Fourteenth Amendment because it reallocated decisionmaking authority over racial issues from the local school board to a "new and remote level of government." *Seattle*, *ante*, at 483. In reaching this conclusion, we specifically affirmed three principles that are particularly relevant to the present inquiry.

First, we rejected the State's argument that a statewide initiative prohibiting mandatory student assignment has no "racial overtones" simply because it does not mention the words "race" or "integration." *Seattle*, *ante*, at 471. We noted that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350." *Ibid.* In light of its language and the history surrounding its adoption, we found it "beyond reasonable dispute . . . that the initiative was enacted '"because of," not merely "in spite of," its adverse effects upon' busing for inte-

gration." *Ibid.*, quoting *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979). Moreover, we rejected the Solicitor General's remarkable contention, a contention also pressed here, that "busing for integration . . . is not a peculiarly 'racial' issue at all." *Seattle*, *ante*, at 471–472. While not discounting the value of an integrated education to nonminority students, we concluded that *Lee* v. *Nyquist*, *supra*, definitively established that "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority, and is designed for that purpose," thereby bringing it within the *Hunter* doctrine. *Seattle*, *ante*, at 472.

Second, the *Seattle* Court determined that Initiative 350 unconstitutionally reallocated power from local school boards to the state legislature or the statewide electorate. After the enactment of Initiative 350, local school boards continued to exercise considerable discretion over virtually all educational matters, including student assignment. Those seeking to eradicate *de facto* segregation, however, were forced to "surmount a considerably higher hurdle than persons seeking comparable legislative action," *Seattle*, *ante*, at 474, for instead of seeking relief from the local school board, those pursuing this racial issue were forced to appeal to a different and more remote level of government. Just as in *Hunter* v. *Erickson*, *supra*, where those interested in enacting fair housing ordinances were compelled to gain the support of a majority of the electorate, we held that this reallocation of governmental power along racial lines offends the Equal Protection Clause. Our holding was not altered by the fact that those seeking to combat *de facto* segregation could still pursue their cause by petitioning local boards to enact voluntary measures or by seeking action from the state legislature. Nor were we persuaded by the argument that no transfer of power had occurred because the State was ultimately responsible for the educational policy of local school boards. We found it sufficient that Initiative 350 had deprived those seek-

ing to redress a racial harm of the right to seek a particularly effective form of redress from the level of government ordinarily empowered to grant the remedy.

Finally, the Court's decision in *Seattle* implicitly rejected the argument that state action that reallocates governmental power along racial lines can be immunized by the fact that it specifically leaves intact rights guaranteed by the Fourteenth Amendment. The fact that mandatory pupil reassignment was still available as a remedy for *de jure* segregation did not alter the conclusion that an unconstitutional reallocation of power had occurred with respect to those seeking to combat *de facto* racial isolation in the public schools.

B

In my view, these principles inexorably lead to the conclusion that California's Proposition I works an unconstitutional reallocation of state power by depriving California courts of the ability to grant meaningful relief to those seeking to vindicate the State's guarantee against *de facto* segregation in the public schools. Despite Proposition I's apparent neutrality, it is "beyond reasonable dispute," *Seattle*, *ante*, at 471, and the majority today concedes, that "court-ordered busing in *excess* of that required by the Fourteenth Amendment . . . prompted the initiation and probably the adoption of Proposition I." *Ante*, at 538, n. 18 (emphasis in original).[1] Because "minorities may consider busing for integration to be 'legislation that is in their interest,'" *Seattle*, *ante*, at 474, quoting

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[1] Just as in *Seattle*, the fact that other types of student transfers conceivably might be prohibited does not alter this conclusion: "Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by" Proposition I. *Seattle*, *ante*, at 471. Indeed in their response to the petition for certiorari, respondents characterized Proposition I as addressing but "one narrow area: the power of a state court to order mandatory student assignment or transportation as a desegregation remedy." Brief in Opposition 9.

Hunter v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring), Proposition I is sufficiently "racial" to invoke the *Hunter* doctrine.[2]

Nor can there be any doubt that Proposition I works a substantial reallocation of state power. Prior to the enactment of Proposition I, those seeking to vindicate the rights enumerated by the California Supreme Court in *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 382 P. 2d 878 (1963), just as those interested in attaining any other educational objective, followed a two-stage procedure. First, California's minority community could attempt to convince the local school board voluntarily to comply with its constitutional obligation to take reasonably feasible steps to eliminate racial isolation in the public schools. If the board was either unwilling or unable to carry out its constitutional duty, those seeking redress could petition the California state courts to require school officials to live up to their obligations. Busing could be required as part of a judicial remedial order. *Crawford I*, 17 Cal. 3d, at 310, 551 P. 2d, at 48.

Whereas Initiative 350 attempted to deny minority children the first step of this procedure, Proposition I eliminates by fiat the second stage: the ability of California courts to order meaningful compliance with the requirements of the State Constitution. After the adoption of Proposition I, the only method of enforcing against a recalcitrant school board the state constitutional duty to eliminate racial isolation is to petition either the state legislature or the electorate as a whole. Clearly, the rules of the game have been signifi-

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[2] It is therefore irrelevant whether the "benefits of neighborhood schooling are racially neutral," as the majority asserts. *Ante*, at 544; see *ante*, at 537. In *Washington* v. *Seattle School District No. 1*, *ante*, at 472, we specifically rejected the argument that because some minorities as well as whites supported the initiative, it could not be considered a racial classification.

cantly changed for those attempting to vindicate this state constitutional right.[3]

The majority seeks to conceal the unmistakable effects of Proposition I by calling it a "mere repeal" of the State's earlier commitment to do "'more' than the Fourteenth Amendment requires." *Ante*, at 535. Although it is true that we have never held that the "mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment," *Hunter* v. *Erickson*, *supra*, at 390, n. 5, it is equally clear that the reallocation of governmental power created by Proposition I is not a "mere repeal" within the meaning of any of our prior decisions.

In *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406 (1977), the new members of the Dayton Board of Education repudiated a resolution drafted by their predecessors admitting the Board's role in the establishment of a segregated school system and calling for various remedial actions. In

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[3] There can be no question that the practical effect of Proposition I will be to deprive state courts of "the sole and exclusive means of eliminating racial segregation in the schools." *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937, 943, 479 P. 2d 669, 671 (1971). As we have often noted "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina Board of Ed.* v. *Swann*, 402 U. S. 43, 46 (1971). Moreover, Proposition I prevents a state court from ordering school officials to take any action respecting *pupil school assignment*, as well as pupil transportation. Presumably, state courts could not design a remedy involving the "pairing" or "clustering" of schools, even if such a remedy did not involve *any* "busing." In the present case, the state trial court found that the voluntary programs proposed by the Los Angeles School Board were "constitutionally suspect" because they "place[d] the burden of relieving the racial isolation of the minority student upon the minority student." App. 160. Consequently, since "a voluntary program would not serve to integrate the community's schools," *Seattle*, *ante*, at 473, n. 16, Proposition I, like the measures at issue in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), and *Seattle*, precludes the effective enjoyment by California's minority children of their right to eliminate racially isolated schools.

concluding that the Board was constitutionally permitted to withdraw its own prior *mea culpa*, this Court was careful to note that "*[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs.*" *Id.*, at 413 (emphasis added). Therefore, the only time that this Court has squarely held that a "mere repeal" did not violate the Fourteenth Amendment, it was presented with a situation where a governmental entity rescinded *its own* prior statement of policy without affecting any existing educational policy. It is no surprise that such conduct passed constitutional muster.

By contrast, in *Seattle*, *Hunter*, and *Reitman* v. *Mulkey*, 387 U. S. 369 (1967),[4] the three times that this Court has explicitly rejected the argument that a proposed change constituted a "mere repeal" of an existing policy, the alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a drastic alteration of the substantive effect of existing policy. This case falls squarely within this latter category. To be sure, the *right* to be free from racial isolation in the public schools remains unaffected by Proposition I. See *ante*, at 535–536; see *McKinny* v. *Oxnard Union High School District Board of Trustees*, 31 Cal. 3d 79, 92–93, 642 P. 2d 460, 467 (1982). But Proposition I does repeal the power of the state court to *enforce* this existing constitutional guarantee through the use of mandatory pupil assignment and transfer.

The majority asserts that the Fourteenth Amendment does not "require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Ante*, at 540. A state court's authority to order appropriate remedies for

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[4] In *Reitman* v. *Mulkey*, this Court struck down another California ballot measure, granting every resident the absolute constitutional right to sell or rent his property to whomever he or she chooses. We held that the provision amounted to an unconstitutional authorization of private discrimination.

state constitutional violations, however, is no more based on the "final authority" of the people than the power of the local Seattle School Board to make decisions regarding pupil assignment is premised on the State's ultimate control of the educational process. Rather, the authority of California courts to order mandatory student assignments in this context springs from the same source as the authority underlying other remedial measures adopted by state and federal courts in the absence of statutory authorization: the "courts power to provide equitable relief" to remedy a constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 30 (1971); *Crawford I*, 17 Cal. 3d, at 307, 551 P. 2d, at 46 ("a trial court may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate . . . school segregation"). Even assuming that the source of a court's power to remedy a constitutional violation can be traced back to "the people," the majority's conclusion that "the people" can therefore confer that remedial power on a discriminatory basis is plainly inconsistent with our prior decisions. In *Hunter* v. *Erickson*, 393 U. S., at 392, we struck down the referendum at issue even though the people of Akron, Ohio, undoubtedly retained "final authority" for all legislation. Similarly, in *Seattle* we concluded that the reallocation of power away from local school boards offended the Equal Protection Clause even though the State of Washington "is ultimately responsible for providing education within its borders." *Ante*, at 477. The fact that this change was enacted through popular referendum, therefore, cannot immunize it from constitutional review. See *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 736–737 (1964).

As in *Seattle*, *Hunter*, and *Reitman*, Proposition I's repeal of the state court's enforcement powers was the work of an independent governmental entity, and not of the state courts themselves. That this repeal drastically alters the substan-

tive rights granted by existing policy is patently obvious from the facts of this litigation.[5] By prohibiting California courts from ordering mandatory student assignment when necessary to eliminate racially isolated schools, Proposition I has placed an enormous barrier between minority children and the effective enjoyment of their constitutional rights, a barrier that is not placed in the path of those who seek to vindicate other rights granted by state law. This Court's precedents demonstrate that, absent a compelling state interest, which respondents have hardly demonstrated, such a discriminatory barrier cannot stand.[6]

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[5] Indeed Proposition I by its express terms allows for the modification of existing plans upon the application of any interested person. Art. 1, § 7(a).

[6] As the majority notes, Proposition I states that the "people of the State of California find and declare that this amendment is necessary to serve compelling public interests," including, *inter alia*, "making the most efficient use of . . . limited financial resources," protecting the "health and safety" of all students, preserving "harmony and tranquility," and "protecting the environment." *Ante*, at 533, n. 6. These purported justifications, while undoubtedly meritorious, are clearly insufficient to sustain the racial classification established by Proposition I. As we have often noted, racial classifications may only be upheld where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). It goes without saying that a self-serving conclusory statement of necessity will not suffice to fulfill this burden. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 28, 29–31 (1971) (rejecting a similar list of justifications for establishing a racial classification). "In any event, [respondents] have failed to show that the purpose[s] they impute to the [Proposition] could not be accomplished by alternative methods, not involving racial distinctions." *Lee* v. *Nyquist*, 318 F. Supp., at 720.

Parenthetically, it is interesting to note that the allegedly compelling interest in establishing "neighborhood schools" so often referred to by the majority appears nowhere in the official list of justifications. The absence of any mention of this supposed justification is not surprising in light of the fact that the Proposition's ban on student "assignment" effectively prevents desegregation remedies that would not require a student to leave his "neighborhood." See n. 3, *supra*.

The fact that California attempts to cloak its discrimination in the mantle of the Fourteenth Amendment does not alter this result. Although it might seem "paradoxical" to some Members of this Court that a referendum that adopts the wording of the Fourteenth Amendment might violate it, the paradox is specious. Because of the Supremacy Clause, Proposition I would have precisely the same legal effect if it contained no reference to the Fourteenth Amendment. The lesson of *Seattle* is that a State, in prohibiting conduct that is not required by the Fourteenth Amendment, may nonetheless create a discriminatory reallocation of governmental power that does violate equal protection. The fact that some less effective avenues remain open to those interested in mandatory student assignment to eliminate racial isolation, like the fact that the voters in *Hunter* conceivably might have enacted fair housing legislation, or that those interested in busing to eliminate racial isolation in *Seattle* conceivably might use the State's referendum process, does not justify the discriminatory reallocation of governmental decision-making.

In this case, the reallocation of power occurs in the judicial process—the major arena minorities have used to ensure the protection of rights "in their interest." *Hunter* v. *Erickson*, *supra*, at 395 (Harlan, J., concurring). Certainly, *Hunter* and *Seattle* cannot be distinguished on the ground that they concerned the reallocation of legislative power, whereas Proposition I redistributes the inherent power of a court to tailor the remedy to the violation. As we have long recognized, courts too often have been "the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP* v. *Button*, 371 U. S. 415, 430 (1963). See *Reitman* v. *Mulkey*, 387 U. S., at 377 (invalidating state constitutional amendment because "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, ex-

ecutive, *or judicial* regulation at any level of the state government") (emphasis added). It is no wonder, as the present case amply illustrates, that whatever progress that has been made towards the elimination of *de facto* segregation has come from the California courts. Indeed, Proposition I, by denying full access to the only branch of government that has been willing to address this issue meaningfully, is far worse for those seeking to vindicate the plainly unpopular cause of racial integration in the public schools than a simple reallocation of an often unavailable and unresponsive legislative process. To paraphrase, "[i]t surely is an excessively formal exercise . . . to argue that the procedural revisions at issue in *Hunter* [and *Seattle*] imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by [Proposition I] does not erect comparable political obstacles." *Seattle*, *ante*, at 475, n. 17.

III

Even if the effects of Proposition I somehow can be distinguished from the enactments at issue in *Hunter* and *Seattle*, the result reached by the majority today is still plainly inconsistent with our precedents. Because it found that the segregation of the California public schools violated the Fourteenth Amendment, the state trial court never considered whether Proposition I was itself unconstitutional because it was the product of discriminatory intent. Despite the absence of *any* factual record on this issue, the Court of Appeal rejected petitioners' argument that the law was motivated by a discriminatory intent on the ground that the recitation of several potentially legitimate purposes in the legislation's preamble rendered any claim that it had been enacted for an invidious purpose "pure speculation." 113 Cal. App. 3d 633, 655, 170 Cal. Rptr. 495, 509 (1981).

In *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266 (1977), we declared that "[d]etermining

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whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Petitioners assert that the disproportionate impact of Proposition I, combined with the circumstances surrounding its adoption and the history of opposition to integration cited *supra*, at 548–551, clearly indicates the presence of discriminatory intent. See Brief for Petitioners 64–96. Yet despite the fact that *no inquiry* has been conducted into these allegations by either the trial or the appellate court, this Court, in its haste to uphold the banner of "neighborhood schools," affirms a factual determination that was never made. Such blind allegiance to the conclusory statements of a lower court is plainly forbidden by our prior decisions.[7]

IV

Proposition I is in some sense "better" than the Washington initiative struck down in *Seattle*.[8] In their generosity, California voters have allowed those seeking racial balance to petition the very school officials who have steadfastly maintained the color line at the schoolhouse door to comply voluntarily with their continuing state constitutional duty to desegregate. At the same time, the voters have deprived minorities of the only method of redress that has proved effective—the full remedial powers of the state judiciary. In the name of the State's "ability to experiment," *ante*, at 535, the Court today allows this placement of yet another burden

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[7] The majority's reliance on *Reitman* v. *Mulkey*, 387 U. S. 369 (1967) is therefore misplaced. How can any deference be given to the state court's "knowledge of the facts and circumstances concerning the passage and potential impact" of Proposition I, *id.*, at 378, when no such findings were ever made.

[8] Initiative 350, however, at least did "not hinder [the] State from enforcing [the State] Constitution." *Seattle*, *ante*, at 490, n. 3 (POWELL, J., dissenting).

in the path of those seeking to counter the effects of nearly three centuries of racial prejudice. Because this decision is neither justified by our prior decisions nor consistent with our duty to guarantee all citizens the equal protection of the laws, I must dissent.

GRIFFIN *v.* OCEANIC CONTRACTORS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-614. Argued April 26, 1982—Decided June 30, 1982

Title 46 U. S. C. § 596, after obligating the master or owner of a vessel making coasting or foreign voyages to pay a seaman's unpaid wages within specified periods after his discharge, provides that a master or owner who fails to make such payment "without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods." Petitioner, who was injured while working aboard respondent's vessel in foreign waters, brought suit under the Jones Act and general maritime law in Federal District Court after respondent refused to pay his medical expenses and to furnish transportation back to the United States. In addition to damages, petitioner sought to recover penalty wages under § 596 for respondent's failure to pay $412.50 in earned wages allegedly due upon discharge. The court found, *inter alia*, that petitioner had been discharged from respondent's employ on the day of the injury, and that respondent's failure to pay petitioner the $412.50 was "without sufficient cause." In assessing the penalty wages at $6,881.60, the court held that "[t]he period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case." It determined that the appropriate penalty period was the 34-day period from the date of discharge through the date when petitioner began work for another company. Petitioner appealed the award of damages as inadequate, but the Court of Appeals affirmed.

Held: The district courts have no discretion to limit the period during which the wage penalty is assessed. Imposition of the penalty is mandatory for each day that payment is withheld in violation of § 596. Pp. 569–577.

(a) The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated. After the District Court found that respondent had refused to pay petitioner the balance of his earned wages promptly after discharge and that its refusal was "without sufficient cause," nothing in § 596's language vested the court with discretion to limit the penalty assessment to the period of petitioner's unemployment. Pp. 569–571.

(b) This is not the type of case where literal application of a statute would thwart its obvious purpose. Section 596's "evident purpose" is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Fergusson*, 281 U. S. 52, 55. Although the statute's purpose is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment. The legislative history confirms that Congress intended the statute to mean exactly what its plain language says. Pp. 571–574.

(c) Nor is literal application of § 596 in this case precluded on the asserted ground that it would produce an absurd and unjust result which Congress could not have intended. Even though the penalty for respondent's failure to promptly pay the $412.50 in wages—if computed on the basis of the period from petitioner's discharge until the date respondent actually paid the wages by satisfying the District Court's judgment—would be over $300,000, awards made under § 596 were not intended to be merely compensatory. Since the District Court found that respondent's refusal to pay petitioner following his discharge was without sufficient cause, and since it made no finding that respondent's continuing delay in payment beyond the period petitioner was unable to work was for sufficient cause, its decision to limit the penalty was error. *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245. Pp. 574–577.

664 F. 2d 36, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 577.

Robert A. Chaffin argued the cause and filed briefs for petitioner.

Theodore Goller argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the application of 46 U. S. C. § 596, which requires certain masters and vessel owners to pay seamen promptly after their discharge and authorizes seamen to

recover double wages for each day that payment is delayed without sufficient cause. The question is whether the district courts, in the exercise of discretion, may limit the period during which this wage penalty is assessed, or whether imposition of the penalty is mandatory for each day that payment is withheld in violation of the statute.

I

On February 18, 1976, petitioner signed an employment contract with respondent in New Orleans, agreeing to work as a senior pipeline welder on board vessels operated by respondent in the North Sea. The contract specified that petitioner's employment would extend "until December 15, 1976 or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever shall occur first." App. 41. The contract also provided that respondent would pay for transportation to and from the worksite, but that if petitioner quit the job prior to its termination date, or if his services were terminated for cause, he would be charged with the cost of transportation back to the United States. Respondent reserved the right to withhold $137.50 from each of petitioner's first four paychecks "as a cash deposit for the payment of your return transportation in the event you should become obligated for its payment." *Id.*, at 47. On March 6, 1976, petitioner flew from the United States to Antwerp, Belgium, where he reported to work at respondent's vessel, the "Lay Barge 27," berthed in the Antwerp harbor for repairs.

On April 1, 1976, petitioner suffered an injury while working on the deck of the vessel readying it for sea. Two days later he underwent emergency surgery in Antwerp. On April 5, petitioner was discharged from the hospital and went to respondent's Antwerp office, where he spoke with Jesse Williams, the welding superintendent, and provided a physician's statement that he was not fit for duty. Williams refused to acknowledge that petitioner's injury was work-

related and denied that respondent was liable for medical and hospital expenses, maintenance, or unearned wages. Williams also refused to furnish transportation back to the United States, and continued to retain $412.50 in earned wages that had been deducted from petitioner's first three paychecks for that purpose. Petitioner returned to his home in Houston, Tex., the next day at his own expense. He was examined there by a physician who determined that he would be able to resume work on May 3, 1976. On May 5, petitioner began working as a welder for another company operating in the North Sea.

In 1978 he brought suit against respondent under the Jones Act, § 20, 38 Stat. 1185, as amended, 46 U. S. C. § 688, and under general maritime law, seeking damages for respondent's failure to pay maintenance, cure, unearned wages, repatriation expenses, and the value of certain personal effects lost on board respondent's vessel. Petitioner also sought penalty wages under Rev. Stat. § 4529, as amended, 46 U. S. C. § 596, for respondent's failure to pay over the $412.50 in earned wages allegedly due upon discharge. The District Court found for petitioner and awarded damages totalling $23,670.40.

Several findings made by that court are particularly relevant to this appeal. First, the court found that petitioner's injury was proximately caused by an unseaworthy condition of respondent's vessel. App. 17, ¶ 10; 23, ¶ 6. Second, the court found that petitioner was discharged from respondent's employ on the day of the injury, and that the termination of his employment was caused solely by that injury. *Id.*, at 18, ¶ 16; 23, ¶ 7.[1] Third, it found that respondent's failure to pay petitioner the $412.50 in earned wages was "without suffi-

[1] According to respondent, petitioner was not formally discharged until June 1, 1976, but his termination was made retroactive to April 1. Brief for Respondent 5.

cient cause." *Id.*, at 20, ¶20; 25, ¶11.[2] Finally, the court found that petitioner had exercised due diligence in attempting to collect those wages. *Id.*, at 20, ¶21.

In assessing penalty wages under 46 U. S. C. §596, the court held that "[t]he period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case." App. 25, ¶11. It determined that the appropriate period for imposition of the penalty was from the date of discharge, April 1, 1976, through the date of petitioner's reemployment, May 5, 1976, a period of 34 days. Applying the statute, it computed a penalty of $6,881.60.[3] Petitioner appealed the award of damages as inadequate.

The Court of Appeals for the Fifth Circuit affirmed. 664 F. 2d 36 (1981). That court concluded, *inter alia*, that the District Court had not erred in limiting assessment of the penalty provided by 46 U. S. C. §596 to the period beginning April 1 and ending May 5. The court recognized that the statute required payment of a penalty for each day during which wages were withheld until the date they were actually paid, which in this case did not occur until September 17, 1980, when respondent satisfied the judgment of the District Court. *Id.*, at 40; see App. 30. Nevertheless, the court believed itself bound by prior decisions within the Circuit, which left calculation of the penalty period to the sound discretion of the district courts. 664 F. 2d, at 40. It concluded

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[2] The court also found:

"Defendant did not begin a thorough investigation of plaintiff's claim until September 30, 1976. The investigation was not made with reasonable diligence. Defendant's failure to pay maintenance and cure, repatriation expenses, the cost of his personal effects, and earned and unearned wages to plaintiff constituted arbitrary, unreasonable, callous, and willful disregard of plaintiff's rights." App. 20, ¶21.

[3] The court found that the daily wage rate to be used in calculating the penalty was $101.20. In accordance with the statute, the court assessed a penalty of twice this rate ($202.40) for each of the 34 days of the penalty period.

that the District Court in this case had not abused its discretion by assessing a penalty only for the period during which petitioner was unemployed.

We granted certiorari to resolve a conflict among the Circuits regarding the proper application of the wage penalty statute.[4] 454 U. S. 1052 (1981). We reverse the judgment of the Court of Appeals as to that issue.[5]

II

A

The language of the statute first obligates the master or owner of any vessel making coasting or foreign voyages to pay every seaman the balance of his unpaid wages within specified periods after his discharge.[6] It then provides:

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[4] The Courts of Appeals for the Third and Ninth Circuits have interpreted the statute to mandate imposition of the penalty for each day until the wages are paid and to leave no room for the district court's exercise of discretion. *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81 (CA3 1966); *Larkins* v. *Hudson Waterways Corp.*, 640 F. 2d 997 (CA9 1981); *Thomas* v. *SS Santa Mercedes*, 572 F. 2d 1331 (CA9 1978). The Courts of Appeals for the First, Second, and Fourth Circuits have adopted the interpretation followed by the Fifth Circuit. *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310 (CA1 1950); *Forster* v. *Oro Navigation Co.*, 228 F. 2d 319 (CA2 1955), aff'g 128 F. Supp. 113 (SDNY 1954); *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d 651 (CA4 1960), cert. denied, 365 U. S. 869 (1961). We noted this conflict in *American Foreign S.S. Co.* v. *Matise*, 423 U. S. 150, 152, n. 1 (1975).

[5] Petitioner has not questioned the other holdings of the Court of Appeals in his case. Respondent did not appeal from the judgment of the District Court and has not cross-petitioned for certiorari here.

[6] The statute reads in full:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time

"Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods . . . ."

The statute in straightforward terms provides for the payment of double wages, depending upon the satisfaction of two conditions. First, the master or owner must have refused or failed to pay the seaman his wages within the periods specified. Second, this failure or refusal must be "without sufficient cause." Once these conditions are satisfied, however, the unadorned language of the statute dictates that the master or owner "*shall pay* to the seaman" the sums specified "*for each and every day* during which payment is delayed." The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated. As this Court described the statute many years ago, it "affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld." *McCrea* v. *United States*, 294 U. S. 23, 32 (1935). Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, "that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980).

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of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

The District Court found that respondent had refused to pay petitioner the balance of his earned wages promptly after discharge, and that its refusal was "without sufficient cause." Respondent challenges neither of these findings. Although the two statutory conditions were satisfied, however, the District Court obviously did not assess double wages "for each and every day" during which payment was delayed, but instead limited the assessment to the period of petitioner's unemployment. Nothing in the language of the statute vests the courts with the discretion to set such a limitation.

B

Nevertheless, respondent urges that the legislative purpose of the statute is best served by construing it to permit some choice in determining the length of the penalty period. In respondent's view, the purpose of the statute is essentially remedial and compensatory, and thus it should not be interpreted literally to produce a monetary award that is so far in excess of any equitable remedy as to be punitive.

Respondent, however, is unable to support this view of legislative purpose by reference to the terms of the statute. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940). See *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917). Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.' " *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965) (quoting *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941)). This, however, is not the exceptional case.

As the Court recognized in *Collie* v. *Fergusson*, 281 U. S. 52 (1930), the "evident purpose" of the statute is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Id.*, at 55. This was to be accomplished "by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible." *Id.*, at 55–56. Thus, although the sure purpose of the statute is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment.

The legislative history of the statute leaves little if any doubt that this understanding is correct. The law owes its origins to the Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133, passed by the First Congress. Although the statute as originally enacted gave every seaman the right to collect the wages due under his contract "as soon as the voyage is ended," it did not provide for the recovery of additional sums to encourage compliance. Such a provision was added by the Shipping Commissioners Act of 1872, ch. 322, § 35, 17 Stat. 269, which provided for the payment of "a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed." The Act of 1872 obviously established a ceiling of 10 days on the period during which the penalty could be assessed and, by use of the words "not exceeding," left the courts with discretion to choose an appropriate penalty within that period.[7]

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[7] The Act of 1790 and the Act of 1872 provided the basis for § 4529 of the Revised Statutes, codified in 1878. Section 4529 read as follows:

"The master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or vice versa, shall pay to every seaman his wages, within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and, in the

Congress amended the law again in 1898. As amended, it read in relevant part:

> "Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods." Act of Dec. 21, 1898, ch. 28, § 4, 30 Stat. 756.

The amending legislation thus effected two changes: first, it removed the discretion theretofore existing by which courts might award less than an amount calculated on the basis of each day during which payment was delayed, and, second, it removed the 10-day ceiling which theretofore limited the number of days upon which an award might be calculated. The accompanying Committee Reports identify the purpose of the legislation as "the amelioration of the condition of the American seamen," and characterize the amended wage penalty in particular as "designed to secure the promptest possible payment of wages." H. R. Rep. No. 1657, 55th Cong., 2d Sess., 2, 3 (1898). See also S. Rep. No. 832, 54th Cong., 1st Sess., 2 (1896).[8] Nothing in the legislative history of the

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case of vessels making foreign voyages, within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one-fourth part of the balance due him. Every master or owner who neglects or refuses to make payment in manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods; which sum shall be recoverable as wages in any claim made before the court. But this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

[8] The 1898 Act was substantially identical to legislation that had passed the House in the previous Congress, and had been favorably reported in the Senate, but had failed to come to a vote before the end of the session. Thus, the House Report of the legislation enacted in 1898 contained little

1898 Act suggests that Congress intended to do anything other than what the Act's enacted language plainly demonstrates: to strengthen the deterrent effect of the statute by removing the courts' latitude in assessing the wage penalty.

The statute was amended for the last time in 1915 to increase further the severity of the penalty by doubling the wages due for each day during which payment of earned wages was delayed. Seamen's Act of 1915, ch. 153, § 3, 38 Stat. 1164. There is no suggestion in the Committee Reports or in the floor debates that in so doing, Congress intended to reinvest the courts with the discretion it had removed in the Act of 1898. Resort to the legislative history, therefore, merely confirms that Congress intended the statute to mean exactly what its plain language says.

III

Respondent argues, however, that a literal construction of the statute in this case would produce an absurd and unjust result which Congress could not have intended. The District Court found that the daily wage to be used in computing the penalty was $101.20. If the statute is applied literally, petitioner would receive twice this amount for each day after his discharge until September 17, 1980, when respondent satisfied the District Court's judgment.[9] Petitioner would re-

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more than a reproduction of the House Report of the previous Congress, and the relevant Senate Report also dates from that Congress.

[9] Respondent assumes that the penalty would run until September 17, 1980, since that was the date on which it finally paid petitioner the $412.50. Brief for Respondent 17. Petitioner, on the other hand, apparently assumes that the penalty period expired on May 6, 1980, the date of the District Court's judgment. Brief for Petitioner 19. Under our construction of the statute, the District Court's entry of judgment will not toll the running of the penalty period unless delays beyond that date are explained by sufficient cause. See *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245, 250–251 (1916) (holding that when an appeal is taken on reasonable grounds, the penalty should not apply to delays in payment beyond the date on which the district court's decree is entered, since those delays are supported by sufficient cause). The Court of Appeals for the Fourth Cir-

ceive over $300,000 simply because respondent improperly withheld $412.50 in wages. In respondent's view, Congress could not have intended seamen to receive windfalls of this nature without regard to the equities of the case.

It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. See *United States* v. *American Trucking Assns., Inc.*, 310 U. S., at 542–543; *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394 (1940). In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks* v. *Harrelson*, 282 U. S. 55, 60 (1930).

It is highly probable that respondent is correct in its contention that a recovery in excess of $300,000 in this case greatly exceeds any actual injury suffered by petitioner as a result of respondent's delay in paying his wages. But this Court has previously recognized that awards made under this statute were not intended to be merely compensatory:

> "We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible." *Collie* v. *Fergusson*, 281 U. S., at 55–56.

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cuit, in *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d, at 660, and the Court of Appeals for the Third Circuit in *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d, at 88, n. 26, have interpreted this Court's decision in *Pacific Mail* to permit the employer to toll the running of the penalty period by placing in the hands of the court the allegedly unlawfully withheld wages.

It is in the nature of punitive remedies to authorize awards that may be out of proportion to actual injury; such remedies typically are established to deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter. It is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute. But it might equally well be said that Congress did not precisely envision the trebled amount of some damages awards in private antitrust actions, see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344–345 (1979), or that, because it enacted the Endangered Species Act, "the survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam for which Congress ha[d] expended more than $1 million," *TVA* v. *Hill*, 437 U. S. 153, 172 (1978). It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S., at 123–124; *Reiter* v. *Sonotone*, *supra*, at 344–345.

Finally, we note that our holding is consistent with *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916). The employer in that case challenged a decision by the Court of Appeals to apply the wage penalty to the delay after the District Court's judgment occasioned by the employer's appeal. The Court held that on the facts of that case, application of the penalty beyond the date of the District Court's judgment was error. Contrary to respondent's assertion, however, the holding does not reflect the discretionary tailoring of the penalty to the equities of the case. Instead, the Court held that the delay pending appeal was not "without sufficient cause," as required by the statute before the penalty can attach.

Id., at 250.[10] As we explained earlier, a condition to the imposition of the wage penalty is a finding that the delay in payment is "without sufficient cause." To the extent that the equities of the situation are to be considered, see *Collie* v. *Fergusson*, *supra*, they bear on that finding, and not on the calculation of the penalty period once that finding has been made.

IV

The District Court found that respondent's refusal to pay petitioner earned wages following his discharge was without sufficient cause. It applied the wage penalty only for the period of nonpayment during which petitioner was unable to work. It made no finding, however, that respondent's continuing delay in payment beyond that period was for sufficient cause. Under the plain language of the statute, therefore, its decision to limit the penalty period was error. The judgment of the Court of Appeals affirming that decision accordingly is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen.[1] In my opinion this is such a case.

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[10] The Court found that the employer "had strong and reasonable ground for believing that the statute ought not to be held to apply," 241 U. S., at 250, because the work for which the seaman claimed unpaid wages did not occur during a voyage and was the result of an oral contract.

[1] "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the

Qualifying language in 46 U. S. C. § 596 supports a much narrower construction than the Court adopts. For over 50 years after the statute's most recent amendment in 1915, federal judges consistently construed it to avoid the absurd result the Court sanctions today. Their reading of the statute was consistent with the specific purposes achieved by the amendments in 1898 and 1915, as well as with the meaning of the statute when an award for unearned wages was first authorized.

I

On April 1, 1976, petitioner, a welder, suffered a temporarily disabling injury aboard respondent's vessel. On April 5, 1976, petitioner met with respondent's welding superintendent, who refused to acknowledge that respondent was responsible for the injury and who also refused to pay petitioner $412.50 in earned wages. Petitioner fully recovered from the injury by May 3, 1976, and two days later obtained comparable work with another employer. He filed this action on February 3, 1978. It is now settled that respondent was responsible for petitioner's injury and that respondent wrongfully refused to pay him $412.50 on April 5, 1976.

The question of statutory construction that is before us is what "sum shall be recoverable as wages" to compensate petitioner for respondent's refusal to pay him $412.50 on April 5, 1976. 46 U. S. C. § 596.[2] The District Court computed that sum by doubling his daily wage of $101.20 and multi-

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intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892).

[2] The statute is quoted in full, *ante*, at 569–570, n. 6.

plying that amount by 34—the number of days between the injury on April 1 and petitioner's reemployment on May 5, 1976. The District Court's award thus amounted to $6,881.60.[3] This Court holds that the sum recoverable as wages amounts to at least $302,790.40.[4]

II

In pertinent part, § 596 provides as follows:

> "Every master or owner who refuses or neglects to make payment [of a seaman's earned wages within four days after the seaman's discharge] without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the [4-day period], *which sum shall be recoverable as wages* in any claim made before the court . . . ."[5] (Emphasis added.)

The text of the statute admittedly supports the construction given it by the Court—if there was not sufficient cause for the refusal to make payment within four days of the discharge, then the seaman is entitled to double wages for the entire period between the fourth day and the date the payment is finally made. The statute, however, is susceptible of another interpretation. Indeed, for a half century following its latest amendment the federal courts, including this Court,

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[3] The Court of Appeals held that the award did not constitute an abuse of discretion. 664 F. 2d 36, 40 (CA5 1981).

[4] This figure is computed by reference to the period between April 1, 1976 (date of discharge), and May 6, 1980 (date of judgment). But see *ante*, at 574–575, n. 9.

[5] The Court omits the italicized clause of the statute when it quotes the statute in the text of its opinion. *Ante*, at 570 and 573. Because wage claims, unlike penalties, have consistently been accorded a high priority in insolvency proceedings against employers, it seems to me the clause is pertinent to our task of discerning the intent of Congress in authorizing an award of double wages. See also *infra*, at 582–583.

consistently exercised some discretion in determining the sum recoverable as wages under this section.

A

In fixing the amount of the award of double wages, the District Court in this case may have reasoned that respondent had sufficient cause for its delay in paying the earned wages after petitioner obtained employment with another shipmaster, but that there was not sufficient cause for its failure to make payment before that time. Although this reasoning conflicts with a literal reading of § 596, it is perfectly consistent with this Court's contemporary construction of the statute in *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916). The teaching of Justice Holmes' opinion for the Court in that case is that the wrongful character of the initial refusal to pay does not mean that all subsequent delay in payment is also "without sufficient cause" within the meaning of the statute.

The controversy in *Pacific Mail* arose in 1913, when the statute provided that the sum recoverable as wages was measured by one day's pay, rather than double that amount, for each day that the wages were withheld without sufficient cause; the statute was otherwise exactly as it is today. The seaman was discharged on October 1, 1913, but $30.33 was withheld from his wages because he was believed responsible for the loss of some silverware. He filed an action on October 20, 1913, and on November 5, 1913, obtained a judgment for his wages and an additional sum of $151.59, representing the sum recoverable as wages for the period between October 1 and November 5, 1913. The District Court's decree established the proposition that the vessel owner's defenses did not constitute sufficient cause for refusing to pay the wages and requiring the seaman to sue to recover them.

The vessel owner prosecuted an unsuccessful appeal. The Court of Appeals not only affirmed the decision of the District Court, but also added an additional recovery of daily wages for the period between the entry of the original judg-

ment on November 5 and the actual payment of the disputed wages. The Court of Appeals thus read the statute literally and ordered the result that the District Court's finding seemed to dictate. This Court, however, set aside the additional recovery, reaching a conclusion that cannot be reconciled with a wooden, literal reading of the statute. Concurrent findings of the District Court and the Court of Appeals established that the refusal to make the wage payment when due was without sufficient cause. Justice Holmes and his Brethren accepted that finding for purposes of decision, but reasoned that there was sufficient cause for the owner's decision to appeal and his refusal to pay while the appeal was pending.

The curious character of this Court's conclusion that reasons insufficient to justify the refusal to pay before the trial court's decision somehow became sufficient to justify a subsequent refusal to pay is not the most significant point to Justice Holmes' opinion. The case is primarily significant because its holding cannot be squared with a literal reading of the statute.[6] Even though the initial refusal is without sufficient cause, statutory wages are not necessarily recoverable for the entire period until payment is made either to the seaman or to a stakeholder.[7] A subsequent event—even

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[6] In a petition for rehearing, after pointing out that the Court had adopted an interpretation of the statute that had not been urged in any of the briefs or in any of the opinions of the lower courts, the seaman argued:

"According to the grammatical, natural and unambiguous meaning conveyed by the words of section 4529, R. S., Congress has limited the running of penalties only by a 'sufficient cause' for original non-payment of earned wages—a sufficient cause operating to prevent penalties from ever beginning to accrue; once these penalties begin to run, nothing short of actual payment or tender can suffice to prevent the continuous accrual of the per diem penalties." Pet. for Rehearing, O. T. 1915, No. 323, p. 5.

[7] Petitioner argues that literal application of § 596 will not yield harsh results because the shipmaster may toll the period of delay by tendering the disputed wage claim into the registry of the court. Brief for Petitioner 27. In petitioner's words, the master may make a "constructive payment

though not expressly mentioned in the statute itself—may foreshorten the recovery period.

In *Pacific Mail* the subsequent event was the vessel owner's decision to appeal. The finding that that event provided sufficient cause for the delay after November 5, 1913, was made *sua sponte* by this Court. In this case the subsequent event was the reemployment of petitioner in a comparable job on May 5, 1976. The finding that that event—coupled with the failure to make any additional demand for almost two years thereafter—was sufficient cause for the delay after May 5, 1976, was made by the District Court. It is true that the judge did not expressly frame his decision in these terms, but his actual decision fits precisely the mold established by *Pacific Mail*. Both cases give a flexible reading to the "sufficient cause" language in the statute. They differ with respect to the nature of the subsequent event but not with respect to their departure from the statutory text.*

B

The second case in which this Court construed § 596, *Collie* v. *Fergusson*, 281 U. S. 52 (1930), also focused on the meaning of the phrase "without sufficient cause." In that case the unpaid seamen claimed that the financial necessities of the owner could not constitute sufficient cause for delay in wage payments; that contention was surely consistent with the plain language of the statute. This Court nevertheless denied recovery, construing the statute as implicitly containing a requirement that the refusal be "in some sense arbitrary or

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of wages." *Id.*, at 28. The Court seems to accept this argument. See *ante*, at 574–575, n. 9. Neither petitioner nor the Court seems to recognize that acceptance of this minimal tolling rule conflicts with a literal reading of the statute. A tender of wages to the court is a "constructive payment of wages" only because a court has added that reasonable gloss to the statute.

* If the Court today were to read *Pacific Mail* as requiring that the subsequent-event finding be made expressly, I would either follow Justice Holmes' lead by making a comparable finding in this Court or I would remand to the District Court for additional findings on this issue.

wilful, or at least a failure not attributable to impossibility of payment." *Id.*, at 55. The Court adopted this nonliteral construction of the statute because it recognized the significance of the provision that a seaman's double-wage claim "shall be recoverable as wages in any claim made before the Court." See *id.*, at 54. In any proceeding arising out of the insolvency of the vessel owner, this provision accords this type of claim priority over general creditors and various lienors who have stronger equitable claims on limited assets. The construction of the words "without sufficient cause" to narrow the protection of the statute was consistent with the intent of Congress even though it involved a rather flexible reading of the text of the statute itself.[9]

This Court's third occasion to interpret § 596 was *McCrea v. United States*, 294 U. S. 23 (1935), and, once again, the Court construed the statute narrowly, this time by taking a literal approach. In that case the seaman, citing specific sections of federal legislation, demanded from the shipmaster his discharge, his earned wages, and other benefits. The master was unfamiliar with the cited sections and asked the seaman to meet with him at noon the next day for an informed discussion of the demands. The seaman missed the appointment and left the country without contacting the master. After his return to the United States, the seaman filed an action in which he claimed entitlement to, *inter alia*, his earned wages and double wages for the delay in payment. The District Court, affirmed by the Court of Appeals, held that the owner of the ship, the United States, was immune from the double-wage provision of § 596 because the double wages con-

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[9] The District Court's finding of arbitrariness in this case—which, in view of the holding in *Collie*, was necessary if any penalty wage were to be recovered—must be read in the context of its actual award. It was not clearly erroneous to find that the refusal to pay petitioner $412.50 was arbitrary while he was unemployed; it surely was not equally arbitrary during the ensuing 2-year period when he was employed by a competitor and did not renew his demand.

stituted a penalty. This Court granted the seaman's petition for certiorari, but avoided decision of the sovereign immunity question by holding that there was sufficient cause for the failure of the shipmaster to make the wage payment within four days of the seaman's discharge. The Court then rejected the seaman's rather reasonable argument that even if the shipmaster had cause to withhold payment during those four days, there was not sufficient cause for the continued refusal once the seaman filed his action and formally made his claim to earned wages. The Court, without citing *Pacific Mail*, held that if the master's failure to pay earned wages at the time specified in the statute was justified by sufficient cause, the fact that he later refused to pay pursuant to a proper demand could not give rise to statutory liability even though there was no sufficient cause for the subsequent refusal.

These early interpretations of § 596 dispel any notion that the statute means exactly what it says. The Court has construed the statute "to effect its purpose," *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952), and, as the early cases demonstrate, the purpose of the statute does not always require the award of double wages in the amount that the statute literally specifies.

C

Flexibility also has characterized the applications of the statute rendered by the lower federal courts. For decades those courts consistently concluded that Congress intended to allow judicial discretion to play a part in determining the amount of the double-wage recovery.[10] Whether those deci-

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[10] See *Mystic S.S. Co.* v. *Stromland*, 20 F. 2d 342, 344 (CA4) ("The District Court, by limiting the right of recovery to 10 days after the libel was filed, in effect placed a limitation on the amount of the recovery under the statute. Was there objection to this? We think not"), rehearing denied, 21 F. 2d 607 (1927), cert. denied, 276 U. S. 618 (1928); *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310, 316 (CA1 1950) ("The language of § 596 has been given a somewhat free reading so as to accord to

sions were entirely consistent with the meaning a grammarian might have placed on the statute is less significant than the fact that they were entirely consistent with this Court's

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the courts a considerable margin of discretion in adjusting the duration of the penalty to the equities of the particular case"); *Prindes* v. *S.S. African Pilgrim*, 266 F. 2d 125, 128 (CA4 1959) ("The period during which the penalty accumulates is to be determined by the equities of the particular case"); *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d 651, 658 (CA4 1960) ("With regard to liability for double pay, a doctrine had developed before the McCrea case, and has continued to the present time, that the District Court has a measure of discretion through the application of equitable principles in determining the number of days for which double wages should be assessed"), cert. denied, 365 U. S. 869 (1961); *Caribbean Federation Lines* v. *Dahl*, 315 F. 2d 370, 374 (CA5) ("The time for which the penalty provision runs rests within the sound discretion of the court and depends upon the equities of the case"), cert. denied, 375 U. S. 831 (1963); *McConville* v. *Florida Towing Corp.*, 321 F. 2d 162, 168, n. 11 (CA5 1963) ("The Court has wide equitable discretion in fixing the time for which the penalty provision runs"); *The Chester*, 25 F. 2d 908, 911 (Md. 1928) ("[I]n spite of the seeming rigidity of the statute, there is still left to the courts certain discretionary power to limit the penalties"); *The Victoria*, 76 F. Supp. 54, 56 (SDNY 1947) ("In spite of the seeming rigidity of the statute, the court still has discretionary power to limit the penalties"), rev'd on other grounds, 172 F. 2d 434 (CA2 1949); *Forster* v. *Oro Navigation Co.*, 128 F. Supp. 113, 116 (SDNY 1954) ("The number of days for which the defendant must pay double wages rests in the discretion of the court and depends on the equities of the particular case"), aff'd, 228 F. 2d 319 (CA2 1955); *Samad* v. *The Etivebank*, 134 F. Supp. 530, 542 (ED Va. 1955) ("The number of days for which respondents must pay double wages rests in the discretion of the Court and depends upon the equities of the particular case"); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1, 6 (ED Va. 1957) ("It is well settled that the number of days for which respondents must pay double wages rests in the discretion of the Court and depends upon the equities of the particular case"); *Kontos* v. *SS Sophie C.*, 236 F. Supp. 664, 674 (ED Pa. 1964) ("Although the penalty is applicable, its duration seems to be committed to the discretion of the trial judge to tailor to the equities of the particular case"); *Ventiadis* v. *C. J. Thibodeaux & Co.*, 295 F. Supp. 135, 138 (SD Tex. 1968) ("'The time for which the penalty provision runs rests within the sound discretion of the court and depends upon the equities of the case'"); see also *Swanson* v. *Torry*, 25 F. 2d 835 (CA4 1928); *The Lake Galewood*, 21 F. 2d 987 (Md. 1927), aff'd, 25 F. 2d 1020 (CA4), cert. denied, 278 U. S. 637 (1928).

decisions and with one another,[11] and the fact that their holdings must have come to the attention of Congress.

It was not until 1966 that a contrary reading of the statute was adopted by the Third Circuit in *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81,[12] and another eight years before that case was followed in another Circuit.[13] I cannot deny that there is wisdom in the rule of construction that mandates close adherence to literal statutory text,[14] but it is also true that a consistent course of judicial construction can become as much a part of a statute as words inserted by the legislature itself. The construction consistently followed by the federal judiciary between 1898 and 1966 was presumably acceptable to Congress, and I find this more persuasive than the literal reading on which the Court places its entire reliance.[15] Moreover, since the result that construction produces in this case is both absurd and palpably unjust, this is one of the cases in which the exercise of judgment dictates a departure from the literal text in order to be faithful to the legislative will.[16]

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[11] See *Southern Cross S.S. Co.* v. *Firipis*, *supra*, at 655–658.

[12] See 360 F. 2d, at 85 ("Despite this rather precise statutory directive, of those cases which we have uncovered, where the question—whether Section 596 of the statute may still be read with a measure of judicial discretion when supposed equitable considerations present themselves—was considered, all have found proper the balancing of the statutory language with a judicial sense of the equities of each case").

[13] See *Escobar* v. *SS Washington Trader*, 503 F. 2d 271, 274 (CA9 1974), vacated and remanded on other grounds *sub nom. American Trading Transportation Co.* v. *Escobar*, 423 U. S. 1070 (1976).

[14] See, most recently, *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 322–335 (STEVENS, J., dissenting).

[15] This Court based its interpretation of "sufficient cause" in *Collie* v. *Fergusson*, 281 U. S. 52 (1930), in part upon "the conclusion reached with practical unanimity by the lower federal courts." *Id.*, at 56.

[16] "The Court has had several occasions within the last few years to construe statutes in which conflicts between reasonable intention and literal meaning occurred. We have refused to nullify statutes, however hard or

III

The construction permitting the district court to exercise some discretion in tailoring the double-wage award to the particular equities of the case is just as consistent with the legislative history of § 596 as the Court's new literal approach to this statute. In 1872, when Congress authorized the recovery of additional wages by seamen who were not paid within five days of their discharge, it used the word "shall" to make it clear that such a recovery must be awarded, but it allowed the district courts a limited discretion in setting the amount of such recovery.[17] The judge's discretion as to amount was limited in two ways: (1) the statutory wage rate could not be more than double the amount of the seaman's daily wage; and (2) the period for which the statutory wage could be awarded could not exceed 10 days.

Subsequent amendments to the statute did not remove the requirement that some recovery "shall" be awarded, but did modify both of the limits on the judge's discretion. With respect to the wage rate, Congress first specified that it should

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unexpected the particular effect, where unambiguous language called for a logical and sensible result. Any other course would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332–333 (1938) (footnotes omitted).

[17] The 1872 version of § 596 provided in pertinent part:

"[E]very master or owner who neglects or refuses to make payment [of a seaman's earned wages within five days after the seaman's discharge] without sufficient cause shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the [five-day period]; and such sum shall be recoverable as wages in any claim made before the court . . . ." Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

equal the daily rate—rather than double the daily rate—and later specified that the rate should be the double rate.[18] With respect to the period for which the statutory wage was payable, the 1898 amendment simply removed the 10-day limit. This amendment is subject to two different interpretations, one that would represent a rather unremarkable change and the other that would be both drastic and dramatic.

The unremarkable change would amount to nothing more than a removal of the narrow 10-day limit on the scope of the judge's discretion. The word "shall" would continue to do nothing more than require some recovery in an amount to be fixed by the judge, but in recognition of the reality that seamen might be stranded for more than 10 days, the recovery period could extend beyond 10 days. This sort of unremarkable change is consistent with the purpose of the statute,[19] as

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[18] The 1898 version of § 596 provided in pertinent part:

"Every master or owner who refuses or neglects to make payment [of a seaman's earned wages within four days of the seaman's discharge] without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the [four-day period], which sum shall be recoverable as wages in any claim made before the court . . . ." Act of Dec. 21, 1898, § 4, 30 Stat. 756.

The 1915 amendment substituted "two days' pay" for "one day's pay." See Act of Mar. 4, 1915, § 3, 38 Stat. 1164–1165.

[19] Justice Cardozo, while a member of the New York Court of Appeals, explained the purpose of the statute:

"The purpose, or at least the predominant one, was, not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon another vessel. It means hardship during the term of waiting, the sufferer often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' (*Calvin* v. *Huntley*, 178 Mass. 29, 32)." *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379, 143 N. E. 226, 227 (1924).

The District Court's award in this case, tolling the period for computing the double wages on the date petitioner obtained employment with another seagoing vessel, was also perfectly consistent with the statutory purpose.

well as with a legislative history that fails to make any comment on its significance. As JUSTICE REHNQUIST has perceptively observed in another context, the fact that the dog did not bark can itself be significant.[20]

The Court's construction of the amendment is, however, both drastic and dramatic. Instead of effecting a modest enlargement of the judge's discretion to do justice in these cases, the Court's construction effects a complete prohibition of judicial discretion. Instead of permitting recoveries for a period somewhat longer than 10 days, the amendment is construed as a command that even when the unresolved dispute persists for two or three years without any special hardship to the seaman, an automatic recovery must be ordered for the entire period regardless of the equitable considerations that may arise after the shipmaster's initial mistake has been made. Such a major change in both the potential amount of the statutory recovery and the character of the judge's authority would normally be explained in the committee reports or the debates if it had been intended.[21]

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[20] *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (dissenting opinion); cf. A. Conan Doyle, Silver Blaze, in The Complete Sherlock Holmes 383 (1938).

[21] The House Report's description of the 1898 amendment was that it "increases from one-fourth to one-third the amount of balance of wages due the seaman, to which he is entitled immediately upon discharge, and, in general, provides for prompter payment of wages of seamen." H. R. Rep. No. 1657, 55th Cong., 2d Sess., 3 (1898). It is noteworthy that the first change described, respecting the part of the seaman's wages to which he is entitled at the time of his discharge in every case, is rather trivial. See the full text of the statute, *ante*, at 569–570, n. 6. And the description of the provision for prompter payment of wages most likely refers to the amendment of the time period during which the shipmaster had to pay the seaman his full wages in order to avoid the double-wage provision of § 596. In the cases of seamen of vessels making foreign voyages, the time period was changed from five days in 1872, see n. 17, *supra*, to four days in 1898, see n. 18, *supra*.

IV

It is ironic that the same seven Justices—who today are transfixed by a literal reading of § 596—only a few days ago blithely ignored the text of the Tax Injunction Act in order to reach the conclusion that a federal court has no jurisdiction to entertain a suit for a declaratory judgment against the United States Secretary of Labor to determine whether a federal statute violates the Federal Constitution. *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982). The inconsistency in the Court's approach to the task of statutory construction in these two cases is less troublesome, however, than its failure in each case to consider whether its conclusion could reasonably be thought to represent the will of Congress. I am not persuaded that the 1898 amendment, removing the 10-day limit on the scope of the trial judge's discretion, was intended to be read as a command to award $302,790.40 to a seaman who was not paid $412.50 in wages when due.

I respectfully dissent.

VELDE, ADMINISTRATOR, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL. v. NATIONAL BLACK POLICE ASSN., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1074. Argued December 9, 1981—Decided June 30, 1982

203 U. S. App. D. C. 202, 631 F. 2d 784, vacated and remanded.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were *Solicitor General Lee, Acting Solicitor General Wallace, Acting Assistant Attorney General Schiffer, Peter Buscemi, Robert E. Kopp,* and *Barbara L. Herwig.*

E. Richard Larson argued the cause for respondents. With him on the brief were *Isabelle Katz Pinzler, Bruce J. Ennis, William L. Robinson,* and *Norman J. Chachkin.*

PER CURIAM.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982).

JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case.

ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. BAREZ, SECRETARY OF LABOR AND HUMAN RESOURCES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1305. Argued April 20, 1982—Decided July 1, 1982

Respondent Commonwealth of Puerto Rico filed suit in Federal District Court against petitioners, individuals and companies engaged in the apple industry in Virginia, alleging that petitioners had violated related provisions of the Wagner-Peyser Act and the Immigration and Nationality Act of 1952, and implementing regulations. The purposes of this statutory and regulatory scheme are to give United States workers, including citizens of Puerto Rico, a preference over temporary foreign workers for jobs that become available within this country, to ensure that working conditions of domestic employees are not adversely affected when foreign workers are brought in, and to prohibit discrimination against United States workers in favor of foreign workers. It was alleged that pursuant to the federal laws petitioners had reported 787 job openings for temporary farm labor to pick the 1978 apple crop, and that in violation of such laws petitioners had discriminated against Puerto Rican workers by failing to provide employment for qualified Puerto Rican migrant farmworkers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers, and by improperly terminating employment of Puerto Rican workers. Seeking declaratory and injunctive relief in its capacity as *parens patriae*, Puerto Rico asserted that this alleged discrimination deprived the Commonwealth of its right "to effectively participate in the benefits of the Federal Employment Service System of which it is a part" and thereby caused irreparable injury to the Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth." The District Court dismissed the complaint, holding that Puerto Rico lacked standing to bring the action in view of the small number of individuals directly involved and the slight impact upon Puerto Rico's general economy that the loss of 787 temporary jobs could have. The Court of Appeals reversed.

Held: Puerto Rico has *parens patriae* standing to maintain this suit. Pp. 600-610.

(a) In order to maintain a *parens patriae* action, a State must articulate an interest apart from the interests of particular private parties, that is, the State must be more than a nominal party. The State must express a "quasi-sovereign" interest, such as its interest in the health and well-being—both physical and economic—of its residents in general. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. A State also has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system—that is, in ensuring that the State and its general population are not excluded from the benefits that are to flow from participation in the federal system. Pp. 600–608.

(b) Under the above principles, Puerto Rico's allegations that petitioners discriminated against Puerto Ricans in favor of foreign laborers falls within the Commonwealth's quasi-sovereign interest in the general well-being of its citizens. A State's interest in the well-being of its residents, which extends beyond mere physical interests to economic and commercial interests, also includes the State's substantial interest in securing its residents from the harmful effects of discrimination. This interest is peculiarly strong in the case of Puerto Rico simply because of the fact that invidious discrimination frequently occurs along ethnic lines. Alternatively, Puerto Rico has *parens patriae* standing to pursue its residents' interests in the Commonwealth's full and equal participation in the federal employment service scheme established by the laws involved here. Pp. 608–610.

632 F. 2d 365, affirmed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 610.

Thomas J. Bacas argued the cause for petitioners. With him on the briefs was *S. Steven Karalekas*.

Paul A. Lenzini argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed by *Francis X. Bellotti*, Attorney General of Massachusetts, and *Anthony P. Sager*, Assistant Attorney General, for the Commonwealth of Massachusetts; by

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JUSTICE WHITE delivered the opinion of the Court.

In this case, the Commonwealth of Puerto Rico seeks to bring suit in its capacity as *parens patriae* against petitioners for their alleged violations of federal law. Puerto Rico contends that those violations discriminated against Puerto Ricans and injured the Puerto Rican economy. The question presented here is whether Puerto Rico has standing to maintain this suit.

I

A

The factual background of this case involves the interaction of two federal statutes, the Wagner-Peyser Act, 48 Stat. 113, 29 U. S. C. § 49 *et seq.*, and the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* (1976 ed. and Supp. IV). The Wagner-Peyser Act was passed in 1933 in order to deal with the massive problem of unemployment resulting from the Depression. The Act establishes the United States Employment Service within the Department of Labor "[i]n order to promote the establishment and maintenance of a national system of public employment offices." 29 U. S. C. § 49. State agencies, which have been approved by the Secretary of Labor, are authorized to participate in the nationwide employment service.[1] § 49c. The Secretary is authorized to make "such rules and regulations as may be necessary" to accomplish the ends of the Act. § 49k. Federal regulations issued pursuant to that authority

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Robert Abrams, Attorney General of New York, *Shirley Adelson Siegel*, Solicitor General, and *Peter Bienstock*, *Deborah Bachrach*, and *Daniel Berger*, Assistant Attorneys General, *Leroy Zimmerman*, Attorney General of Pennsylvania, *Frank P. Tuplin*, Deputy Attorney General, and *Paul E. Waters*, Executive Deputy Attorney General, for the State of New York et al.; and by *A. Douglas Melamed* for the Migrant Legal Action Program, Inc., et al.

[1] As used in the Act, the word "State" includes Puerto Rico. 29 U. S. C. § 49b(b). Puerto Rico's Department of Labor and Human Resources has been approved by the Secretary of Labor and participates in the federal-state system established by the Act.

have established an interstate clearance system to provide employers a means of recruiting nonlocal workers, when the supply of local workers is inadequate. 20 CFR § 602.2(c) (1981). If local workers are not available, a "clearance order" is sent through the Employment and Training Administration of the Department of Labor to other state agencies in order to give them an opportunity to meet the request.

Some of petitioners' obligations under the employment system established by the Wagner-Peyser Act stem from the Immigration and Nationality Act of 1952, insofar as it regulates the admission of nonimmigrant aliens into the United States. The latter Act authorizes the admission of temporary foreign workers into the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U. S. C. § 1101(a)(15)(H)(ii). The Attorney General is charged with determining whether entry of foreign workers would meet this standard, "upon petition of the importing employer." 8 U. S. C. § 1184(c). He is to make this determination "after consultation with appropriate agencies of the Government." *Ibid.* The Attorney General has delegated this responsibility to the Commissioner of Immigration and Naturalization, 8 CFR § 2.1 (1982), who, in turn, relies on the Secretary of Labor for the initial determinations. 8 CFR § 214.2(h)(3) (1982).[2] To meet this responsibility, the Secretary of Labor relies upon the employment referral system established under the Wagner-Peyser Act.

Any employer who wants to employ temporary foreign agricultural laborers must first seek domestic laborers for the openings through use of the interstate clearance system.

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[2] "Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii)." 8 CFR § 214.2(h)(3)(i) (1982).

The employer who anticipates a need for foreign laborers must file an application with the local public employment office, including a copy of the job offer. 20 CFR §§ 655.201(a)(1), (b)(1) (1981). The application must be filed in sufficient time to allow the agency to recruit through the interstate clearance system for 60 days prior to the estimated date of the start of employment. § 655.201(c). The regulations further provide that the employer must include assurances that the job opportunity is "open to all qualified U. S. workers without regard to race, color, national origin, sex, or religion, and is open to U. S. workers with handicaps who are qualified to perform the work," and that the employer will continue to seek United States workers until the foreign workers have departed for the employer's place of employment. §§ 655.203(c), (d).[3] Finally, the regulations require that "each employer's job offer to U. S. workers must offer U. S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers." § 655.202(a). Similarly, the employer may not impose obligations or restrictions on domestic workers that are not, or will not be, imposed on foreign workers. *Ibid.*

The obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers, including the citizens of Puerto Rico. First, these workers are given a preference over foreign workers for jobs that become available within this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers.

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[3] There is a further requirement that the employer continue to provide an opportunity for employment to any qualified United States worker who applies for a position from the time the foreign workers depart for the employer's place of employment until the time that 50 percent of the period of the work contract has elapsed. 20 CFR § 655.203(e) (1981).

B

The particular facts of this case involve the 1978 apple harvest on the east coast. That was apparently a good year for apples, resulting in a substantial need for temporary farm laborers to pick the crop. To meet this need the apple growers filed clearance orders with their state employment agencies. Through the system described above, a total of 2,318 job openings were transmitted to Puerto Rico on August 2, 1978. As of August 14, which marked the end of the 60-day "availability" period, *supra*, at 596, the Commonwealth Department of Labor had recruited 1,094 Puerto Rican workers. Puerto Rican workers for the remaining openings were subsequently recruited. As stated in Puerto Rico's complaint:

> "Of this total number of 2,318 Puerto Rican workers, only 992 actually arrived on the mainland. The remainder never left Puerto Rico because of oral advice from the United States Department of Labor requesting cancellation of remaining flights because many of the defendant growers had refused to employ Puerto Rican workers who had already arrived. Of the 992 workers who arrived at the orchards, 420 came to Virginia orchards. Of these 420 workers, fewer than 30 had employment three weeks later, the growers having refused to employ most of these workers and having dismissed most of the rest within a brief time for alleged unproductivity." App. 17–18.

Puerto Rico filed this suit on January 11, 1979, naming as defendants numerous individuals and companies engaged in the apple industry in Virginia.[1] Of the 2,318 job requests forwarded to Puerto Rico, respondent alleged that 787 of these had come from the named Virginia growers. In three counts, the complaint alleged that the defendants had vio-

[1] The complaint named 51 defendants: 32 apple growers and 19 officers, partners or employees of the apple growers.

lated the Wagner-Peyser Act, the Immigration and Nationality Act of 1952, and various federal regulations implementing those statutes, by failing to provide employment for qualified Puerto Rican migrant farmworkers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers,[5] and by improperly terminating employment of Puerto Rican workers. Alleging that this discrimination against Puerto Rican farmworkers deprived "the Commonwealth of Puerto Rico of its right to effectively participate in the benefits of the Federal Employment Service System of which it is a part" and thereby caused irreparable injury to the Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth," respondent sought declaratory relief with respect to the past practices of petitioners and injunctive relief requiring petitioners to con-

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[5] The theory of the complaint was that the apple growers were discriminating against the Puerto Ricans in favor of Jamaican workers. In August 1978, apple growers in several States, including Virginia, filed suit in Federal District Court seeking an injunction against the United States Secretary of Labor, the Commissioner of the Immigration and Naturalization Service, and their subordinates, to permit the recruitment and employment of foreign workers. Puerto Rico was allowed to intervene in this suit to represent the interests of its residents in these work opportunities. The growers complained that the federal employment service had not produced sufficient laborers to assure that the harvest, which was about to begin, could be successfully accomplished with sufficient speed. The District Court issued a preliminary injunction ordering that a certain number of foreign workers be allowed to enter this country to pick apples. *Frederick County Fruit Growers Assn., Inc.* v. *Marshall*, No. 78-0086(H) (WD Va., Aug. 31, 1978). The Jamaicans secured entry under this order. Prior to issuing this injunction, however, the court was assured by the apple growers that they recognized their obligation to give priority to Puerto Rican workers, notwithstanding the court order. Puerto Rico's complaint was founded on the charge that the apple growers failed to meet this commitment and, thus, failed to meet their obligations under federal law.

form to the relevant federal statutes and regulations in the future.

Petitioners responded with a motion to dismiss, asserting that respondent lacked standing to bring this action. Although the District Court held that the Commonwealth of Puerto Rico is capable of asserting *parens patriae* interests in general, it agreed with petitioners' contention that no such action could be maintained under the circumstances of this case. In particular, the District Court relied upon the relatively small number of individuals directly involved—some 787 out of a total population of close to 3 million—and the slight impact upon the general economy of Puerto Rico that the loss of this number of temporary jobs could have.

A divided panel of the Court of Appeals for the Fourth Circuit reversed.[6] 632 F. 2d 365 (1980). The majority held that the District Court had focused too narrowly on those directly involved, ignoring those that were indirectly affected by petitioners' alleged actions. Noting the serious dimensions of the unemployment problem in Puerto Rico and the general condition of its economy,[7] the court stated that "[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting" and the "inability of the United States government . . . to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico." *Id.*, at 370. These indirect effects on the interests of "a substantial portion of its citizenry" were sufficient, in its view, to support a *parens patriae* action. *Ibid.*

We granted certiorari to determine whether Puerto Rico could maintain a *parens patriae* action here, despite the small number of individuals directly involved. 454 U. S. 1079 (1981).

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[6] The dissenting judge agreed with the analysis of the District Court.

[7] In September 1978, 18.5% of the adults in the Puerto Rican labor force were unemployed. Rural unemployment stood at 23%.

II

Parens patriae means literally "parent of the country."[8] The *parens patriae* action has its roots in the common-law concept of the "royal prerogative."[9] The royal prerogative included the right or responsibility to take care of persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property."[10] At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Mormon Church* v. *United States*, 136 U. S. 1, 57 (1890).

This common-law approach, however, has relatively little to do with the concept of *parens patriae* standing that has developed in American law. That concept does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—*i. e.*, if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine. See *Pennsylvania* v. *New Jersey*, 426 U. S. 660 (1976); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938); *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S.

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[8] "'*Parens patriae*,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability." Black's Law Dictionary 1003 (5th ed. 1979).

[9] See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 257 (1972); G. Curtis, The Checkered Career of *Parens Patriae*, 25 DePaul L. Rev. 895, 896 (1976); Black's, *supra*.

[10] J. Chitty, Prerogatives of the Crown 155 (1820), quoted in Curtis, *supra*, at 896.

277 (1911). Rather, to have such standing the State must assert an injury to what has been characterized as a "quasi-sovereign" interest, which is a judicial construct that does not lend itself to a simple or exact definition. Its nature is perhaps best understood by comparing it to other kinds of interests that a State may pursue and then by examining those interests that have historically been found to fall within this category.

Two sovereign interests are easily identified: First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders. The former is regularly at issue in constitutional litigation. The latter is also a frequent subject of litigation, particularly in this Court:

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. . . . The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 450 (1945).

Not all that a State does, however, is based on its sovereign character. Two kinds of nonsovereign interests are to be distinguished. First, like other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pur-

sue those interests in court. Second, a State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party.

Quasi-sovereign interests stand apart from all three of the above: They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases.

That a *parens patriae* action could rest upon the articulation of a "quasi-sovereign" interest was first recognized by this Court in *Louisiana* v. *Texas*, 176 U. S. 1 (1900). In that case, Louisiana unsuccessfully sought to enjoin a quarantine maintained by Texas officials, which had the effect of limiting trade between Texas and the port of New Orleans. The Court labeled Louisiana's interest in the litigation as that of *parens patriae*, and went on to describe that interest by distinguishing it from the sovereign and proprietary interests of the State:

> "Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the

> matters complained of affect her citizens at large." *Id.*, at 19.[11]

Although Louisiana was unsuccessful in that case in pursuing the commercial interests of its residents, a line of cases followed in which States successfully sought to represent the interests of their citizens in enjoining public nuisances. *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); *Wyoming* v. *Colorado*, 259 U. S. 419 (1922); *New York* v. *New Jersey*, 256 U. S. 296 (1921); *Kansas* v. *Colorado*, 206 U. S. 46 (1907); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907); *Kansas* v. *Colorado*, 185 U. S. 125 (1902); *Missouri* v. *Illinois*, 180 U. S. 208 (1901).

In the earliest of these, *Missouri* v. *Illinois*, Missouri sought to enjoin the defendants from discharging sewage in such a way as to pollute the Mississippi River in Missouri. The Court relied upon an analogy to independent countries in order to delineate those interests that a State could pursue in federal court as *parens patriae*, apart from its sovereign and proprietary interests:[12]

> "It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened,

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[11] Justice Harlan, in a concurring opinion, specifically rejected the idea that Louisiana had standing to pursue more than its sovereign and proprietary interests: "I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce." 176 U. S., at 24.

[12] Admittedly, the discussion here and in the other cases discussed below focused on the *parens patriae* question in the context of a suit brought in the original jurisdiction of this Court. There may indeed be special considerations that call for a limited exercise of our jurisdiction in such instances; these considerations may not apply to a similar suit brought in federal district court.

> the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering." *Id.*, at 241.

This analogy to an independent country was also articulated in *Georgia* v. *Tennessee Copper Co.*, *supra*, at 237, a case involving air pollution in Georgia caused by the discharge of noxious gasses from the defendant's plant in Tennessee. Justice Holmes, writing for the Court, described the State's interest under these circumstances as follows:

> "[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. . . .
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> ". . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests."

Both the Missouri and the Georgia case involved the State's interest in the abatement of public nuisances, instances in which the injury to the public health and comfort was graphic and direct. Although there are numerous examples of such *parens patriae* suits, *e. g.*, *North Dakota* v. *Minnesota*, *supra* (flooding); *New York* v. *New Jersey*, *supra*

(water pollution); *Kansas* v. *Colorado*, 185 U. S. 125 (1902) (diversion of water), *parens patriae* interests extend well beyond the prevention of such traditional public nuisances.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), for example, Pennsylvania was recognized as a proper party to represent the interests of its residents in maintaining access to natural gas produced in West Virginia:

> "The private consumers in each State . . . constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law." *Id.*, at 592.

The public nuisance and economic well-being lines of cases were specifically brought together in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), in which Georgia alleged that some 20 railroads had conspired to fix freight rates in a manner that discriminated against Georgia shippers in violation of the federal antitrust laws:

> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. . . . [Trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. . . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her

sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." *Id.*, at 450–451.[11]

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[11] The Court also said, 324 U. S., at 450, 451–452:

"It seems to us clear that under the authority of these cases Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens though here, as in *Georgia* v. *Tennessee Copper Co.*, [206 U. S., at] 237, we treat the injury to the State as proprietor merely as a 'makeweight.' The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. See *Missouri* v. *Illinois*, [180 U. S., at] 219–224, *Virginia* v. *West Virginia*, 246 U. S. 565, 599. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. *Missouri* v. *Illinois*, *supra*, p. 241; *Georgia* v. *Tennessee Copper Co.*, *supra*, p. 237.

. . . . . .

"*Oklahoma* v. *Atchison, T. & S. F. R. Co.*, [220 U. S. 277 (1911)], is not opposed to this view. In that case, the defendant railroad company had obtained a grant from Congress to locate and maintain a railway line through the Indian Territory out of which the State of Oklahoma was later formed. The federal act provided certain maximum transportation rates which the company might charge. Oklahoma sued to cancel the grant, to have the property granted decreed to be in the State of Oklahoma as *cestui que trust*, to enjoin the defendant from operating a railroad in the State, and to enjoin *pendente lite* the exaction of greater rates than the maximum rates specified. The Court construed the Act of Congress as subjecting the rates to federal control until the territory became a part of a State, at which time the rates became subject to state control. The Court held that our original jurisdiction could not be invoked by a State merely because its citizens were injured. We adhere to that decision. It does not control the present one. This is no attempt to utilize our original jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers."

This summary of the case law involving *parens patriae* actions leads to the following conclusions. In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i. e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.[11]

Distinct from but related to the general well-being of its residents, the State has an interest in securing observance of

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[11] Obviously, a State might make use of "private bills" in order to use its legislative power to aid particular individuals. If the analogy spoken of above is to this form of legislative action, then the State remains merely a nominal party from the perspective of a federal court; it has failed to articulate any general interest, apart from that of the individual involved.

the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system. Thus, the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce. See *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923). Similarly, federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945) (federal antitrust laws); *Maryland* v. *Louisiana*, 451 U. S. 725 (1981) (Natural Gas Act). Once again, we caution that the State must be more than a nominal party. But a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population.

We turn now to the allegations of the complaint to determine whether they satisfy either or both of these criteria.[15]

III

The complaint presents two fundamental contentions. First, it alleges that the petitioners discriminated against Puerto Ricans in favor of foreign laborers. Second, it alleges that Puerto Ricans were denied the benefits of access to domestic work opportunities that the Wagner-Peyser Act and the Immigration and Nationality Act of 1952 were designed to secure for United States workers. We find each of these allegations to fall within the Commonwealth's quasi-sovereign interests and, therefore, each will support a *parens patriae* action.

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[15] Although we have spoken throughout of a "State's" standing as *parens patriae*, we agree with the lower courts and the parties that the Commonwealth of Puerto Rico is similarly situated to a State in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.

Petitioners contend that at most there were only 787 job opportunities at stake in Virginia and that this number of temporary jobs could not have a substantial direct or indirect effect on the Puerto Rican economy. We believe that this is too narrow a view of the interests at stake here. Just as we have long recognized that a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination. This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from se evils. This interest is peculiarly strong in the case of Puerto Rico simply because of the unfortunate fact that invidious discrimination frequently occurs along ethnic lines. Puerto Rico's situation differs somewhat from other States in this regard—not in theory but in fact—simply because this country has for the most part been spared the evil of invidious discrimination based on state lines. Were this to come to pass, however, we have no doubt that a State could seek, in the federal courts, to protect its residents from such discrimination to the extent that it violates federal law. Puerto Rico claims that it faces this problem now. Regardless of the possibly limited effect of the alleged financial loss at issue here, we agree with the Court of Appeals that "[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting." 632 F. 2d, at 370.

Alternatively, we find that Puerto Rico does have *parens patriae* standing to pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. Unemployment among Puerto Rican residents is surely a legitimate object of the Commonwealth's concern. Just as it may address that problem through its own legislation, it may also seek to assure its residents that they will

have the full benefit of federal laws designed to address this problem. The Commonwealth's position in this respect is not distinguishable from that of Georgia when it sought the protection of the federal antitrust laws in order to eliminate freight rates that discriminated against Georgia shippers, *Georgia* v. *Pennsylvania R. Co.*, *supra*, or from that of Maryland when it sought to secure the benefits of the Natural Gas Act for its residents, *Maryland* v. *Louisiana*, *supra*. Indeed, the fact that the Commonwealth participates directly in the operation of the federal employment scheme makes even more compelling its *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents.[16]

For these reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL did not participate in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring.

As the Court notes, *ante*, at 603, n. 12, the question whether a State can bring a *parens patriae* action within the original jurisdiction of this Court may well turn on considerations quite different from those implicated where the State

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[16] A State does not have standing as *parens patriae* to bring an action against the Federal Government. *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486 (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*"). Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants. Indeed, the Secretary of Labor has represented that he has no objection to Puerto Rico's standing as *parens patriae* under these circumstances. See Brief for the Secretary of Labor as *Amicus Curiae* in *Puerto Rico* v. *Bramkamp*, No. 724, Docket 79–7777 (CA2).

seeks to press a *parens patriae* claim in the district courts. The Framers, in establishing original jurisdiction in this Court for suits "in which a State shall be a Party," Art. III, § 2, cl. 2, and Congress, in implementing the grant of original jurisdiction with respect to suits between States, 28 U. S. C. § 1251(a) (1976 ed., Supp. IV), may well have conceived of a somewhat narrower category of cases as presenting issues appropriate for initial determination in this Court than the full range of cases to which a State may have an interest cognizable by a federal court. The institutional limits on the Court's ability to accommodate such suits accentuates the need for more restrictive access to the original docket. In addition, because the judicial power of the United States does not extend to suits "commenced or prosecuted against one of the United States by Citizens of another State," U. S. Const., Amdt. 11, where one State brings a suit *parens patriae* against another *State*, a more circumspect inquiry may be required in order to ensure that the provisions of the Eleventh Amendment are not being too easily circumvented by the device of the State's bringing suit on behalf of some private party. Of course, none of the concerns that might counsel for a restrictive approach to the question of *parens patriae* standing is present in this case.

In cases such as the present one, I can discern no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens. At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations. A private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed. *E. g., Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 378–379 (1982);[1] *Arlington Heights*

[1] Indeed, in *Havens* we held that interference with HOME's "ability to provide counseling and referral services," 455 U. S., at 379, provided it with standing to vindicate claims under the Fair Housing Act of 1968. In this case, the alleged violations of the Wagner-Peyser Act, 29 U. S. C. § 49

v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 263 (1977); *NAACP* v. *Button*, 371 U. S. 415, 428 (1963). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 109–111 (1979) (standing of municipality premised on diminished tax base and other "harms flowing from the realities of a racially segregated community"). Cf. *Sierra Club* v. *Morton*, 405 U. S. 727, 739 (1972).[2] There is no doubt that Puerto Rico's interest in this litigation compares favorably to interests of the private organizations, and municipality, in the cases cited above.

More significantly, a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.

With these considerations in mind, I join the opinion of the Court.

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et seq., directly interfere with Puerto Rico's ability to perform the job referral service that it has undertaken as part of its sovereign responsibility to its citizens.

[2] A private organization may also maintain a federal-court action on behalf of its members. *E. g.*, *NAACP* v. *Button*, 371 U. S. 415, 428 (1963); *National Motor Freight Assn.* v. *United States*, 372 U. S. 246 (1963) (*per curiam*). See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 341–345 (1977).

ROGERS ET AL. v. LODGE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-2100. Argued February 23, 1982—Decided July 1, 1982

Burke County, Ga., a large, predominantly rural county, has an at-large system for electing members of its governing Board of Commissioners. No Negro has ever been elected to the Board. Appellee black citizens of the county filed a class action in Federal District Court, alleging that the at-large system of elections violated, *inter alia*, appellees' Fourteenth and Fifteenth Amendment rights by diluting the voting power of black citizens. Finding that blacks have always made up a substantial majority of the county's population but that they are a minority of the registered voters, that there had been bloc voting along racial lines, and that past discrimination had restricted the present opportunity of blacks to participate effectively in the political process, the District Court held that although the state policy behind the at-large electoral system was "neutral in origin," the policy was being maintained for invidious purposes in violation of appellees' Fourteenth and Fifteenth Amendment rights. The court then ordered the county to be divided into districts for purposes of electing County Commissioners. The Court of Appeals affirmed, holding that the District Court properly required appellees to prove that the at-large system was maintained for a discriminatory purpose, and that the District Court's findings were not only not clearly erroneous but that its conclusion that the at-large system was maintained for invidious purposes was "virtually mandated by the overwhelming proof."

Held:

1. The Court of Appeals did not err in concluding that the District Court applied the proper legal standard, where it appears that the District Court demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent was "a requisite to a finding of unconstitutional vote dilution" under the Fourteenth and Fifteenth Amendments. Pp. 616–622.

2. Where neither the District Court's ultimate findings of intentional discrimination nor its subsidiary findings of fact appear to be clearly erroneous and such findings were agreed to by the Court of Appeals, this Court will not disturb the findings. Pp. 622–627.

3. Nor is there any reason to overturn the relief ordered by the District Court, where neither that court nor the Court of Appeals discerned

any special circumstances that would militate against utilizing single-member districts. Pp. 627–628.

639 F. 2d 1358, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 628. STEVENS, J., filed a dissenting opinion, *post*, p. 631.

E. Freeman Leverett argued the cause for appellants. With him on the briefs was *Preston B. Lewis*.

David F. Walbert argued the cause for appellees. With him on the brief were *Robert W. Cullen*, *Laughlin McDonald*, *Christopher Coates*, and *Neil Bradley*.*

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the at-large system of elections in Burke County, Ga., violates the Fourteenth Amendment rights of Burke County's black citizens.

I

Burke County is a large, predominately rural county located in eastern Georgia. Eight hundred and thirty-one square miles in area,[1] it is approximately two-thirds the size of the State of Rhode Island. According to the 1980 census, Burke County had a total population of 19,349, of whom 10,385, or 53.6%, were black.[2] The average age of blacks

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*Briefs of *amici curiae* urging affirmance were filed by *Arthur Kinoy* and *Robert Boehm* for the Center for Constitutional Rights; by *Marvin S. Arrington*, *Bobby L. Hill*, *John R. Myer*, and *Margrett Ford* for the Georgia Association of Black Elected Officials et al.; by *William L. Robinson* and *Frank R. Parker* for the Lawyers' Committee for Civil Rights Under Law; and by *Jack Greenberg*, *James M. Nabrit III*, and *Lani Guinier* for the NAACP Legal Defense and Educational Fund, Inc., et al.

[1] U. S. Dept. of Commerce, Bureau of the Census, County and City Data Book 1977, p. 90 (1978).

[2] U. S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population and Housing, PHC80–V–12, p. 5 (Mar. 1981). In 1930, Burke County had a total population of 29,224, of whom 22,698 or 78% were black.

living there is lower than the average age of whites and therefore whites constitute a slight majority of the voting age population. As of 1978, 6,373 persons were registered to vote in Burke County, of whom 38% were black.[3]

The Burke County Board of Commissioners governs the county. It was created in 1911, see 1911 Ga. Laws 310–311, and consists of five members elected at large to concurrent 4-year terms by all qualified voters in the county. The county has never been divided into districts, either for the purpose of imposing a residency requirement on candidates or for the purpose of requiring candidates to be elected by voters residing in a district. In order to be nominated or elected, a candidate must receive a majority of the votes cast in the primary or general election, and a runoff must be held if no candidate receives a majority in the first primary or general election. Ga. Code § 34–1513 (Supp. 1980). Each candidate must run for a specific seat on the Board, Ga. Code § 34–1015 (1978), and a voter may vote only once for any candidate. No Negro has ever been elected to the Burke County Board of Commissioners.

Appellees, eight black citizens of Burke County, filed this suit in 1976 in the United States District Court for the Southern District of Georgia. The suit was brought on behalf of all black citizens in Burke County. The class was certified in 1977. The complaint alleged that the county's system of at-large elections violates appellees' First, Thirteenth, Fourteenth and Fifteenth Amendment rights, as well as their rights under 42 U. S. C. §§ 1971, 1973, and 1983 by diluting the voting power of black citizens. Following a bench trial at which both sides introduced extensive evidence, the court issued an order on September 29, 1978, stating that appellees were entitled to prevail and ordering that Burke County be

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U. S. Dept. of Commerce, Bureau of the Census, II Characteristics of the Population, pt. 2, p. 229 (1943). The percentage of blacks in the total population of Burke County has steadily diminished over the last 50 years.

[3] App. to Juris. Statement 72a.

divided into five districts for purposes of electing County Commissioners. App. to Juris. Statement 62a. The court later issued detailed findings of fact and conclusions of law in which it stated that while the present method of electing County Commissioners was "racially neutral when adopted, [it] is being *maintained* for invidious purposes" in violation of appellees' Fourteenth and Fifteenth Amendment rights. *Id.*, at 71a, 96a.

The Court of Appeals affirmed. *Lodge* v. *Buxton*, 639 F. 2d 1358 (CA5 1981). It stated that while the proceedings in the District Court took place prior to the decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), the District Court correctly anticipated *Mobile* and required appellees to prove that the at-large voting system was maintained for a discriminatory purpose. 639 F. 2d, at 1375–1376. The Court of Appeals also held that the District Court's findings were not clearly erroneous, and that its conclusion that the at-large system was maintained for invidious purposes was "virtually mandated by the overwhelming proof." *Id.*, at 1380. We noted probable jurisdiction, 454 U. S. 811 (1981), and now affirm.[4]

II

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines. While multimember districts have been challenged for

[4] The District Court's judgment was stayed pending appeal to the Court of Appeals. 439 U. S. 948 (1978). The Court of Appeals stayed its mandate on April 6, 1981, pending disposition of the case here.

"their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party," *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159 (1971), this Court has repeatedly held that they are not unconstitutional *per se*. *Mobile* v. *Bolden*, *supra*, at 66; *White* v. *Regester*, 412 U. S. 755, 765 (1973); *Whitcomb* v. *Chavis*, *supra*, at 142. The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population. *Whitcomb* v. *Chavis*, *supra*, at 149. See also *White* v. *Regester*, *supra*, at 765. Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases. *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977), made it clear that in order for the Equal Protection Clause to be violated, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis*, *supra*, at 240. Neither case involved voting dilution, but in both cases the Court observed that the requirement that racially discriminatory purpose or intent be proved applies to voting cases by relying upon, among others, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), a districting case, to illustrate that a showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination. *Arlington Heights*, *supra*, at 265; *Washington* v. *Davis*, *supra*, at 240.[5]

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[5] Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality. *Washington* v. *Davis*, 426 U. S., at 247–248.

Arlington Heights and *Washington* v. *Davis* both rejected the notion that a law is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. *Arlington Heights, supra*, at 265; *Washington* v. *Davis*, 426 U. S., at 242. However, both cases recognized that discriminatory intent need not be proved by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Ibid.* Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra*, at 266.

In *Mobile* v. *Bolden, supra*, the Court was called upon to apply these principles to the at-large election system in Mobile, Ala. Mobile is governed by three commissioners who exercise all legislative, executive, and administrative power in the municipality. 446 U. S., at 59. Each candidate for the City Commission runs for one of three numbered posts in an at-large election and can only be elected by a majority vote. *Id.*, at 59–60. Plaintiffs brought a class action on behalf of all Negro citizens of Mobile alleging that the at-large scheme diluted their voting strength in violation of several statutory and constitutional provisions. The District Court concluded that the at-large system "violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process," *Bolden* v. *Mobile*, 423 F. Supp. 384, 399 (SD Ala. 1976), and ordered that the commission form of government be replaced by a mayor and a nine-member City Council elected from single-member districts. *Id.*, at 404. The Court of Appeals affirmed. 571 F. 2d 238 (CA5 1978). This Court reversed.

Justice Stewart, writing for himself and three other Justices, noted that to prevail in their contention that the at-large voting system violates the Equal Protection Clause of the Fourteenth Amendment, plaintiffs had to prove the

system was "'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" 446 U. S., at 66, quoting *Whitcomb* v. *Chavis*, 403 U. S., at 149.[6] Such a requirement "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," 446 U. S., at 66, and *White* v. *Regester* is consistent with that principle. 446 U. S., at 69. Another Justice agreed with the standard of proof recognized by the plurality. *Id.*, at 101 (WHITE, J., dissenting).

The plurality went on to conclude that the District Court had failed to comply with this standard. The District Court had analyzed plaintiffs' claims in light of the standard which had been set forth in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1975) *(per curiam)*.[7] *Zimmer* set out a list of factors[8] gleaned from

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[6] With respect to the Fifteenth Amendment, the plurality held that the Amendment prohibits only direct, purposefully discriminatory interference with the freedom of Negroes to vote. "Having found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of [the Fifteenth] Amendment in the present case." *Mobile* v. *Bolden*, 446 U. S., at 65. Three Justices disagreed with the plurality's basis for putting aside the Fifteenth Amendment. *Id.*, at 84, n. 3 (STEVENS, J., concurring in judgment); *id.*, at 102 (WHITE, J., dissenting); *id.*, at 125–135 (MARSHALL, J., dissenting). We express no view on the application of the Fifteenth Amendment to this case.

The plurality noted that plaintiffs' claim under § 2 of the Voting Rights Act, 79 Stat. 437, as amended, 42 U. S. C. § 1973, added nothing to their Fifteenth Amendment claim because the "legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." 446 U. S., at 60–61.

[7] We specifically affirmed the judgment below "without approval of the constitutional views expressed by the Court of Appeals." 424 U. S., at 638.

[8] The primary factors listed in *Zimmer* include a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a tenuous state policy underlying the preference for

Whitcomb v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*, that a court should consider in assessing the constitutionality of at-large and multimember district voting schemes. Under *Zimmer*, voting dilution is established "upon proof of the existence of an aggregate of these factors." 485 F. 2d, at 1305.

The plurality in *Mobile* was of the view that *Zimmer* was "decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." 446 U. S., at 71. The plurality observed that while "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," the mere existence of those criteria is not a substitute for a finding of discriminatory purpose. *Id.*, at 73. The District Court's standard in *Mobile* was likewise flawed. Finally, the plurality concluded that the evidence upon which the lower courts had relied was "insufficient to prove an unconstitutionally discriminatory purpose in the present case." *Ibid.* JUSTICE STEVENS rejected the intentional discrimination standard but concluded that the proof failed to satisfy the legal standard that in his view was the applicable rule. He therefore concurred in the judgment of reversal. Four other Justices, however, thought the evidence sufficient to satisfy the purposeful discrimination standard. One of them, JUSTICE BLACKMUN, nevertheless concurred in the Court's judgment because he believed an erroneous remedy had been imposed.

Because the District Court in the present case employed the evidentiary factors outlined in *Zimmer*, it is urged that

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multimember or at-large districting, and the existence of past discrimination which precludes effective participation in the elector process. 485 F. 2d, at 1305. Factors which enhance the proof of voting dilution are the existence of large districts, anti-single-shot voting provisions, and the absence of any provision for at-large candidates to run from geographic subdistricts. *Ibid.*

its judgment is infirm for the same reasons that led to the reversal in *Mobile*. We do not agree. First, and fundamentally, we are unconvinced that the District Court in this case applied the wrong legal standard. Not only was the District Court's decision rendered a considerable time after *Washington* v. *Davis* and *Arlington Heights*, but the trial judge also had the benefit of *Nevett* v. *Sides*, 571 F. 2d 209 (1978), where the Court of Appeals for the Fifth Circuit assessed the impact of *Washington* v. *Davis* and *Arlington Heights* and held that "a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim . . . ." 571 F. 2d, at 219. The court stated that "[t]he ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group." *Id.*, at 226. The Court of Appeals also explained that although the evidentiary factors outlined in *Zimmer* were important considerations in arriving at the ultimate conclusion of discriminatory intent, the plaintiff is not limited to those factors. "The task before the fact finder is to determine, under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case." *Id.*, at 224 (footnote omitted).

The District Court referred to *Nevett* v. *Sides* and demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent is "a requisite to a finding of unconstitutional vote dilution" under the Fourteenth and Fifteenth Amendments. App. to Juris. Statement 68a. Furthermore, while recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was "not limited in its determination only to the *Zimmer* factors" but could consider other relevant factors as well. *Id.*, at 70a. The District Court then proceeded to deal with what it considered to

be the relevant proof and concluded that the at-large scheme of electing commissioners, "although racially neutral when adopted, is being *maintained* for invidious purposes." *Id.*, at 71a. That system "while neutral in origin . . . has been subverted to invidious purposes." *Id.*, at 90a. For the most part, the District Court dealt with the evidence in terms of the factors set out in *Zimmer* and its progeny, but as the Court of Appeals stated:

> "Judge Alaimo employed the constitutionally required standard . . . [and] did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent." 639 F. 2d, at 1376.

Although a tenable argument can be made to the contrary, we are not inclined to disagree with the Court of Appeals' conclusion that the District Court applied the proper legal standard.

III

A

We are also unconvinced that we should disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population. In *White* v. *Regester*, 412 U. S., at 769–770, we stated that we were not inclined to overturn the District Court's factual findings, "representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." See also *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 468 (1979) (BURGER, C. J., concurring in judgment). Our recent decision in *Pullman-Standard* v. *Swint*, 456 U. S. 273 (1982), emphasizes the deference Federal Rule of Civil Procedure 52 requires reviewing courts to give a trial court's findings of fact. "Rule 52(a) broadly requires that findings of fact not be set aside unless

clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings . . . ." 456 U. S., at 287. The Court held that the issue of whether the differential impact of a seniority system resulted from an intent to discriminate on racial grounds "is a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard." *Id.*, at 287–288. The *Swint* Court also noted that issues of intent are commonly treated as factual matters. *Id.*, at 288. We are of the view that the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact. The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See, *e. g.*, *Berenyi* v. *Information Director*, 385 U. S. 630, 635 (1967); *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). We agree with the Court of Appeals that on the record before us, none of the factual findings are clearly erroneous.

B

The District Court found that blacks have always made up a substantial majority of the population in Burke County, App. to Juris. Statement 66a, n. 3, but that they are a distinct minority of the registered voters. *Id.*, at 71a–72a. There was also overwhelming evidence of bloc voting along racial lines. *Id.*, at 72a–73a. Hence, although there had been black candidates, no black had ever been elected to the Burke County Commission. These facts bear heavily on the issue of purposeful discrimination. Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. Because it is sensible to expect that at least some

blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion. See *White* v. *Regester*, *supra*, at 766.

Under our cases, however, such facts are insufficient in themselves to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice. *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 167 (1977); *White* v. *Regester*, *supra*, at 765–766; *Whitcomb* v. *Chavis*, 403 U. S., at 149–150. See also *Mobile* v. *Bolden*, 446 U. S., at 66 (plurality opinion). Both the District Court and the Court of Appeals thought the supporting proof in this case was sufficient to support an inference of intentional discrimination. The supporting evidence was organized primarily around the factors which *Nevett* v. *Sides*, 571 F. 2d 209 (CA5 1978), had deemed relevant to the issue of intentional discrimination. These factors were primarily those suggested in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973).

The District Court began by determining the impact of past discrimination on the ability of blacks to participate effectively in the political process. Past discrimination was found to contribute to low black voter registration because prior to the Voting Rights Act of 1965, blacks had been denied access to the political process by means such as literacy tests, poll taxes, and white primaries. The result was that "Black suffrage in Burke County was virtually non-existent." App. to Juris. Statement 71a. Black voter registration in Burke County has increased following the Voting Rights Act to the point that some 38% of blacks eligible to vote are registered to do so. *Id.*, at 72a. On that basis the District Court inferred that "past discrimination has had an adverse effect on black voter registration which lingers to this date." *Ibid.* Past discrimination against blacks in education also had the same effect. Not only did Burke County schools discriminate against blacks as recently as 1969, but also some schools

still remain essentially segregated and blacks as a group have completed less formal education than whites. *Id.*, at 74a.

The District Court found further evidence of exclusion from the political process. Past discrimination had prevented blacks from effectively participating in Democratic Party affairs and in primary elections. Until this lawsuit was filed, there had never been a black member of the County Executive Committee of the Democratic Party. There were also property ownership requirements that made it difficult for blacks to serve as chief registrar in the county. There had been discrimination in the selection of grand jurors, the hiring of county employees, and in the appointments to boards and committees which oversee the county government. *Id.*, at 74a–76a. The District Court thus concluded that historical discrimination had restricted the present opportunity of blacks effectively to participate in the political process. Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.

Extensive evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community,[9] which increases the likelihood that the political process was not equally open to blacks. This evidence ranged from the effects of past discrimination which still

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[9] The Court of Appeals held that "proof of unresponsiveness by the public body in question to the group claiming injury" is an *essential* element of a claim of voting dilution under the Fourteenth Amendment. 639 F. 2d, at 1375. Under our cases, however, unresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred.

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Here the robbers did commit murder; but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

In *Gregg* v. *Georgia* the opinion announcing the judgment observed that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U. S., at 183 (footnote omitted). Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment. *Coker* v. *Georgia*, *supra*, at 592. We are quite unconvinced, however, that the threat

that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher* v. *United States*, 328 U. S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, *supra*, at 186 (footnote omitted).

It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. Model Penal Code § 210.2, Comment, p. 38, and n. 96. This conclusion was based on three comparisons of robbery statistics, each of which showed that only about one-half of one percent of robberies resulted in homicide.[23] The most recent national

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[23] The statistics relied upon by the American Law Institute may be summarized as follows:

Date & Location	*No. of Robberies*	*Robberies Accompanied by Homicide*	%
Cook County, Ill. 1926–1927	14,392 (est.)	71	.49
Philadelphia, Pa. 1948–1952	6,432	38	.59
New Jersey 1975	16,273	66	.41

Model Penal Code § 210.2, Comment, p. 38, n. 96.

crime statistics strongly support this conclusion.[24] In addition to the evidence that killings only rarely occur during robberies is the fact, already noted, that however often death occurs in the course of a felony such as robbery, the death penalty is rarely imposed on one only vicariously guilty of the murder, a fact which further attenuates its possible utility as an effective deterrence.

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to "the degree of [his] criminal culpability," *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing. In *Robinson* v. *California*, 370 U. S. 660, 667 (1962), a statute making narcotics addiction a crime, even though such addiction "is apparently an illness which may be contracted innocently or involuntarily," was struck down under the Eighth Amendment. Similarly, in *Weems* v. *United States*, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender to "injur[e] any one by his act or inten[d] to injure any one." 217 U. S., at 363. The Court employed a similar approach in *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect "a consciousness

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[24] An estimated total of 548,809 robberies occurred in the United States in 1980. U. S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports 17 (1981). Approximately 2,361 persons were murdered in the United States in 1980 in connection with robberies, *id.*, at 13, and thus only about 0.43% of robberies in the United States in 1980 resulted in homicide. See also Cook, The Effect of Gun Availability on Robbery and Robbery Murder, in 3 R. Haveman & B. Zellner, Policy Studies Review Annual 743, 747 (1980) (0.48% of all robberies result in murder).

materially more 'depraved' than that of any person guilty of murder."

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

IV

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. However, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion).

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from executing a convicted felony murderer. I dissent from this holding not only because I believe that it is not supported by the analysis in our previous cases, but also

because today's holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law.

I

The evidence at trial showed that at approximately 7:30 a. m. on April 1, 1975, Sampson and Jeanette Armstrong approached the back door of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car.[1] When Thomas Kersey retrieved a water jug to help the Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot Jeanette Armstrong. Sampson Armstrong, and perhaps Jeanette Armstrong, returned the fire, killing both of the Kerseys.[2] The Armstrongs dragged the bodies into the kitchen, took Thomas Kersey's money, and fled to a nearby car, where the petitioner, Earl Enmund, was waiting to help the Armstrongs escape. Record 1348–1351.[3]

Ida Jean Shaw[4] testified that on March 31 the petitioner and the two Armstrongs were staying at her house. When she awoke on April 1, the day of the murders, the petitioner,

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[1] Much of the evidence concerning these crimes came from J. B. Neal, to whom Sampson Armstrong made numerous admissions on the day of the murders. See Record 1344–1365.

[2] J. B. Neal testified that Armstrong had told him that two guns were involved; Jeanette had one and Sampson had the other. *Id.*, at 1354.

[3] An autopsy revealed that Mr. Kersey had been shot twice, once with a .38-caliber bullet, and once with a .22-caliber bullet. Mrs. Kersey had been shot six times; of the bullets that could be identified, two were fired from a .38-caliber gun, and one from a .22-caliber gun. According to a firearms expert, the .22-caliber bullets were fired from the same gun, and the .38-caliber bullets were fired from the same gun. See 399 So. 2d 1362, 1364 (Fla. 1981).

[4] Ida Jean Shaw was the petitioner's common-law wife and Jeanette Armstrong's mother. She was later given immunity from prosecution in return for her testimony. Record 1178–1179.

Jeanette, and Sampson, as well as Shaw's 1969 yellow Buick, were gone. *Id.*, at 1185–1186. A little after eight o'clock, either the petitioner or Sampson Armstrong entered the house and told her that Jeanette had been shot. *Id.*, at 1187–1188. After learning that Jeanette had been shot during a robbery, Shaw asked the petitioner "[w]hy he did it." Enmund answered that he had decided to rob Thomas Kersey after he had seen Kersey's money a few weeks earlier. *Id.*, at 1205.[5] At the same time, Sampson Armstrong volunteered that he had made sure that the Kerseys were dead. *Id.*, at 1207–1208.

Ida Jean Shaw also testified that, pursuant to the petitioner's and Sampson Armstrong's instructions, she had disposed of a .22-caliber pistol that she normally kept in her car, as well as a .38-caliber pistol belonging to the Armstrongs. *Id.*, at 1198–1202. The murder weapons were never recovered.[6]

In his closing argument, the prosecutor did not argue that Earl Enmund had killed the Kerseys. Instead, he maintained that the petitioner had initiated and planned the

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[5] Thomas Kersey normally kept large sums of money in his wallet and indiscriminately showed the cash to people he dealt with. A few weeks before his murder, Kersey revealed the contents of his wallet to the petitioner and bragged that at any time he could "dig up $15,000, $16,000." 399 So. 2d, at 1365. See Record 1205–1206.

[6] Ida Jean Shaw's trial testimony contradicted her earlier statements to police. When police initially questioned her, she insisted that Jeanette had been shot by an unknown assailant while she and Jeanette had been traveling to a nearby town. *Id.*, at 1191–1192. Later she gave investigators a statement implicating the petitioner and Sampson Armstrong in the murders. *Id.*, at 1209–1210. Subsequently, she gave two more statements repudiating the statement implicating the petitioner. *Id.*, at 1208–1209.

In his closing argument, the prosecutor acknowledged the conflict between Ida Jean Shaw's testimony that she was not in the yellow Buick the morning of the murders, and the testimony of a witness who saw her in the car shortly before and after the murders. The prosecutor deemed the inconsistency irrelevant. *Id.*, at 1571–1572.

armed robbery, and was in the car during the killings. According to the prosecutor, "Sampson Armstrong killed the old people." *Id.*, at 1577.[7]

After deliberating for four hours, the jury found Sampson Armstrong and the petitioner each guilty of two counts of first-degree murder[8] and one count of robbery.[9] The jury

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[7] At the sentencing hearing, the prosecutor theorized that the petitioner was not the "trigger man," but the "person who set it all up." *Id.*, at 1679. The prosecutor admitted that he did not "know whether [the petitioner] set foot inside that house or not. But he drove them there. He set it up, planned it." *Id.*, at 1679–1680. In this Court as well, the State acknowledges that the petitioner "was apparently not the triggerman in the two murders involved in his *[sic]* case." Brief in Opposition 14.

[8] In Florida at the time of the Kersey murders, first-degree murder was defined in Fla. Stat. § 782.04(1)(a) (1973) as

"[t]he unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . robbery . . . ."

In instructing the jury on first-degree murder, the judge read the above provision verbatim. Record 1605–1606. He also added that

"[t]he killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." *Id.*, at 1606.

Distinguishing first- and second-degree felony murder, the judge stated:

"In order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

"In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime." *Id.*, at 1609–1610.

[9] On the motion of the petitioner and the prosecution, Jeanette Armstrong's trial had been severed from the trial of her codefendants. *Id.*, at

then heard evidence pertaining to the appropriate sentence for the two defendants, and recommended the death penalty for each defendant on each of the murder counts.[10]

In its sentencing findings,[11] the trial court found four statutory aggravating circumstances regarding the petitioner's involvement in the murder: (1) the petitioner previously had been convicted of a felony involving the use of violence (an armed robbery in 1957), Fla. Stat. § 921.141(5)(b) (1981); (2) the murders were committed during the course of a robbery, § 921.141(5)(d); (3) the murders were committed for pecuniary gain, § 921.141(5)(f); and (4) the murders were especially heinous, atrocious, or cruel because the Kerseys had been shot in a prone position in an effort to eliminate them as witnesses, § 921.141(5)(h). App. 30–31; 399 So. 2d 1362, 1371–1372 (Fla. 1981).[12]

50, 57. Jeanette Armstrong was tried first and convicted of two counts of second-degree murder and one count of robbery. The trial judge sentenced her to three consecutive life sentences. 399 So. 2d, at 1371.

[10] Under Florida law, the "court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. § 921.141(1) (1981). The jury renders only an "advisory sentence" based on the mitigating and aggravating circumstances. § 921.141(2).

At the sentencing hearing, the petitioner presented no evidence, Record 1677, but his attorney argued that the death penalty was inappropriate because at most the evidence showed that the petitioner saw Thomas Kersey's money, suggested the robbery, and drove the Armstrongs to the Kersey house. *Id.*, at 1683–1684. He also argued that death was an excessive penalty because the gunfight was spontaneous, and beyond the petitioner's control. *Id.*, at 1684.

[11] Initially, the trial court failed to make written findings as required by Fla. Stat. § 921.141(3) (1981). On the first state appeal, the Florida Supreme Court remanded the case for such findings. See App. 29.

[12] Regarding the extent of the petitioner's involvement, the trial court reasoned that because two different guns had been used in the murders, and because Jeanette Armstrong had been seriously wounded by gunfire, the petitioner must have fired one of the guns. Moreover, since each of the Kerseys was injured by a bullet of each type, the petitioner must have shot each victim. *Id.*, at 31; 399 So. 2d, at 1372.

The trial court also found that "*none* of the statutory mitigating circumstances applied" to the petitioner. App. 32 (emphasis in original). Most notably, the court concluded that the evidence clearly showed that the petitioner was an accomplice to the capital felony and that his participation had not been "relatively minor," but had been major in that he "planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." *Ibid.*; 399 So. 2d, at 1373. See Fla. Stat. § 921.141(6)(d) (1981).[13]

Considering these factors, the trial court concluded that the "aggravating circumstances of these capital felonies outweigh the mitigating circumstances," and imposed the death penalty for each count of murder. App. 32; 399 So. 2d, at 1373. The court sentenced the petitioner to life imprisonment for the robbery. App. 28.[14]

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[13] The court also rejected the other statutory mitigating circumstances. In particular, the petitioner did not have a record free of criminal convictions, Fla. Stat. § 921.141(6)(a) (1981); there was no evidence that he had acted under the influence of extreme mental or emotional disturbance, § 921.141(6)(b); there was no evidence that the victims were participants in or consented to the crimes, § 921.141(6)(c); there was no evidence that he acted under extreme duress or under the substantial domination of another person, § 921.141(6)(e); there was no evidence that the petitioner was incapable of appreciating the criminality of his conduct or conforming his conduct to the requirements of law, § 921.141(6)(f); and because he was 42 years old at the time of the offense, his age was not a mitigating factor, § 921.141(6)(g). App. 32; 399 So. 2d, at 1372–1373.

[14] The trial court made nearly identical findings for Sampson Armstrong. In particular, it found that the murders were committed during the course of a robbery, that they were committed for pecuniary gain, and that they were especially heinous, atrocious, or cruel. See *Armstrong* v. *State*, 399 So. 2d 953, 960–961 (Fla. 1981). The trial court considered the only possible mitigating circumstance to be Armstrong's age (23), but did not actually find that fact to be mitigating. See *id.*, at 962 ("the factor of age was given no consideration"). Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial judge imposed the death penalty for each murder conviction, and imposed a life sentence for the robbery. *Id.*, at 955, 962.

On appeal, the Florida Supreme Court affirmed the petitioner's convictions and sentences.[15] In challenging his convictions for first-degree murder, the petitioner claimed that there was no evidence that he had committed premeditated murder, or that he had been present aiding and abetting the robbery when the Kerseys were shot. He argued that since the jury properly could have concluded only that he was in the car on the highway when the murders were committed, he could be found guilty at most of second-degree murder under the State's felony-murder rule.[16]

The court rejected this argument. Quoting from an earlier case, the Florida Supreme Court held:

> "'[A]n individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. . . . Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.'" 399 So. 2d, at 1369 (quoting *Adams* v. *State*, 341 So. 2d 765, 768–769 (Fla. 1976) (footnote omitted), cert. denied, 434 U. S. 878 (1977)).

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[15] The Florida Supreme Court also affirmed the convictions and sentences of Sampson Armstrong. See *Armstrong* v. *State*, *supra*, at 960.

[16] Second-degree murder, based on felony murder, is defined in Fla. Stat. § 782.04(3) (1973):

"[W]hen committed in the perpetration of, or in the attempt to perpetrate, any . . . robbery, . . . except as provided in subsection (1), it shall be murder in the second degree . . . punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court."

384-537 O—82——6 : QL 3

Consequently, the critical issue regarding liability was whether the petitioner's conduct would make him a principal or merely an accessory before the fact to the underlying robbery. Under Florida law at the time of the murders, "if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder." 399 So. 2d, at 1370. Moreover,

> "'the presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.'" *Ibid.* (quoting *Pope* v. *State*, 84 Fla. 428, 446, 94 So. 865, 871 (1922)).

The court noted that there "was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." 399 So. 2d, at 1370.[17] Instead,

> "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." *Ibid.*

This evidence, the court concluded, was sufficient to find the petitioner to be a principal under state law, "constructively present aiding and abetting the commission of the crime of robbery," and thus guilty of first-degree murder. *Ibid.*

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[17] The court also noted that Sampson Armstrong's admissions to J. B. Neal made no mention of the petitioner, and that the petitioner's admissions to Ida Jean Shaw indicated only "his complicity." 399 So. 2d, at 1370.

Turning to the trial court's written sentencing findings, the State Supreme Court rejected two of the four aggravating circumstances. First, the court held that two of the trial judge's findings—that the murders were committed both in the course of robbery and for pecuniary gain—referred to the same aspect of the petitioner's crime. Consequently, these facts supported only one aggravating circumstance. Second, citing *Armstrong* v. *State*, 399 So. 2d 953 (Fla. 1981), the court held that "[t]he recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved." 399 So. 2d, at 1373.[18] The court affirmed the trial court's findings that none of the statutory mitigating circumstances applied. *Ibid.* Because one of those findings was that Enmund's participation in the capital felony was not minor, due to his role in planning the robbery, the State Supreme Court implicitly affirmed the finding that Enmund had planned the robbery.

Regarding the petitioner's claim that imposition of the death penalty, absent a showing that he intended to kill, would violate the Eighth Amendment's ban on cruel and unusual punishments, the court simply stated that the petitioner "offers us no binding legal authority that directly supports this proposition, and we therefore reject it." *Id.*, at 1371.

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[18] In *Armstrong*, the Florida Supreme Court expressly had rejected the trial court's conclusion that the Kerseys were murdered in order to eliminate them as witnesses. "It simply cannot be said that there was proof that the robbers killed in order to assure that there would be no witnesses against them." 399 So. 2d, at 963. On the contrary, "[t]he only direct account of what transpired is from the testimony of J. B. Neal about Armstrong's statement to him. By that account, the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Kersey." *Ibid.* In reaching this conclusion, the State Supreme Court also rejected the trial court's conclusions derived from the pathologist's testimony. Rather than indicating that the victims were prone when shot, the pathologist's testimony "as to the direction of fire and the positions of the victims when shot [was] equivocal at best." *Ibid.*

II

Earl Enmund's claim in this Court is that the death sentence imposed by the Florida trial court, and affirmed by the Florida Supreme Court, is unconstitutionally disproportionate to the role he played in the robbery and murders of the Kerseys.[19] In particular, he contends that because he had no actual intent to kill the victims—in effect, because his behavior and intent were no more blameworthy than that of any robber—capital punishment is too extreme a penalty.[20]

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), a majority of this Court concluded that the death penalty does not invariably violate the Cruel and Unusual Punishments Clause of the Eighth Amendment.[21] See *id.*, at 187 (opinion of Stewart, POWELL, and STEVENS, JJ.) ("[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes") (footnote omitted); *id.*, at 226 (opinion of WHITE, J.) (rejecting the argument that "the death penalty, however imposed and for whatever crime, is cruel and unusual punishment");

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[19] In this Court, the petitioner neither challenges his convictions for robbery and felony murder nor argues that the State has overstepped constitutional bounds in defining murder to include felony murder. The petitioner's sole challenge is to the penalty imposed for the murders.

[20] Although the petitioner ostensibly relies on the fact that he was not the triggerman, the core of his argument is that the death penalty is disproportionate to his crime because he did not have the specific intent to kill the Kerseys. Pulling the trigger is only one factor, albeit a significant one, in determining intent. See Tr. of Oral Arg. 21–23 (counsel for petitioner asserting that so long as a defendant had the intent to kill, he need not actually have pulled the trigger in order to be subjected to capital punishment, and that even if he had pulled the trigger, he would not be subject to the death penalty absent a specific intent to kill).

[21] The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

id., at 227 (BLACKMUN, J., concurring in judgment). In no case since *Gregg* and its companion cases,[22] has this Court retreated from that position.[23] Recognizing the constitutional-

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[22] See *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976) (holding that Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (holding that the State's mandatory death penalty statute violated the Eighth and Fourteenth Amendments); *Jurek* v. *Texas*, 428 U. S. 262 (1976) (upholding the Texas death penalty statute); *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (upholding Florida's death penalty statute).

[23] In only one case since *Gregg* has this Court upheld a challenged death sentence. See *Dobbert* v. *Florida*, 432 U. S. 282 (1977) (holding that changes in the death penalty statute between the time of the murder and the sentencing did not amount to an *ex post facto* violation). In five cases, the Court vacated the death sentence because the sentencer could not or did not consider all mitigating factors proffered by the defendant. See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633 (1977) *(per curiam)*; *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Bell* v. *Ohio*, 438 U. S. 637 (1978) (plurality opinion); *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*; *Eddings* v. *Oklahoma*, 454 U. S. 104 (1982) (adopting the reasoning of the *Lockett* plurality as the holding of the Court). In two cases, the Court reversed the judgments affirming the death sentences because the jury had been selected in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). See *Adams* v. *Texas*, 448 U. S. 38 (1980); *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*. In five other cases, the Court vacated death sentences for a variety of reasons unrelated to the proportionality of the punishment to the crime. See *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality opinion) (due process violated when defendant had no chance to explain or deny information given to the sentencing judge); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (plurality opinion) (reversing the death sentence because the aggravating circumstance relied upon by jury was not so tailored as to avoid arbitrary and capricious infliction of death penalty); *Beck* v. *Alabama*, 447 U. S. 625 (1980) (holding that death penalty may not be imposed where jury was precluded from considering lesser included noncapital offense, when evidence existed to support such a verdict); *Bullington* v. *Missouri*, 451 U. S. 430 (1981) (holding that Double Jeopardy Clause prevented imposition of death sentence upon retrial when jury had imposed life imprisonment at the first trial); *Estelle* v. *Smith*, 451 U. S. 454 (1981) (holding that admission of psychiatrist's testimony at the penalty phase of the capital trial violated the defendant's Fifth Amendment

ity of the death penalty, however, only marks the beginning of the inquiry, for Earl Enmund was not convicted of murder as it is ordinarily envisioned—a deliberate and premeditated, unlawful killing. Rather, through the doctrine of accessorial liability, the petitioner has been convicted of two murders that he did not specifically intend.[24] Thus, it is necessary to examine the concept of proportionality as enunciated in this Court's cases to determine whether the penalty imposed on Earl Enmund is unconstitutionally disproportionate to his crimes.

A

The Eighth Amendment concept of proportionality was first fully expressed in *Weems* v. *United States*, 217 U. S. 349 (1910). In that case, defendant Weems was sentenced to 15 years at hard labor for falsifying a public document.

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privilege against self-incrimination because he had not been told before his psychiatric examination that his statements could be used against him during the sentencing proceeding).

In *Coker* v. *Georgia*, 433 U. S. 584 (1977), the Court vacated a death sentence for a man who had been convicted of rape of an adult woman. Nevertheless, the Court made clear that the death penalty is not *per se* disproportionate to the crime of murder. See, *e. g.*, *id.*, at 591 (opinion of WHITE, J.) ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; . . . neither is it always disproportionate to the crime for which it is imposed"); *id.*, at 604 (opinion of BURGER, C. J.) (accepting "that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes," but rejecting the argument that death is a disproportionate punishment for rape, much less murder).

[24] Strictly speaking, this Court cannot state unequivocally whether the petitioner specifically intended either to kill the Kerseys or to have them killed because the trial court made no findings on these issues. The trial court, however, did make the finding, not rejected by the Florida Supreme Court, that the petitioner's participation was not minor, but "major" in that he "planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." App. 32. Accordingly, I proceed on the assumption that the petitioner's only intent was to commit an armed robbery with his accomplices, the Armstrongs.

After remarking that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and after comparing Weems' punishment to the punishments for other crimes, the Court concluded that the sentence was cruel and unusual. *Id.*, at 381.

Not until two-thirds of a century later, in *Coker* v. *Georgia*, 433 U. S. 584 (1977), did the Court declare another punishment to be unconstitutionally disproportionate to the crime. Writing for himself and three other Members of the Court, JUSTICE WHITE concluded that death is a disproportionate penalty for the crime of raping an adult woman. *Id.*, at 597.[25] In reaching this conclusion, the plurality was careful to inform its judgment "by objective factors to the maximum possible extent [by giving attention] to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions." *Id.*, at 592. The plurality's resort to objective factors was no doubt an effort to derive "from the evolving standards of decency that mark the progress of a maturing society" the meaning of the requirement of proportionality contained within the Eighth Amendment. *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.).

The plurality noted that within the previous 50 years a majority of the States had never authorized death as a punishment for rape. More significantly to the plurality, only 3 of the 35 States that immediately reinstituted the death penalty following the Court's judgment in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (invalidating nearly all state capital punish-

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[25] JUSTICE POWELL concurred in the plurality's reasoning in concluding that "ordinarily" death was disproportionate for such a crime, but stopped short of a *per se* rule. 433 U. S., at 601. JUSTICE BRENNAN and JUSTICE MARSHALL concurred in the judgment, adhering to their previously announced views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *id.*, at 600–601.

ment statutes), defined rape as a capital offense.[26] The plurality also considered "the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." 433 U. S., at 596. See *Gregg* v. *Georgia*, 428 U. S., at 181 ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved") (opinion of Stewart, POWELL, and STEVENS, JJ.). From the available data, the plurality concluded that in at least 90% of the rape convictions since 1973, juries in Georgia had declined to impose the death penalty. 433 U. S., at 597.

Thus, the conclusion reached in *Coker* rested in part on the Court's observation that *both* legislatures *and* juries firmly rejected the penalty of death for the crime of rape. See *Woodson* v. *North Carolina*, 428 U. S. 280, 293 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (concluding that the State's mandatory death penalty statute violates the Eighth Amendment because the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences").

In addition to ascertaining "contemporary standards," the plurality opinion also considered qualitative factors bearing on the question whether the death penalty was disproportionate, for "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U. S., at 597. The plurality acknowledged that a rapist is almost as blameworthy as a murderer, describing

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[26] In fact, two of those States, Louisiana and North Carolina, did not define rape as a capital felony when they reenacted their death penalty statutes following their invalidation in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). See 433 U. S., at 594. Consequently, at the time *Coker* was decided only Georgia authorized the death penalty for the rape of an adult woman.

the crime of rape as "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim." *Ibid.* Despite the enormity of the crime of rape, however, the Court concluded that the death penalty was "grossly out of proportion to the severity of the crime," *id.*, at 592, in part because the harm caused by a rape "does not compare with murder, which does involve the unjustified taking of human life." *Id.*, at 598.

Coker teaches, therefore, that proportionality—at least as regards capital punishment—requires not only an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness.[27] Moreover, because they turn on considerations unique to each defendant's case, these latter factors underlying the concept of proportionality are reflected in this Court's conclusion in *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), that "individualized consideration [is] a constitutional requirement in imposing the death sentence" (opinion of BURGER, C. J.) (footnote omitted). See *id.*, at 613 (opinion of BLACKMUN, J.) ("the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide").

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[27] The Court has conducted a less searching inquiry for punishments less than death. See *Rummel* v. *Estelle*, 445 U. S. 263 (1980) (upholding, against an Eighth Amendment challenge, a life sentence imposed under a state recidivist statute); *Hutto* v. *Davis*, 454 U. S. 370 (1981) *(per curiam)* (upholding, on the basis of *Rummel*, a 40-year sentence for two marihuana convictions). In *Rummel*, the Court expressly noted that, for purposes of Eighth Amendment analysis, those "decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality" of prison sentences. 445 U. S., at 272.

In sum, in considering the petitioner's challenge, the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime, as well as whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in *Lockett*.

B

Following the analysis set forth in *Coker*, the petitioner examines the historical development of the felony-murder rule, as well as contemporary legislation and jury verdicts in capital cases, in an effort to show that imposition of the death penalty on him would violate the Eighth Amendment. This effort fails, however, for the available data do not show that society has rejected conclusively the death penalty for felony murderers.

As the petitioner acknowledges, the felony-murder doctrine, and its corresponding capital penalty, originated hundreds of years ago,[28] and was a fixture of English common law until 1957 when Parliament declared that an unintentional killing during a felony would be classified as manslaughter.[29] The common-law rule was transplanted to the American Col-

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[28] According to one source, at early common law most felonies were capital crimes, but attempts were punished as misdemeanors and accidental killings were not punishable at all. The felony-murder rule was an effort to create felony liability for accidental killings caused during the course of an attempted felony. See ALI, Model Penal Code § 210.2, Comment, p. 31, n. 74 (Off. Draft and Revised Comments 1980).

[29] See English Homicide Act of 1957, 5 & 6 Eliz. 2, ch. 11. The English attitude toward capital punishment, as reflected in recent legislation, differs significantly from American attitudes as reflected in state legislation; in 1965, England abolished the death penalty for all murders. See Murder (Abolition of Death Penalty) Act of 1965, 8 Halsbury's Statutes of England 541 (3d ed. 1969).

onies, and its use continued largely unabated into the 20th century, although legislative reforms often restricted capital felony murder to enumerated violent felonies.[30]

The petitioner discounts the weight of this historical precedent by arguing that jurors and judges widely resisted the application of capital punishment by acquitting defendants in felony-murder cases or by convicting them of noncapital manslaughter.[31] The force of the petitioner's argument is speculative at best, however, for it is unclear what fraction of the jury nullification in this country resulted from dissatisfaction with the capital felony-murder rule. Much of it, surely, was a reaction to the mandatory death penalty, and the failure of the common law and early state statutes to classify murder by degree. In fact, it was in response to juror attitudes toward capital punishment that most jurisdictions by the early part of this century replaced their mandatory death penalty statutes with statutes allowing juries the discretion to decide whether to impose or to recommend the death penalty. See *Woodson* v. *North Carolina*, 428 U. S., at 291–292 (opinion of Stewart, POWELL, and STEVENS, JJ.).[32] Thus, it simply is not possible to conclude that histori-

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[30] See Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 364–365 (1978); Alderstein, Felony-Murder in the New Criminal Codes, 4 Am. J. Crim. L. 249, 251–252 (1976).

[31] See, *e. g.*, Royal Commission on Capital Punishment 1949–1953, Report 31–33 (1953) (reporting that application of the felony-murder doctrine was limited to those cases in which the verdict could have been intentional murder); Law Revision Commission of the State of New York, 3d Annual Report 665, 668, and n. 444 (1937). It is significant that the New York Legislature rejected the Commission's recommendation of requiring some element of *mens rea*, and instead adopted a scheme giving jurors discretion to recommend life sentences. See 1937 N. Y. Laws, ch. 67.

[32] The extent of jury nullification and the nearly complete repudiation of mandatory death penalty laws led a plurality of this Court to conclude that the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences." *Woodson* v. *North Carolina*, 428 U. S., at 293 (opinion

cally this country conclusively has rejected capital punishment for homicides committed during the course of a felony.

The petitioner and the Court turn to jury verdicts in an effort to show that, by present standards at least, capital punishment is grossly out of proportion to the crimes that the petitioner committed. Surveying all reported appellate court opinions since 1954 involving executions, the petitioner has found that of the 362 individuals executed for homicide, 339 personally committed the homicidal assault, and two others each had another person commit the homicide on his behalf. Only six persons executed were "non-triggermen."[33] A similar trend can be seen in the petitioner's survey of the current death row population.[34] Of the 739 prisoners for whom sufficient data are available, only 40 did not participate in the homicidal assault, and of those, only 3 (including the petitioner) were sentenced to death absent a finding that they had collaborated with the killer in a specific plan to kill. Brief for Petitioner 35–36. See also App. to Reply Brief for Petitioner (showing that of the 45 felony murderers currently on death row in Florida, 36 were found by the State Supreme Court or a trial court to have had the intent to kill; in 8 cases, the state courts made no finding, but the defendant was the triggerman; and in 1, the petitioner's case, the defendant was not the triggerman, and there was no finding of intent to kill).

Impressive as these statistics are at first glance, they cannot be accepted uncritically. So stated, the data do not reveal the number or fraction of homicides that were charged as felony murders, or the number or fraction of cases in which the State sought the death penalty for an accomplice guilty of

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of Stewart, POWELL, and STEVENS, JJ.). These factors supported the Court's conclusion that North Carolina's mandatory death penalty law violated the Eighth Amendment.

[33] See App. D to Brief for Petitioner. Moreover, the last nontriggerman was executed in 1955. By contrast, 72 rapists were executed between 1955 and this Court's 1977 decision in *Coker*. Brief for Petitioner 34–35.

[34] See App. E to Brief for Petitioner; NAACP Legal Defense and Education Fund, Inc., Death Row U. S. A. (Oct. 20, 1981).

felony murder. Consequently, we cannot know the fraction of cases in which juries rejected the death penalty for accomplice felony murder. Moreover, as JUSTICE BLACKMUN pointed out in his concurring opinion in *Lockett* v. *Ohio*, 438 U. S., at 615, n. 2, much of these data classify defendants by whether they "personally committed a homicidal assault," and do not show the fraction of capital defendants who were shown to have an intent to kill. While the petitioner relies on the fact that he did not pull the trigger, his principal argument is, and must be, that death is an unconstitutional penalty absent an intent to kill, for otherwise defendants who hire others to kill would escape the death penalty. See n. 20, *supra*. Thus, the data he presents are not entirely relevant. Even accepting the petitioner's facts as meaningful, they may only reflect that sentencers are especially cautious in imposing the death penalty, and reserve that punishment for those defendants who are sufficiently involved in the homicide, whether or not there was specific intent to kill.

Finally, as the petitioner acknowledges, the jury verdict statistics cannot be viewed in isolation from state death penalty legislation. The petitioner and the Court therefore review recent legislation in order to support the conclusion that society has rejected capital felony murder. Of the 35 States that presently have a death penalty, however, fully 31 authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery.[35] The States are not uniform in delimiting the circumstances under which the

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[35] Only Missouri, New Hampshire, and Pennsylvania define felony murder as a crime distinct from capital murder. See Mo. Rev. Stat. §§ 565.001, 565.003, 565.008(2) (1978); N. H. Rev. Stat. Ann. §§ 630:1, 630:1–a(I)(b)(2), 630:1–a(III) (1974 and Supp. 1981); 18 Pa. Cons. Stat. §§ 2502(a), (b), (d), 1102(b) (1980). One exception to the New Hampshire scheme is § 630:1(I)(b), which includes in the definition of capital murder a death caused "knowingly" in the course of a kidnaping. A fourth State, Washington, permits imposition of the death penalty if premeditated murder is aggravated by, *inter alia*, commission during a felony. Wash. Rev. Code §§ 9A.32.030(1)(a), 10.95.020(9) (1981).

death penalty may be imposed for felony murder, but each state statute can be classified as one of three types. The first category, containing 20 statutes, includes those States that permit imposition of the death penalty for felony murder even though the defendant did not commit the homicidal act, and even though he had no actual intent to kill.[36] Three addi-

[36] See Ariz. Rev. Stat. Ann. §§ 13–1105(A)(2), (C) (Supp. 1981–1982); Cal. Penal Code Ann. §§ 189, 190 (West Supp. 1982); Colo. Rev. Stat. §§ 18–3–102(1)(b), 18–1–105(1)(a) (1978 and Supp. 1981); Conn. Gen. Stat. Ann. §§ 53a–54b, 53a–54c, 53a–35a(1) (West Supp. 1982); Fla. Stat. §§ 782.04(1)(a), 775.082(1) (1981); Ga. Code §§ 26–1101(b), (c) (1978); Idaho Code §§ 18–4003(d), 4004 (1979); Ind. Code §§ 35–42–1–1(2), 35–50–2–3(b) (Supp. 1981); Miss. Code Ann. §§ 97–3–19(2)(e), 97–3–21 (Supp. 1981); Mont. Code Ann. §§ 45–5–102(1)(b), (2) (1981); Neb. Rev. Stat. §§ 28–303(2), 28–105(1) (1979); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4)(a) (1981); N. M. Stat. Ann. §§ 30–2–1(A)(2), 31–18–14(A), 31–20A–5 (Supp. 1981); N. C. Gen. Stat. § 14–17 (1981); Okla. Stat., Tit. 21, §§ 701.7(B), 701.9(A) (1981); S. C. Code §§ 16–3–10, 16–3–20(C)(a)(1) (1976 and Supp. 1981); S. D. Codified Laws §§ 22–16–4, 22–16–12, 22–6–1(1), 22–3–3 (1979 and Supp. 1981); Tenn. Code Ann. §§ 39–2402(a), (b) (Supp. 1981); Vt. Stat. Ann., Tit. 13, §§ 2301, 2303(b), (c) (1974 and Supp. 1981); and Wyo. Stat. §§ 6–4–101(a), (b) (1977).

Two of these States, Colorado and Connecticut, provide that it is an affirmative defense to the capital crime if the accomplice did not "in any way solicit, request, command, importune, cause or aid the commission" of the homicidal act; was not armed with a deadly weapon and had no reason to believe that his cofelons were so armed; and did not engage or intend to engage, and had no reason to believe that his cofelons would engage in conduct "likely to result in death or serious bodily injury." See Colo. Rev. Stat. § 18–3–102 (2) (1978); Conn. Gen. Stat. § 53a–54c (Supp. 1982). Colorado also prevents imposition of the death penalty if the defendant's role, though sufficient to establish guilt, was "relatively minor." Colo. Rev. Stat. § 16–11–103(5)(d) (1978). Even if they were available under the Florida statute, these provisions would have been of no help to the petitioner since the trial court found that there were no mitigating circumstances, in part because Enmund's role in the capital felony was not minor. See Fla. Stat. § 921.141(6)(d) (1981). The State Supreme Court expressly affirmed the trial court's finding of no mitigating circumstances, and therefore the finding that the petitioner's role was not minor. 399 So. 2d, at 1373.

Of course, not all of the statutes listed above are identical. Several of them provide that robbery murder is a capital felony, but require proof of

tional States, while requiring some finding of intent, do not require the intent to kill that the petitioner believes is constitutionally mandated before the death sentence may be imposed.[37] The second category, containing seven statutes, includes those States that authorize the death penalty only if the defendant had the specific intent (or some rough equivalent) to kill the victim.[38] The third class of statutes, from

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additional aggravating circumstances, *e. g.*, the defendant had been convicted previously of a violent felony, or the victim was a correctional officer, before the death penalty can be imposed. See, *e. g.*, Okla. Stat., Tit. 21, § 701.12 (1981); N. M. Stat. Ann. §§ 30–2–1(A)(2), 31–18–14(A), 31–20A–5 (Supp. 1981). Others, like the Florida statute, define robbery murder as a capital offense and use the robbery as an aggravating circumstance. The common thread in all of these statutes, however, is that the defendant need not have the intent to kill in order to be subject to the death penalty. The Court's additional subdivision of this group of statutes, see *ante*, at 791–793, and nn. 10–13, serves only to obscure the point that 20 States permit imposition of the death penalty even though the defendant did not actually kill, and had no intent to kill.

[37] See Ark. Stat. Ann. §§ 41–1501(1)(a), (2), (3) (1977) (a capital crime if death occurs during commission of the felony "under circumstances manifesting extreme indifference to the value of human life"); Del. Code Ann., Tit. 11, §§ 636(a)(6), 636(b), 4209(a) (1979) (a capital crime only if the death is caused "with criminal negligence"); Ky. Rev. Stat. § 507.020(1)(b), (2) (Supp. 1980) (defendant must "caus[e] the death of another person" under "circumstances manifesting extreme indifference to human life [and while] wantonly engag[ing] in conduct which creates a grave risk of death to another person"). It is an affirmative defense to capital felony murder in Arkansas if the "defendant did not commit the homicide act or in any way solicit, command, induce, procure, counsel, or aid its commission." Ark. Stat. Ann. § 41–1501(2) (1977).

At oral argument, counsel for petitioner stated that "the determining factor is the intent to take life, conscious purpose to take life." Tr. of Oral Arg. 18. Under the petitioner's proposed standard, these statutes would be unconstitutional.

[38] See Ala. Code §§ 13A–2–23, 13A–5–40(a)(2), (b), (c), (d), 13A–6–2(a)(1) (1977 and Supp. 1982) (the accomplice is not guilty of capital murder unless the killing is intentional, and the accomplice had "intent to promote or assist the commission" of the murder); Ill. Rev. Stat., ch. 38, ¶¶ 9–1(a)(3), 9–1(b)(6) (1979) (a capital crime only if the defendant killed intentionally or with knowledge that his actions "created a strong probability of death or

only three States, restricts application of the death penalty to those felony murderers who actually commit the homicide.[39]

The Court's curious method of counting the States that authorize imposition of the death penalty for felony murder cannot hide the fact that 23 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim. While the Court acknowledges that eight state statutes follow the Florida death penalty scheme, see *ante*, at 789, n. 5, it also concedes that 15 other statutes permit imposition of the death penalty where the defendant neither intended to kill or actually killed the victims. See *ante*, at 790, n. 8 (Arkansas, Delaware, and Kentucky); *ante*, at 793–794, n. 15 (New Mexico); *ante*, at 791, n. 10 (Colorado); *ante*, at 791, n. 11 (Vermont); *ante*,

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great bodily harm"); La. Rev. Stat. Ann. § 14.30(1) (West Supp. 1982) (defendant is guilty of capital murder only if he had "specific intent to kill or to inflict great bodily harm"); Ohio Rev. Code Ann. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (1982) (accomplice is not guilty of the capital crime unless he "purposely cause[d]" the death and was "specifically found to have intended to cause the death of another"; if defendant is not the "principal offender," the death penalty is precluded unless he "committed the aggravated murder with prior calculation and design"); Tex. Penal Code Ann. §§ 12.31, 19.03(a)(2), 19.02(a)(1) (1974) (defendant is guilty of capital murder only if he "intentionally or knowingly" caused death during the course of the robbery); Utah Code Ann. §§ 76–5–202(1)(d), (2), 76–3–206(1) (1978) (defendant is guilty of capital murder only if he "intentionally or knowingly" caused the death during the course of the robbery); and Va. Code §§ 18.2–31(d), 18.2–10(a) (1982) (capital murder only if killing is "willful, deliberate and premeditated").

[39] See Ill. Rev. Stat., ch. 38, ¶¶ 9–1(a)(3), 9–1(b)(6) (1979) (a capital crime only if the defendant actually killed the victim and the defendant killed intentionally or with knowledge that his actions "created a strong probability of death or great bodily harm"); Md. Ann. Code, Art. 27, §§ 410, 412(b), 413(d)(10), (e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty); Va. Code §§ 18.2–31(d), 18.2–10(a), 18.2–18 (1982) (except in cases of murder for hire, only the immediate perpetrator of the homicide, and not accomplice before the fact or principal in the second degree, may be tried for capital murder). Note that Illinois and Virginia also require an intent to kill. See n. 38, *supra*.

at 792, n. 12 (Arizona, Connecticut, Indiana, Montana, Nebraska, and North Carolina); *ante*, at 792, n. 13 (Idaho, Oklahoma, and South Dakota). Not all of the statutes list the same aggravating circumstances. Nevertheless, the question before the Court is not whether a particular species of death penalty statute is unconstitutional, but whether a scheme that permits imposition of the death penalty, absent a finding that the defendant either killed or intended to kill the victims, is unconstitutional. In short, the Court's peculiar statutory analysis cannot withstand closer scrutiny.

Thus, in nearly half of the States, and in two-thirds of the States that permit the death penalty for murder, a defendant who neither killed the victim nor specifically intended that the victim die may be sentenced to death for his participation in the robbery-murder. Far from "weigh[ing] very heavily on the side of rejecting capital punishment as a suitable penalty for" felony murder, *Coker* v. *Georgia*, 443 U. S., at 596, these legislative judgments indicate that our "evolving standards of decency" still embrace capital punishment for this crime. For this reason, I conclude that the petitioner has failed to meet the standards in *Coker* and *Woodson* that the "two crucial indicators of evolving standards of decency . . . —jury determinations and legislative enactments—*both point conclusively* to the repudiation" of capital punishment for felony murder. 428 U. S., at 293 (emphasis added). In short, the death penalty for felony murder does not fall short of our national "standards of decency."

C

As I noted earlier, the Eighth Amendment concept of proportionality involves more than merely a measurement of contemporary standards of decency. It requires in addition that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness. Critical to the holding in *Coker*, for example, was that "in terms of moral depravity and of the injury to the person and

384-537 O—82——7: QL 3

to the public, [rape] does not compare with murder, which . . . involve[s] the unjustified taking of human life." 433 U. S., at 598.

Although the Court disingenuously seeks to characterize Enmund as only a "robber," *ante*, at 797, it cannot be disputed that he is responsible, along with Sampson and Jeanette Armstrong, for the murders of the Kerseys. There is no dispute that their lives were unjustifiably taken, and that the petitioner, as one who aided and abetted the armed robbery, is legally liable for their deaths.[40] Quite unlike the defendant in *Coker*, the petitioner cannot claim that the penalty imposed is "grossly out of proportion" to the harm for which he admittedly is at least partly responsible.

The Court's holding today is especially disturbing because it makes intent a matter of federal constitutional law, requiring this Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent. As JUSTICE BLACKMUN pointed out in his concurring opinion in *Lockett*, the Court's holding substantially "interfere[s] with the States' individual statutory categories for assessing legal

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[40] The Court's attempt to downplay the significance of Enmund's role in the murders, see *ante*, at 786–787, n. 2, does not square with the facts of this case. The trial court expressly found that because Enmund had planned the robbery, his role was not minor, and that therefore no statutory mitigating circumstances applied. The Florida Supreme Court affirmed the finding of no mitigating circumstances, thereby affirming the underlying factual predicate—Enmund had planned the armed robbery. Moreover, even Enmund's trial counsel conceded at the sentencing hearing that Enmund initiated the armed robbery and drove the getaway car. See n. 10, *supra*.

The Court misreads the opinion below in suggesting that the State Supreme Court deduced from the *sentencing hearing* that Enmund's only participation was as the getaway driver. In fact, the court made that statement with respect to the *guilt* phase of the trial. As I mentioned above, Enmund's counsel conceded at the sentencing hearing that Enmund had initiated the armed robbery.

guilt." 438 U. S., at 616.[41] See also *id.*, at 635–636 (opinion of REHNQUIST, J.) (rejecting the idea that intent to kill must be proved before the State can impose the death penalty). Although the Court's opinion suggests that intent can be ascertained as if it were some historical fact, in fact it is a legal concept, not easily defined. Thus, while proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness, the Court fails to explain why the Eighth Amendment concept of proportionality requires rejection of standards of blameworthiness based on other levels of intent, such as, for example, the intent to commit an armed robbery coupled with the knowledge that armed robberies involve substantial risk of death or serious injury to other persons. Moreover, the intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentencer, who can sift through the facts unique to each case. Consequently, while the type of *mens rea* of the defendant must be considered carefully in assessing the proper penalty, it is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder.

In sum, the petitioner and the Court have failed to show that contemporary standards, as reflected in both jury determinations and legislative enactments, preclude imposition of

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[41] It is not true, as the petitioner suggests, that an intent-to-kill requirement would not interfere with the State's substantive categories of murder. Prohibiting the death penalty for accomplice felony murder would create a category of murder between capital murder, for which the death penalty is permitted, and the next statutory degree, for which some term of years (typically less than life imprisonment) is imposed.

the death penalty for accomplice felony murder. Moreover, examination of the qualitative factors underlying the concept of proportionality do not show that the death penalty is disproportionate as applied to Earl Enmund. In contrast to the crime in *Coker*, the petitioner's crime involves the very type of harm that this Court has held justifies the death penalty. Finally, because of the unique and complex mixture of facts involving a defendant's actions, knowledge, motives, and participation during the commission of a felony murder, I believe that the factfinder is best able to assess the defendant's blameworthiness. Accordingly, I conclude that the death penalty is not disproportionate to the crime of felony murder, even though the defendant did not actually kill or intend to kill his victims.[42]

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[42] The petitioner and the Court also contend that capital punishment for felony murder violates the Eighth Amendment because it "makes no measurable contribution to acceptable goals of punishment." *Coker* v. *Georgia*, 433 U. S., at 592. In brief, the petitioner and the Court reason that since he did not specifically intend to kill the Kerseys, since the probability of death during an armed robbery is so low, see ALI, Model Penal Code, *supra* n. 28, § 210.2, Comment, p. 38, n. 96 (concluding from several studies that a homicide occurs in about one-half of one percent of all robberies), and since the death penalty is so rarely imposed on nontriggermen, capital punishment could not have deterred him or anyone else from participating in the armed robbery. The petitioner and the Court also reject the notion that the goal of retribution might be served because his "moral guilt" is too insignificant.

At their core, these conclusions are legislative judgments regarding the efficacy of capital punishment as a tool in achieving retributive justice and deterring violent crime. Surely, neither the petitioner nor the Court has shown that capital punishment is ineffective as a deterrent for his crime; the most the Court can do is speculate as to its effect on other felony murderers and rely on "competent observers" rather than legislative judgments. See *ante*, at 799–800. Moreover, the decision of whether or not a particular punishment serves the admittedly legitimate goal of retribution seems uniquely suited to legislative resolution. Because an armed robber takes a serious risk that someone will die during the course of his crime, and because of the obviousness of that risk, we cannot conclude that the death penalty "makes no measurable contribution to acceptable goals of punishment."

III

Although I conclude that the death penalty is not disproportionate to the crime of felony murder, I believe that, in light of the State Supreme Court's rejection of critical factual findings, our previous opinions require a remand for a new sentencing hearing.[43] Repeatedly, this Court has emphasized that capital sentencing decisions must focus "on the circumstances of each individual homicide and individual defendant." *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). In striking down the mandatory capital punishment statute in *Woodson* v. *North Carolina*, 428 U. S., at 304, a plurality of the Court wrote:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> ". . . [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

In *Lockett* v. *Ohio*, 438 U. S., at 605, a plurality of this Court concluded:

> "Given that the imposition of death by public authority is so profoundly different from all other penalties, we can-

[43] Apparently, the Court also intends that the case be remanded for a new death sentence hearing, consistent, of course, with its holding today.

> not avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence" (footnote omitted).

Accordingly, "the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (footnotes omitted). *Id.*, at 604. See *id.*, at 613 (opinion of BLACKMUN, J.) (concluding that the Ohio capital sentencing statute is unconstitutional because it "provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide"); *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) *(per curiam)* (holding that the exclusion of evidence, from the capital sentencing proceeding, that the petitioner was not present when the victim was killed violated due process because "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (adopting the plurality's rule in *Lockett*). Thus, in deciding whether or not to impose capital punishment on a felony murderer, a sentencer must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder. Because of the peculiar circumstances of this case, I conclude that the trial court did not give sufficient consideration to the petitioner's role in the crimes, and thus did not consider the miti-

gating circumstances proffered by the defendant at his sentencing hearing.[4]

In sentencing the petitioner, the trial court found four statutory aggravating circumstances: the petitioner had been convicted previously of a violent felony; the murders had been committed during the course of a robbery; the murders had been committed for pecuniary gain; and the murders were especially heinous, atrocious, or cruel. In its factual findings, the trial court stated that the "armed robbery . . . was planned ahead of time by the defendant Enmund," App. 30, and that he had shot each of the victims while they lay prone in order to eliminate them as witnesses. *Id.*, at 30–31. The court expressly found that "*none* of the statutory mitigating circumstances applied" to the petitioner. *Id.*, at 32 (emphasis in original). Among other findings, the court rejected Enmund's claim that his participation in the murders had been "relatively minor," and found instead that "his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." *Ibid.*

The Florida Supreme Court rejected these findings in part. The court noted that there "was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." 399 So. 2d, at 1370. Rather,

> "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." *Ibid.*

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[4] Although the petitioner challenges the constitutionality of his sentencing hearing, he does not challenge the constitutionality of the statutory capital sentencing procedures. See *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (upholding the Florida scheme).

Consequently, the court expressly rejected the trial court's finding that Enmund personally had committed the homicides. Reviewing the aggravating circumstances, the Supreme Court consolidated two of them, and rejected the trial court's conclusion that the murders had been "heinous, atrocious, or cruel," since the evidence showed that the Armstrongs had killed the Kerseys in a gun battle arising from Mrs. Kersey's armed resistance, and not that the petitioner had killed them in an effort to eliminate them as witnesses. See *Armstrong* v. *State*, 399 So. 2d, at 963.

Although the state statutory procedures did not prevent the trial judge from considering any mitigating circumstances,[45] the trial judge's view of the facts, in part rejected by the State Supreme Court, effectively prevented such consideration. In his erroneous belief that the petitioner had shot both of the victims while they lay in a prone position in order to eliminate them as witnesses, the trial judge necessarily rejected the only argument offered in mitigation—that the petitioner's role in the capital felonies was minor, undeserving of the death penalty, because the petitioner was in the car when the fatal shots were fired. This fundamental misunderstanding of the petitioner's role in the crimes prevented the trial court from considering the "circumstances of the particular offense" in imposing sentence. *Woodson* v. *North Carolina*, 428 U. S., at 304. Moreover, this error was not so insignificant that we can be sure its effect on the

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[45] See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (holding that Fla. Stat. § 921.141(6) (1981), which lists mitigating circumstances, does not restrict the sentencer's consideration of mitigating circumstances to those expressly listed in the statute); *Shriner* v. *State*, 386 So. 2d 525, 533 (Fla. 1980), cert. denied, 449 U. S. 1103 (1981); 399 So. 2d, at 1371. As noted above, the petitioner offered no additional evidence at the sentencing hearing in mitigation of his crime. See Record 1677. His counsel argued, however, that the petitioner did not deserve the death penalty because his role in the crime was relatively minor. *Id.*, at 1683–1685.

sentencing judge's decision was negligible.[46] Accordingly, I would vacate the decision below insofar as it affirms the death sentence, and remand the case for a new sentencing hearing.

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[46] The Florida Supreme Court's opinion fails to correct this error either by remanding for new sentencing or by evaluating the impact of the trial court's fundamental misperception of the petitioner's role in the killings. Rather, the court simply repeats three times, without any discussion of the evidence, that there are "no mitigating circumstances." 399 So. 2d, at 1373. In light of the court's dramatically different factual findings, this review is inadequate to satisfy the *Lockett* principle.

RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO

APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

No. 80–2162. Argued April 28, 1982—Decided July 2, 1982

Held: Federal law pre-empts New Mexico's tax imposed on the gross receipts that appellant non-Indian construction company received from appellant tribal school board for the construction of a school for Indian children on the reservation. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, controlling. Pp. 836–847.

(a) In view of the federal and tribal interests arising from Congress' broad power to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3, and from the semi-autonomous status of Indian tribes, the exercise of state authority over commercial activity on an Indian reservation may be pre-empted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions. Traditional notions of tribal sovereignty, and the recognition and encouragement of such sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis. Ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity. Pp. 837–839.

(b) Federal statutes (particularly the Indian Self-Determination and Education Assistance Act) reflect the federal policy of encouraging the development of Indian-controlled institutions on the reservation, and under detailed regulations governing school construction the Bureau of Indian Affairs has wide-ranging authority to monitor and review subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. The direction and supervision provided by the comprehensive federal regulatory scheme for the construction of Indian schools leave no room for the additional burden sought to be imposed by New Mexico. There is no merit to the contention that the state tax is not pre-empted merely because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority. The interest asserted by the State relating to its providing services to the non-Indian contractor for its activities off the reservation is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization. Nor is the State's purpose in imposing the tax pursuant to a general desire to increase revenues sufficient to justify the additional burdens thereby imposed on the comprehensive federal

scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education. Pp. 839–845.

(c) Pre-emption analysis in this area need not be modified by applying a new approach relying on the Indian Commerce Clause. Existing pre-emption analysis governing this type of case provides sufficient guidance to state courts and also allows for more flexible consideration of the federal, state, and tribal interests at issue. Pp. 845–846.

95 N. M. 708, 625 P. 2d 1225, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE and STEVENS, JJ., joined, *post*, p. 847.

Michael P. Gross argued the cause for appellants. With him on the briefs were *Carl Bryant Rogers* and *Neal A. Jackson.*

Jan Unna, Special Assistant Attorney General of New Mexico, argued the cause for appellee. With him on the brief were *Jeff Bingaman*, Attorney General, and *Gerald B. Richardson*, Assistant Attorney General.

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Dinkins, Elinor Hadley Stillman, Edward J. Shawaker*, and *Maria A. Iizuka.**

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*Briefs of *amici curiae* urging reversal were filed by *George P. Vlassis* and *Katherine Ott* for the Navajo Tribe of Indians; and by *Richard W. Hughes* for the Pueblo of Santa Ana.

Helena S. Maclay and *Deirdre Boggs*, Special Assistant Attorneys General of Montana, *Leland T. Johnson*, Assistant Attorney General of Washington, *Warren Spannaus*, Attorney General of Minnesota, *Mark V. Meierhenry*, Attorney General of South Dakota, and *Richard H. Bryan*, Attorney General of Nevada, filed a brief for the State of Montana et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *George Deukmejian*, Attorney General, and *Neal J. Gobar*, Deputy Attorney General, for the State of California; and by *Arthur Lazarus, Jr.*, for the Association of American Indian Affairs, Inc.

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we address the question whether federal law pre-empts a state tax imposed on the gross receipts that a non-Indian construction company receives from a tribal school board for the construction of a school for Indian children on the reservation. The New Mexico Court of Appeals held that the gross receipts tax imposed by the State of New Mexico was permissible. Because the decision below is inconsistent with *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980) *(White Mountain)*, we reverse.

I

Approximately 2,000 members of the Ramah Navajo Chapter of the Navajo Indian Tribe live on tribal trust and allotment lands located in west central New Mexico. Ramah Navajo children attended a small public high school near the reservation until the State closed this facility in 1968. Because there were no other public high schools reasonably close to the reservation, the Ramah Navajo children were forced either to abandon their high school education or to attend federal Indian boarding schools far from the reservation. In 1970, the Ramah Navajo Chapter exercised its authority under Navajo Tribal Code, Title 10, § 51 (1969), and established its own school board in order to remedy this situation. Appellant Ramah Navajo School Board, Inc. (the Board), was organized as a nonprofit corporation to be operated exclusively by members of the Ramah Navajo Chapter. The Board is a Navajo "tribal organization" within the meaning of 25 U. S. C. § 450b(c), 88 Stat. 2204. With funds provided by the federal Bureau of Indian Affairs (BIA) and the Navajo Indian Tribe, the Board operated a school in the abandoned public school facility, thus creating the first independent Indian school in modern times.[1]

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[1] On July 8, 1970, in his Message to the Congress on Indian Affairs, President Nixon referred specifically to these efforts of the Board to assume responsibility for the education of tribal children abandoned by the

In 1972, the Board successfully solicited from Congress funds for the design of new school facilities. Pub. L. 92–369, 86 Stat. 510. The Board then contracted with the BIA for the design of the new school and hired an architect. In 1974, the Board contracted with the BIA for the actual construction of the new school to be built on reservation land. Funding for the construction of this facility was provided by a series of congressional appropriations specifically earmarked for this purpose.[2] The contract specified that the Board was the design and building contractor for the project, but that the Board could subcontract the actual construction work to third parties. The contract further provided that any subcontracting agreement would have to include certain clauses governing pricing, wages, bonding, and the like, and that it must be approved by the BIA.

The Board then solicited bids from area building contractors for the construction of the school, and received bids from two non-Indian firms. Each firm included the state gross receipts tax as a cost of construction in their bids, although the tax was not itemized separately. Appellant Lembke Construction Co. (Lembke) was the low bidder and was awarded the contract. The contract between the Board and Lembke provides that Lembke is to pay all "taxes required by law." Lembke began construction of the school facilities in 1974 and continued this work for over five years. During that time, Lembke paid the gross receipts tax and, pursuant to standard industry practice, was reimbursed by the Board for the full amount paid. Before the second contract between Lembke and the Board was executed in 1977, a clause was inserted into the contract recognizing that the Board could

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State as a "notable exampl[e]" of Indian self-determination. 6 Weekly Comp. of Pres. Doc. 894, 899 (1970).

[2] See Pub. L. 93–245, 87 Stat. 1073 (1973) (amending Pub. L. 93–120, 87 Stat. 431 (1973) to specifically earmark funds appropriated there for the construction of the Ramah school facility); Pub. L. 93–404, 88 Stat. 810 (1974); Pub. L. 94–165, 89 Stat. 985 (1975); Pub. L. 95–74, 91 Stat. 293 (1977).

litigate the validity of this tax and was entitled to any refund.

Both Lembke and the Board protested the imposition of the gross receipts tax. In 1978, after exhausting administrative remedies, they filed this refund action against appellee New Mexico Bureau of Revenue in the New Mexico District Court. At the time of trial, the parties stipulated that the Board had reimbursed Lembke for tax payments of $232,264.38 and that the Board would receive any refund that might be awarded.

The trial court entered judgment for the State Bureau of Revenue. After noting that the "legal incidence" of the tax fell on the non-Indian construction firm, the court rejected appellants' arguments that the tax was pre-empted by comprehensive federal regulation and that it imposed an impermissible burden on tribal sovereignty. The Court of Appeals for the State of New Mexico affirmed. Although acknowledging that the economic burden of the tax fell on the Board, the Court of Appeals concluded that the tax was not preempted by federal law and that it did not unlawfully burden tribal sovereignty. 95 N. M. 708, 625 P. 2d 1225 (1980). The Board filed a petition for rehearing in light of this Court's intervening decisions in *White Mountain, supra*, and *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U. S. 160 (1980). The Court of Appeals denied the petition, stating only that this case did not involve either "a comprehensive or pervasive scheme of federal regulation" or "federal regulation similar to the Indian trader statutes." App. to Juris. Statement 36. After initially granting discretionary review, the New Mexico Supreme Court quashed the writ as improvidently granted. 96 N. M. 17, 627 P. 2d 412 (1981). We noted probable jurisdiction. 454 U. S. 1079 (1981).

II

In recent years, this Court has often confronted the difficult problem of reconciling "the plenary power of the States over residents within their borders with the semi-

autonomous status of Indians living on tribal reservations." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 165 (1973). Although there is no definitive formula for resolving the question whether a State may exercise its authority over tribal members or reservation activities, we have recently identified the relevant federal, tribal, and state interests to be considered in determining whether a particular exercise of state authority violates federal law. See *White Mountain*, 448 U. S., at 141–145.

A

In *White Mountain*, we recognized that the federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3, and from the semi-autonomous status of Indian tribes. 448 U. S., at 142. These interests tend to erect two "independent but related" barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions. *Ibid.* (citing, *inter alia*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *McClanahan* v. *Arizona State Tax Comm'n*, *supra;* and *Williams* v. *Lee*, 358 U. S. 217 (1959)). As we explained in *White Mountain:*

> "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' . . . against which vague or ambiguous federal enactments must always be measured." 448 U. S., at

143 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 172).

The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight. Pre-emption analysis in this area is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty"; it requires a particularized examination of the relevant state, federal, and tribal interests. 448 U. S., at 145. The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas. *Id.*, at 143–144. Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. See *id.*, at 143, and n. 10. Relevant federal statutes and treaties must be examined in light of "the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.*, at 144–145. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity. *Id.*, at 143–144, 150–151.

In *White Mountain*, we applied these principles and held that federal law pre-empted application of the state motor carrier license and use fuel taxes to a non-Indian logging company's activity on tribal land. We found the federal regulatory scheme for harvesting Indian timber to be so pervasive that it precluded the imposition of additional burdens by the relevant state taxes. *Id.*, at 148. The Secretary of the Interior (Secretary) had promulgated detailed regulations for the purpose of developing "'Indian forests by the Indian people for the purpose of promoting self-sustaining communities.'" *Id.*, at 147 (quoting 25 CFR § 141.3(a)(3) (1979)).

Under these regulations, the BIA was involved in virtually every aspect of the production and marketing of Indian timber. 448 U. S., at 145–148. In particular, the Secretary and the BIA extensively regulated the contractual relationship between the Indians and the non-Indians working on the reservation: they established the bidding procedure, set mandatory terms to be included in every contract, and required that all contracts be approved by the Secretary. *Id.*, at 147.

We found that the state taxes in question would "threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . .'" *Id.*, at 149 (quoting 25 CFR § 141.3(a)(3) (1979)). We concluded that the imposition of state taxes would also undermine the Secretary's ability to carry out his obligations to set fees and rates for the harvesting and sale of the timber, and it would impede the "Tribe's ability to comply with the sustained-yield management policies imposed by federal law." 448 U. S., at 149–150. Balanced against this intrusion into the federal scheme, the State asserted only "a general desire to raise revenue" as its justification for imposing the taxes. *Id.*, at 150. In this context, this interest is insufficient to justify the State's intrusion into a sphere so heavily regulated by the Federal Government. *Ibid.*

B

This case is indistinguishable in all relevant respects from *White Mountain*. Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive. The Federal Government's concern with the education of Indian children can be traced back to the first treaties between the United States and the Navajo Tribe.[3] Since that time, Congress has enacted numerous

[3] Article VI of the 1868 Treaty between the United States and the Navajo Tribe, 15 Stat. 669, provides that "[i]n order to insure the civiliza-

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statutes empowering the BIA to provide for Indian education both on and off the reservation. See, *e. g.*, Snyder Act, 42 Stat. 208 (1921), 25 U. S. C. § 13; Johnson-O'Malley Act, 48 Stat. 596 (1934), 25 U. S. C. § 452 *et seq.;* Navajo-Hopi Rehabilitation Act, 64 Stat. 44 (1950), 25 U. S. C. § 631 *et seq.;* Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975), 25 U. S. C. § 450 *et seq.* (Self-Determination Act). Although the early focus of the federal efforts in this area concentrated on providing federal or state educational facilities for Indian children, in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation. See 6 Weekly Comp. of Pres. Doc. 894, 899–900 (1970) (Message of President Nixon).

This federal policy has been codified in the Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, and most notably in the Self-Determination Act. The Self-Determination Act declares that a "major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 88 Stat. 2203, as set forth in 25 U. S. C. § 450a(c). In achieving this goal, Congress expressly recognized that "parental and community control of the educational process is of crucial importance to the Indian people." 88 Stat. 2203, as set forth in 25 U. S. C. § 450(b)(3).

Section 450k empowers the Secretary to promulgate regulations to accomplish the purposes of the Act. 88 Stat. 2212, 25 U. S. C. § 450k. Pursuant to this authority, the Secretary has promulgated detailed and comprehensive regulations respecting "school construction for previously private

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tion of the Indians entering into this treaty, the necessity of education is admitted."

schools now controlled and operated by tribes or tribally approved Indian organizations." 25 CFR §274.1 (1981). Under these regulations, the BIA has wide-ranging authority to monitor and review the subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. See 25 CFR §274.2 (1981).[4] Specifically, the BIA must conduct preliminary on-site inspections, and prepare cost estimates for the project in cooperation with the tribal organization. 25 CFR §274.22 (1981). The Board must approve any architectural or engineering agreements executed in connection with the project. 25 CFR §274.32(c) (1981). In addition, the regulations empower the BIA to require that all subcontracting agreements contain certain terms, ranging from clauses relating to bonding and pay scales, 41 CFR §14H–70.632 (1981), to preferential treatment for Indian workers. 25 CFR §274.38 (1981). Finally, to ensure that the Tribe is fulfilling its statutory obligations, the regulations require the tribal organization to maintain records for the Secretary's inspection. 25 CFR §274.41 (1981).

This detailed regulatory scheme governing the construction of autonomous Indian educational facilities is at least as comprehensive as the federal scheme found to be pre-emptive in *White Mountain*.[5] The direction and supervision pro-

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[4] Although these regulations did not become effective until several months after the BIA and the Board had executed the initial contracts, the Secretary and the BIA had applied similar requirements under the authority of the Johnson-O'Malley Act, 48 Stat. 596, 25 U. S. C. §452 *et seq.* In any event, the two subsequent agreements between the BIA, the Board and Lembke, accounting for two-thirds of the total construction, were signed after the effective date of these regulations, which clearly authorize the BIA to monitor these construction agreements.

[5] JUSTICE REHNQUIST asserts that the comprehensive federal regulatory scheme outlined above "do[es] not regulate school construction, which is the activity taxed." *Post*, at 851. The dissent fails to explain, however, how this fact distinguishes this case from *White Mountain*. In that

vided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board. This burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the "quality and quantity" of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.[6]

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case, we struck down Arizona's use fuel tax and motor carrier license tax, not because of any federal interest in gasoline, licenses, or highways, but because the imposition of these state taxes on a non-Indian contractor doing work on the reservation was pre-empted by the "comprehensive regulation of the harvesting and sale of tribal timber." 448 U. S., at 151. We find that New Mexico is similarly precluded from impeding the federal interest in the construction of autonomous Indian educational institutions by imposing its gross receipts tax on Lembke. JUSTICE REHNQUIST's contention that the New Mexico tax is somehow compatible with this federal interest because such taxes "are as much a normal cost of school construction as the cost of cement and labor," *post*, at 855, is also foreclosed by *White Mountain*. Surely, state use fuel and motor carrier license taxes are considered part of the cost of harvesting and marketing timber. Yet in *White Mountain*, we concluded that these taxes impeded the federal interest in "guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding,'" 448 U. S., at 149, despite the dissent's argument that the taxes amounted to less than 1% of the annual profits produced by the logging operation. Here, as in *White Mountain*, JUSTICE REHNQUIST continues to press this argument.

[6] Appellee would have us impute congressional awareness and approval of the state gross receipts tax from appropriations bills which earmarked funds for the construction of these facilities, see n. 2, *supra*. Brief for Appellee 21–22. Appellee strains to find this awareness and approval by arguing that the same architects who prepared the cost estimates and requests that the Board submitted to Congress also prepared the bid specifications pursuant to which Lembke submitted its bid. However, as we have indicated, the bid specifications only required prospective bidders to include "all taxes required by law," and the submitted bids did not specify the gross receipts tax as a separate line item. *Supra*, at 835. Therefore, it is by no means clear, and the Board disputes the contention, that the Board ever intended to have these state taxes included in the construction costs of its school facilities. Furthermore, there is absolutely no

The Bureau of Revenue argues that imposition of the state tax is not pre-empted because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority. This argument is clearly foreclosed by our precedents. In *White Mountain* we flatly rejected a similar argument. 448 U. S., at 150–151 (citing *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Williams* v. *Lee*, 358 U. S. 217 (1959); and *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971)). There is nothing unique in the nature of a gross receipts tax or in the federal laws governing the development of tribal self-sufficiency in the area of education that requires a different analysis.

In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax. Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has "left the State with no duties or responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*, at 691.[7] Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax. The only arguably

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indication that Congress was even made aware of the existence of these taxes when it appropriated funds for the construction of the Ramah Navajo school. In any event, as we have noted in a related context, courts should be wary of inferring congressional intent to alter the force of existing law from an appropriations Act. Cf. *TVA* v. *Hill*, 437 U. S. 153, 189–191 (1978).

[7] Of course, these statutes and regulations do not prevent the States from providing for the education of Indian children within their boundaries. Indeed, the Self-Determination Act specifically authorizes the Secretary to enter into contracts with any State willing to construct educational institutions for Indian children on or near the reservation. 88 Stat. 2214, 25 U. S. C. § 458. This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children.

specific interest advanced by the State is that it provides services to *Lembke* for its activities *off the reservation*. This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.[8] Furthermore, although the State may confer substantial benefits on Lembke as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm.[9] The New Mexico gross receipts tax is intended to compensate the State for granting "the privilege of engaging in business." N. M. Stat. Ann. §§ 7-9-3(F) and 7-9-4(A) (1980). New Mexico has not explained the source of its power to levy such a tax in this case where the "privilege of doing business" on an Indian reservation is exclusively bestowed by the Federal Government.

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[8] The Bureau of Revenue invites us to adopt the "legal incidence" test, under which the legal incidence and not the actual burden of the tax would control the pre-emption inquiry. Of course, in some contexts, the fact that the legal incidence of the tax falls on a non-Indian is significant. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 150–151 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976). However, in *White Mountain*, 448 U. S., at 151, we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company. Given the comprehensive federal regulatory scheme at issue here, we decline to allow the State to impose additional burdens on the significant federal interest in fostering Indian-run educational institutions, even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation.

[9] In *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U. S. 160 (1980), we held that the Indian trader statutes, 19 Stat. 200, 25 U. S. C. § 261 *et seq.*, pre-empted the State's jurisdiction to tax the sale of farm machinery to the Indian Tribe, notwithstanding the substantial services that the State undoubtedly provided to the off-reservation activities of the non-Indian seller. Presumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke.

The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues. This purpose, as we held in *White Mountain*, 448 U. S., at 150, is insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education.[10] This regulatory scheme precludes any state tax that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

C

The Solicitor General, in an *amicus* brief filed on behalf of the United States, suggests that we modify our pre-emption analysis and rely on the dormant Indian Commerce Clause, Art. I, § 8, cl. 3, to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue. He argues that adopting this approach is preferable for several reasons: it would provide guidance to the state courts addressing these issues, thus reducing the need for our case-by-case review of these decisions; it would avoid the tension

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[10] We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to the construction of schools on Indian land. Furthermore, the evidence introduced below by the State on this issue is far from clear. Although the State does provide services to the Ramah Navajo Indians, it receives federal funds for providing some of these services, and the State conceded at trial that it saves approximately $380,000 by not having to provide education for the Ramah Navajo children. App. 95, 105–106, 108.

created by focusing on the pervasiveness of federal regulation as a principal barrier to state assertions of authority when the primary federal goal is to encourage tribal self-determination and self-government; and it would place a higher burden on the State to articulate clearly its particularized interests in taxing the transaction and to demonstrate the services it provides in assisting the taxed transaction.

We do not believe it necessary to adopt this new approach—the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General. Although clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue. We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *White Mountain, supra,* at 144; see also *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S., at 174–175, and n. 13; *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S., at 690–691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

III

In sum, the comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the

state gross receipts tax in this case. Accordingly, the judgment of the New Mexico Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

The Court today reproves the New Mexico Court of Appeals for failing to heed our precedents, much as a disappointed parent would rebuke a wayward child.[1] I do not think the Court of Appeals deserves the rebuke; it seems to me that the state court applied our precedents at least as faithfully, and coherently, as the Court itself. In its desire to reach a result that it evidently finds quite salutary as a matter of policy, the Court finds "indistinguishable" a case that is considerably off the mark, and it finds "pervasively regulated" an activity that is largely free of federal regulation. It ultimately accords a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States a short three months ago in a case involving the precise state taxes at issue here.

I

The general question presented by this case has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law. This insistent question concerns the extent to which the States can tax economic activity on Indian reservations within their borders. I believe the dominant trend of

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[1] "Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future." *Ante*, at 846.

our cases is toward treating the scope of reservation immunity from nondiscriminatory state taxation as a question of pre-emption, ultimately dependent on congressional intent. In such a framework, the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will.

The principles announced in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980), are consistent with this trend.[2] Thus, the Court in *White Mountain* recognized federal pre-emption as a principal barrier to the assertion of state regulatory authority over tribal reservations and members, *id.*, at 142, and specifically invalidated the challenged assertion of taxing authority on that basis, *id.*, at 148, 151, n. 15. The Court also recognized that in some instances a state law may be invalid because it infringes "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.*, at 142 (quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)). But apart from those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its own members, the "tradition of tribal sovereignty" merely provides a "backdrop" against which the pre-emptive effect of federal statutes or treaties must be assessed. See 448 U. S., at 143.

The Court today pays homage to these principles but then promptly bestows its favors on a new analytical framework in which the extent of economic burden on the tribe, and not the pre-emptive effect of federal regulations, appears to be the paramount consideration. Such a shift is necessary, for the

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[2] Nevertheless, the Solicitor General has again suggested that on-reservation activities affecting resident tribes be considered presumptively beyond the reach of state law by operation of the "principle of tribal sovereignty." See Brief for United States as *Amicus Curiae* 17–24. The same suggestion was urged, and rejected, in *White Mountain*. It has proved no more appealing in this case.

Court's purported reliance on *White Mountain* will not withstand even superficial scrutiny.

II

The Court declares that "[t]his case is indistinguishable in all relevant respects from *White Mountain*." *Ante*, at 839. This statement is quite inaccurate. *White Mountain* involved an attempt by the State of Arizona to apply its motor carrier license and use fuel taxes to the logging operations of a non-Indian company doing business exclusively on the reservation. The Court concluded that application of the State's taxes was inconsistent with the pervasive federal regulation of the very activity subject to taxation. The Court repeatedly emphasized the comprehensiveness of the regulations on which it relied.

> "Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber. In the present case, contracts between [the tribal organization] and [the non-Indian contractor] must be approved by the Bureau; indeed, the record shows that some of those contracts were drafted by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marking of timber by [the tribal organization and the contractor]. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment [the contractor] should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads.
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> "The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs. . . . On the Fort Apache Reservation the Forestry Department of the Bureau has required [the tribal organization] and its contractors . . . to repair and

maintain existing Bureau and tribal roads and in some cases to construct new logging roads. . . . A high percentage of [the contractor's] receipts are expended for those purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks relating to road maintenance." 448 U. S., at 147–148.

But the Court in *White Mountain* did not merely review the comprehensiveness of the regulations and conclude, *ipso facto*, that state taxes on the logging operations were preempted. It found, with considerable attention to specifics, that "the assessment of state taxes would obstruct federal policies." *Id.*, at 148.

"At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . .' 25 CFR § 141.3(a)(3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe subject only to administrative expenses incurred by the Federal Government. . . .

"In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber. The Secretary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for services rendered to the Tribe by the Federal Government, and determines stumpage rates for timber to be paid to the Tribe. Most notably in reviewing or writing the terms of the contracts between [the tribal organization] and its contractors, federal agents must predict the amount and determine the proper allocation of all business expenses, including fuel costs. The assessment of state taxes would throw additional

factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.

"Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Id.*, at 149–150.

The Court thinks that this case is "indistinguishable in all relevant respects from *White Mountain*." *Ante*, at 839. It finds that "[f]ederal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive." *Ibid.* But the regulations on which the Court relies do not regulate school construction, which is the activity taxed. They merely detail procedures by which tribes may apply for federal funds in order to carry out school construction.

The purpose of the regulations, which the Court quotes only in part, *ante*, at 840–841, "*is to give the application and approval process for obtaining a contract or services from the Bureau* for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations . . . ." 25 CFR § 274.1 (1981) (emphasis added). The regulations that follow explain the procedures by which tribes may obtain, complete, and file application forms for federal funding or services. §§ 274.12–274.18. As the Court observes, *ante*, at 841, the regulations also authorize the BIA to approve or disapprove plans and specifications for construction as well as construction contracts let by the tribe, which are treated as subcontracts of the funding contract between the tribe and the BIA. The contracts are required to contain a clause establishing a hiring preference for Indians. § 274.38. And the BIA is given access to the tribe's records for auditing purposes. § 274.41. That is the extent of the regulations.

In this case the BIA "contracted" with the School Board in order to convey federal funds for the construction project.

It also approved the Board's construction "subcontract" with the construction contractor. It played *no role* in the selection of the contractor and it played *no role* in regulating or supervising the actual construction of the school. The Court concludes that this scheme, which is little more than a grant application process, "is at least as comprehensive as the federal scheme found to be pre-emptive in *White Mountain*." *Ante*, at 841. I simply cannot agree.

More important, the Court concludes in the very next sentence that "[t]he direction and supervision provided by the Federal Government for the construction of Indian schools leaves no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board." *Ante*, at 841–842. This statement constitutes the sum total of the Court's preemption analysis in this case. In *White Mountain* the Court engaged in a detailed examination of the extent to which state taxes would interfere both with the Secretary's ability to carry out his congressional mandate and with the tribe's ability to carry out federal policy. In the place of such careful analysis, the Court today relies on *ipse dixit*. It does so because there is no realistic basis for concluding that the State's taxes would interfere with a "pervasive" regulatory scheme. The BIA simply does not regulate the construction activity which the State seeks to tax. It provides federal money to eligible tribes and tribal organizations and it establishes a contract-approval and auditing mechanism as a means of attempting to ensure that the money is put to the use for which it is earmarked.[3]

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[3] The Court ignores other distinctions between this case and *White Mountain*. For example, the logging contractor in the latter case, although a non-Indian corporation, operated exclusively to harvest timber on the reservation; it conducted no off-reservation activities whatsoever. See 448 U. S., at 139. The contractor in this case is a general building contractor doing business throughout the State of New Mexico, and enjoying state services to the same extent as any other commercial enterprise in

III

A careful reading of the Court's opinion demonstrates that the single, determinative factor in its judgment is the fact that the challenged state taxes have increased the financial burden of constructing a tribal school. Whether the federal regulations are detailed and comprehensive or largely a matter of bookkeeping is an irrelevancy, for the Court concludes that the tax burden "impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians *by depleting the funds available for the construction of Indian schools.*" *Ante*, at 842 (emphasis added). The Court recognizes that the legal incidence of the tax is on the non-Indian contractor, but asserts that "in *White Mountain* . . . we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe,

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New Mexico. The Court dismisses this factor with the statement that "[p]resumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke." *Ante*, at 844, n. 9. The Court's "presumptions," however, are no substitute for the considered judgment of the state taxing authority. Indeed, in assessing validity of a state tax, the Court has previously recognized that the State's interests are strongest when the taxpayer is the recipient of state services. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 157 (1980). To the extent presumptions are relevant, the Court has inverted the one that ought to apply.

Another distinction is also relevant. The activity taxed in *White Mountain* was the exploitation of natural resources located on the reservation and devoted to the beneficial use and enjoyment of reservation Indians. Indeed, over 90% of the total profits generated by tribal enterprises were derived from the Tribe's logging operations. 448 U. S., at 138. In this case, the state taxes diminish, not the income generated by the Tribe for its own preservation and welfare, but federal funds appropriated by Congress for the purpose of school construction. No tribal funds are devoted to this endeavor, and congressional appropriations were based on funding requests that included the gross receipts tax as part of the estimated construction cost.

even though the legal incidence of the tax was on the non-Indian logging company." *Ante*, at 844, n. 8.

The Court in *White Mountain* did indeed note that "the economic burden of the asserted taxes will ultimately fall on the Tribe." 448 U. S., at 151. But in a footnote immediately following that sentence, which is today ignored, the Court declared:

> "Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which . . . leaves no room for the additional burdens sought to be imposed by state law." *Id.*, at 151, n. 15.

Despite its references to the supposed "comprehensive and pervasive" regulatory scheme in this case, the Court clearly has chosen to bar the State from taxing Lembke's gross receipts principally because the tax imposes an indirect economic burden on the tribal organization. As the Court in *White Mountain* recognized, our precedents undeniably view that as an insufficient basis for the recognition of an Indian tax immunity. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 156 (1980) ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' . . . merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving"); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–482 (1976) (upholding tax on cigarette sales from Indians to non-Indians because the legal incidence of the tax was on the consumer); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 156–157 (1973) (refusing to imply tax immunity despite economic burden on tribal enterprise).[4] Even under the

[4] In other areas of tax immunity, the Court has steadfastly refused to assess the validity of a tax by reference to the economic burdens it imposes if

modified form of pre-emption doctrine applicable to state regulation of reservation activities, there must be some affirmative indication that Congress did not intend the State to exercise the sovereign power challenged in the suit. Until today, the mere fact that the asserted power will impose an economic burden on a tribal endeavor has not provided that affirmative indication.

I do not disagree with the Court's judgment that congressional enactments such as the Indian Financing Act and the Indian Self-Determination and Education Assistance Act embody a federal policy encouraging the development of Indian-controlled educational institutions. But it is a considerable leap to infer from that policy the independent principle that all state laws which might increase the cost of such an endeavor are to be considered null and void. It is perfectly conceivable that Congress favored Indian education, but also contemplated that all costs of obtaining that end would be paid in a normal fashion. State taxes are as much a normal cost of school construction as the cost of cement and labor. The cost of taxes was included in the bids submitted to the Board by the construction contractors, and it apparently was also included in the funding requests submitted by the Board to Congress. The Board cannot be faulted for attempting to stretch its federal construction funds as far as possible, but that is a woefully inadequate basis for interfering with the sovereign prerogatives of the State of New Mexico.

IV

A short three months ago, this Court considered whether the State of New Mexico could impose its gross receipts and

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those burdens are nondiscriminatory and comport with due process. See *United States* v. *New Mexico*, 455 U. S. 720 (1982) (state taxation of federal contractors); *United States* v. *County of Fresno*, 429 U. S. 452 (1977) (state taxation of Federal Government); *New York* v. *United States*, 326 U. S. 572 (1946) (federal taxation of state government); *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976) (state taxation of imports and exports).

384-537 O—82——9: QL 3

compensating use taxes on private contractors that conduct business with the Federal Government. We concluded that tax immunity was appropriate in only one circumstance: "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States* v. *New Mexico*, 455 U. S. 720, 735 (1982). In reaching this conclusion, we held that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.*, at 734. If the legal incidence of the tax is on the contractor, it is to be considered valid, absent specific congressional action, as long as "the contractors can realistically be considered entities independent of the United States." *Id.*, at 738.[6]

In this case, as in *United States* v. *New Mexico*, the legal incidence of the New Mexico tax is on the private contractor, not on the entity whose status might be the source of a tax immunity. And, as in *United States* v. *New Mexico*, it is evident that Lembke is a separate taxable entity completely independent of the tribal school board. Were the tax immunity of the Tribe no greater than that of the United States, it seems plain that New Mexico's tax would have to be upheld as applied to the gross receipts of the non-Indian contractor. But the Court reaches a different conclusion because it finds that the tax imposes an economic burden on the Tribe's effort to build a school with federal funds. Thus, the Court accords

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[6] We recognized one possible exception to this general rule: "In the case of a sales tax . . . it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale—in both a real and a symbolic sense—a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure." 455 U. S., at 742. In this case, there is no basis for arguing that Lembke has acted merely as a purchasing agent for the Board or the BIA.

an Indian Tribe, whose sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance," *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978), greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent.[6]

For these reasons, I dissent from the Court's judgment.

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[6] Of course, the Court purports to rest its decision on the pre-emptive effect of federal law. But the immunity of federal contractors from state taxes is also dependent on "generalized notions of federal supremacy." *United States* v. *New Mexico*, *supra*, at 730. The critical question, both in *United States* v. *New Mexico* and in this case, is what factors will the Court examine to determine whether the State has exceeded limits imposed by the Supremacy Clause and by Congress. I think it is evident that in the area of federal tax immunity, the Court has required evidence of more than mere economic burdens before it will invalidate a state tax as applied. As this case demonstrates, tribal tax immunity may be invoked on no greater showing than the fact of economic burdens on a federally supported tribal endeavor. Since both immunities derive from precisely the same source—the supremacy of federal law—I find the Court's decision today inexplicable. "With the abandonment of the notion that the economic—as opposed to the legal—incidence of the tax is relevant, it becomes difficult to maintain that federal tax immunity is designed to insulate federal operations from the effects of state taxation." *United States* v. *New Mexico*, *supra*, at 735, n. 11.

UNITED STATES *v.* VALENZUELA-BERNAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-450. Argued April 20, 1982—Decided July 2, 1982

Respondent was indicted in Federal District Court for transporting one Romero-Morales in violation of 8 U. S. C. § 1324(a)(2), which prohibits the knowing transportation of an alien illegally in the United States who last entered the country within three years prior to the date of the transportation. Two other illegal aliens—who, with Romero-Morales, were passengers in the car being driven by respondent and were apprehended with respondent—were deported after an Assistant United States Attorney concluded that they possessed no evidence material to respondent's prosecution. Romero-Morales was detained to provide a nonhearsay basis for establishing that respondent had violated § 1324(a)(2). The District Court denied respondent's motion to dismiss the indictment on the asserted ground that the deportation of the other passengers deprived him of the opportunity to interview them to determine whether they could aid in his defense and thus violated his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process for obtaining witnesses. Following a bench trial respondent was convicted, but the Court of Appeals reversed, holding that although a constitutional violation occurs only when "the alien's testimony could conceivably benefit the defendant," the "conceivable benefit" test was satisfied—without requiring the defendant to explain what beneficial evidence would have been provided by the alien—whenever, as here, the deported alien was an eyewitness to the crime.

Held: Respondent failed to establish a violation of the Fifth or Sixth Amendment. Pp. 863–874.

(a) In cases like this, the Executive Branch's responsibility faithfully to execute Congress' immigration policy of prompt deportation of illegal aliens justifies deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. In addition to satisfying such policy, the prompt deportation of such witnesses is justified by practical considerations, including the financial and physical burdens imposed upon the Government in detaining alien eyewitnesses. Pp. 863–866.

(b) Respondent cannot establish a violation of the Sixth Amendment, which guarantees a criminal defendant the right to compulsory process

for obtaining witnesses "in his favor," merely by showing that deportation of the aliens deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense. Cf. *Washington* v. *Texas*, 388 U. S. 14. While a relaxation of the specificity required in showing materiality may be supported by the fact that, because the witnesses were deported, neither respondent nor his attorney had an opportunity to interview the witnesses to determine what favorable information they possessed, this does not afford a basis for wholly dispensing with a showing of materiality. Cf. *Roviaro* v. *United States*, 353 U. S. 53. Moreover, respondent was present throughout the commission of the crime, and no one knew better than he what the deported witnesses said in his presence that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. Pp. 867–871.

(c) At least the same materiality requirement obtains with respect to a due process claim. In order to establish a denial of due process, the acts complained of must be of such quality as necessarily prevents a fair trial. Such an absence of fairness is not made out by the Government's deportation of the witnesses here unless there is some explanation of how their testimony would have been favorable and material. P. 872.

(d) Sanctions against the Government are warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. In this case, respondent made no effort to explain what material, favorable evidence the deported aliens would have provided for his defense. Pp. 872–874.

647 F. 2d 72, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., *post*, p. 874, and O'CONNOR, J., *post*, p. 875, filed opinions concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 879.

Carter G. Phillips argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Frey*.

Eugene G. Iredale argued the cause for respondent. With him on the brief were *John J. Cleary* and *Craig E. Weinerman*.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent, a citizen of Mexico, was indicted in the United States District Court for the Southern District of California for transporting one Romero-Morales in violation of 8 U. S. C. § 1324(a)(2). That section generally prohibits the knowing transportation of an alien illegally in the United States who last entered the country within three years prior to the date of the transportation.[1] Respondent was found guilty after a bench trial, but his conviction was overturned by the United States Court of Appeals for the Ninth Circuit. That court held that the action of the Government in deporting two aliens other than Romero-Morales violated respondent's right under the Sixth Amendment to the United States Constitution to compulsory process, and his right under the Fifth Amendment to due process of law. We granted certiorari in order to review the Court of Appeals' application of these constitutional provisions to this case, 454 U. S. 963 (1981),[2] and we now reverse.

I

Respondent entered the United States illegally on March 23, 1980, and was taken by smugglers to a house in Escondido, Cal. Six days later, in exchange for his not having to pay the smugglers for bringing him across the border, respondent agreed to drive himself and five other passengers to Los Angeles. When the car which respondent was driving

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[1] Section 1324(a)(2) applies to "[a]ny person" who "transports, or moves, or attempts to transport or move," "any alien," "knowing that [the alien] is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior" to the transportation or attempted transportation with which the person is charged.

[2] Other Courts of Appeals have adopted slight variations of the position held by the Court of Appeals for the Ninth Circuit. See, *e. g.*, *United States* v. *Armijo-Martinez*, 669 F. 2d 1131 (CA6 1982); *United States* v. *Rose*, 669 F. 2d 23 (CA1 1982); *United States* v. *Avila-Dominguez*, 610 F. 2d 1266 (CA5 1980); *United States* v. *Calzada*, 579 F. 2d 1358 (CA7 1978).

approached the Border Patrol checkpoint at Temecula, agents noticed the five passengers lying down inside of the car and motioned to respondent to stop. Respondent accelerated through the checkpoint and was chased at high speed for approximately one mile before stopping the car and fleeing on foot along with the five passengers. Three of the passengers and respondent were apprehended by the Border Patrol agents.

Following their arrest, respondent and the other passengers were interviewed by criminal investigators. Respondent admitted his illegal entry into the country and explained his reason for not stopping at the checkpoint: "I was bringing the people [and] I already knew I had had it—too late—it was done." App. 27. The three passengers also admitted that they were illegally in the country and each identified respondent as the driver of the car. *Id.*, at 66. An Assistant United States Attorney concluded that the passengers possessed no evidence material to the prosecution or defense of respondent for transporting illegal aliens, and two of the passengers were deported to Mexico. The third, Enrique Romero-Morales, was detained to provide a nonhearsay basis for establishing that respondent had transported an illegal alien in violation of 8 U. S. C. § 1324(a)(2).

Respondent moved in the District Court to dismiss the indictment, claiming that the Government's deportation of the two passengers other than Romero-Morales violated his Fifth Amendment right to due process of law and his Sixth Amendment right to compulsory process for obtaining favorable witnesses. He claimed that the deportation had deprived him of the opportunity to interview the two remaining passengers to determine whether they could aid in his defense. Although he had been in their presence throughout the allegedly criminal activity, respondent made no attempt to explain how the deported passengers could assist him in proving that he did not know that Romero-Morales was an illegal alien who had last entered the United States within the preceding three years.

At least one evidentiary hearing was held on respondent's motion, at which Romero-Morales testified that he had not spoken to respondent during the entire time that they were together. At the same hearing the Government offered, without obtaining agreement by respondent, to stipulate that none of the passengers in the car told respondent that they were in the United States illegally. The District Court denied respondent's motion and, following a bench trial on stipulated evidence, found respondent guilty as charged.[3]

The Court of Appeals reversed the conviction. The court relied upon the rule, first stated in *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (CA9 1971), that the Government violates the Fifth and Sixth Amendments when it deports alien witnesses before defense counsel has an opportunity to interview them. 647 F. 2d 72, 73–75 (1981). Although it stated that a constitutional violation occurs only when "the alien's testimony could conceivably benefit the defendant," *id.*, at 74, the court's application of the "conceivable benefit" test demonstrated that the test will be satisfied whenever the deported aliens were eyewitnesses to the crime.[4] Respond-

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[3] The joint appendix contains excerpts of transcribed testimony from a hearing on June 2, 1980, at which the District Court heard arguments of counsel and the testimony of Romero-Morales. At the conclusion of this testimony, counsel for respondent proposed the highly unusual step of calling the Assistant United States Attorney as a witness. App. 45. The attorney testified at further proceedings held on June 12, 1980, and was interrogated, *inter alia*, about his understanding of various decisions of the Court of Appeals for the Ninth Circuit and about the Government's litigating strategy in these cases. *Id.*, at 63–64. This procedure seems to us highly unusual, if not bizarre; ordinarily the litigating strategies of the United States Attorney are no more the subject of permissible inquiry by his opponent than would be the litigating strategies of the Public Defender by his opponent.

[4] As the Court of Appeals explained:

"The conceivable benefit in *Mendez-Rodriguez* stemmed from the fact that the deported aliens were eyewitnesses to, and active participants in, the crime charged, so that there was a strong possibility that they could have provided material and relevant evidence concerning the events constituting the crime. Conversely, where a missing deported alien was not an

ent's failure to explain what beneficial evidence would have been provided by the two passengers was thus inapposite, for "the deported aliens were eyewitnesses to, and active participants in, the crime charged, thus establishing a strong possibility that they could have provided material and relevant information concerning the events constituting the crime." *Id.*, at 75. Accordingly, the Court of Appeals held that respondent's motion to dismiss the indictment should have been granted by the District Court.

II

We think that the decision of the Court of Appeals in this case, and some of the additional arguments made in support of it by respondent, misapprehend the varied nature of the duties assigned to the Executive Branch by Congress. The Constitution imposes on the President the duty to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 3. One of the duties of the Executive Branch, and a vitally important one, is that of apprehending and obtaining the conviction of those who have violated criminal statutes of the United States. The prosecution of respondent is of course one example of the Executive's effort to discharge that responsibility.

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eyewitness to the offense, we have been unwilling to assume that the alien's testimony could conceivably benefit the defendant." 647 F. 2d, at 74 (citation and footnotes omitted).

As described by the Court of Appeals, the "conceivable benefit" test "impose[s] no requirement of government misconduct or negligence before dismissal of an indictment is warranted. Nor is a defendant required to show specific prejudice caused by the unavailability of the alien eyewitnesses." *Ibid.* (citation omitted). Other Courts of Appeals have recognized the Ninth Circuit rule as requiring no showing of prejudice, *United States* v. *Calzada*, 579 F. 2d, at 1362, and as permitting dismissal of the indictment even when the "'record is completely devoid of anything which would suggest that the testimony of any one, or more, of the deported persons would have been helpful' to the defendants." *United States* v. *Avila-Dominguez*, 610 F. 2d, at 1269–1270 (quoting *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1, 6 (CA9 1971) (Kilkenny, J., dissenting)).

But the Government is charged with a dual responsibility when confronted with incidents such as that which resulted in the apprehension of respondent. One or more of the persons in the car may have violated the criminal laws enacted by Congress; but some or all of the persons in the car may also be subject to deportation as provided by Congress. The Government may, therefore, find itself confronted with the obligation of prosecuting persons in the position of respondent on criminal charges, and at the same time obligated to deport other persons involved in the event in order to carry out the immigration policies that Congress has enacted.

The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government. See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976). "The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'" *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972) (quoting *Boutilier* v. *INS*, 387 U. S. 118, 123 (1967)). In exercising this power, Congress has adopted a policy of apprehending illegal aliens at or near the border and deporting them promptly. Border Patrol agents are authorized by statute to make warrantless arrests of aliens suspected of "attempting to enter the United States in violation of . . . law," 8 U. S. C. § 1357(a)(2), and are directed to examine them without "unnecessary delay" to determine whether "there is prima facie evidence establishing" their attempted illegal entry. 8 CFR § 287.3 (1982). Aliens against whom such evidence exists may be granted immediate voluntary departure from the country. See 8 U. S. C. § 1252(b); 8 CFR § 242.5(a)(2)(i) (1982). Thus, Congress has determined that prompt deportation, such as occurred in this case, constitutes the most effective method for curbing the enormous flow of illegal aliens across our southern border.[5]

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[5] As evidence of the effectiveness of Congress' policy and of the colossal problem presented by illegal entries from Mexico, the United States notes that approximately one million illegal aliens were detained by Border Pa-

In addition to satisfying immigration policy, the prompt deportation of alien witnesses who are determined by the Government to possess no material evidence relevant to a criminal trial is justified by several practical considerations. During fiscal year 1979, almost one-half of the more than 11,000 inmates incarcerated in federal facilities in the Southern District of California were material witnesses who had neither been charged with nor convicted of a criminal offense. App. 18. The average period of detention for such witnesses exceeded 5 days, and many were detained for more than 20 days. *Id.*, at 20. The resulting overcrowded conditions forced the Government to house many detainees in federal facilities located outside of the Southern District of California or in state-operated jails. *Id.*, at 21–22; Brief for United States 19. Thus, the detention of alien eyewitnesses imposes substantial financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime. In addition, the rule adopted by the Court of Appeals significantly constrains the Government's prosecutorial discretion. As explained by the United States:

> "Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all the aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming. As a consequence, many valid and appropriate prosecutions are foregone." *Id.*, at 21–22.

It simply will not do, therefore, to minimize the Government's dilemma in cases like this with statements such as "[t]he prosecution may not deny access to a witness by hiding

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trol officials during each of the three years preceding 1981. Brief for United States 19; see U. S. Department of Justice, Internal Audit Report, U. S. Border Patrol Management of the Mexican Border 1, 6 (Jan. 1981).

him out. See *Freeman* v. *State of Georgia*, 599 F. 2d 65 (5th Cir. 1979) (police detective concealed location of witness)." Brief for Respondent 35. Congress' immigration policy and the practical considerations discussed above demonstrate that the Government had good reason to deport respondent's passengers once it concluded that they possessed no evidence relevant to the prosecution or the defense of respondent's criminal charge. No onus, in the sense of "hiding out" or "concealing" witnesses, attached to the Government by reason of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses.

III

Viewing the Government's conduct in this light, we turn to the evaluation of the Court of Appeals' "conceivable benefit" test. There seems to us to be little doubt that this test is a virtual "*per se*" rule which requires little if any showing on the part of the accused defendant that the testimony of the absent witness would have been either favorable or material. As we said with respect to a similar test—phrased in terms of information "that might affect the jury's verdict"—for determining when a prosecutor must disclose information to a criminal defendant:

> "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *United States* v. *Agurs*, 427 U. S. 97, 109 (1976).

So it is with the "conceivable benefit" test. Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have "conceivably benefited" the defense. To us, the

number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.[6]

A

The only recent decision of this Court dealing with the right to compulsory process guaranteed by the Sixth Amendment suggests that more than the mere absence of testimony is necessary to establish a violation of the right. See *Washington* v. *Texas*, 388 U. S. 14 (1967). Indeed, the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining *witnesses in his favor*." U. S. Const., Amdt. 6 (emphasis added). In *Washington*, this Court found a violation of this clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense." 388 U. S., at 16 (emphasis added). This language suggests that respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.[7]

When we turn from *Washington* to other cases in what might loosely be called the area of constitutionally guaranteed access to evidence, we find *Washington*'s intimation of a

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[6] See n. 4, *supra*.

[7] That the Sixth Amendment does not guarantee criminal defendants the right to compel the attendance of any and all witnesses is reflected in the Federal Rules of Criminal Procedure. Rule 17(b) requires the Government to subpoena witnesses on behalf of indigent defendants, but only "upon a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense." See also *Isaacs* v. *United States*, 159 U. S. 487, 489 (1895); *Crumpton* v. *United States*, 138 U. S. 361, 364–365 (1891).

materiality requirement more than borne out. *Brady* v. *Maryland*, 373 U. S. 83 (1963), held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. This materiality requirement was emphasized in *Moore* v. *Illinois*, 408 U. S. 786 (1972), where we stated that a defendant will prevail upon a *Brady* claim "where the evidence is favorable to the accused and is material either to guilt or to punishment." *Id.*, at 794. And in *United States* v. *Agurs*, *supra*, we noted that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.*, at 104. We further explained:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 112–113 (footnotes omitted).

Similarly, when the Government has been responsible for delay resulting in a loss of evidence to the accused, we have recognized a constitutional violation only when loss of the evidence prejudiced the defense. In *United States* v. *Marion*, 404 U. S. 307 (1971), for example, the Court held that preindictment delay claims were governed by the Due Process Clause of the Fifth Amendment, not by the speedy-trial guarantee of the Sixth Amendment. Elaborating on the nature of the guarantee provided by the Due Process Clause

in such cases, the Court emphasized the requirement of materiality:

> "Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.*, at 325.

Five years later, in *United States* v. *Lovasco*, 431 U. S. 783 (1977), we summarized this aspect of *Marion:*

> "Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.*, at 790.

The same "prejudice" requirement has been applied to cases of postindictment delay. In *Barker* v. *Wingo*, 407 U. S. 514 (1972), the Court set forth several factors to be considered in determining whether an accused has been denied his Sixth Amendment right to a speedy trial by the Government's pretrial delay. One of the four factors identified by the Court, and a factor more fully discussed in *United States* v. *MacDonald*, 435 U. S. 850, 858–859 (1978), was whether there had been any "prejudice to the defendant from the delay." *Id.*, at 858. Although the Court recognized that prejudice may take the form of "'oppressive pretrial incarceration'" or "'anxiety and concern of the accused,'" the "'most serious'" consideration, analogous to considerations in this case, was impairment of the ability to mount a defense. See *ibid.* (quoting *Barker* v. *Wingo*, *supra*, at 532). Thus, other interests protected by the Sixth Amendment look to the degree of prejudice incurred by a defendant as a result of governmental action or inaction.

The principal difference between these cases in related areas of the law and the present case is that respondent simply had no access to the witnesses who were deported after he was criminally charged. Respondent contends that requiring him to show materiality is unreasonable in light of the fact that neither he nor his attorney was afforded an opportunity to interview the deported witnesses to determine what favorable information they possessed. But while this difference may well support a relaxation of the specificity required in showing materiality, we do not think that it affords the basis for wholly dispensing with such a showing.

The closest case in point is *Roviaro* v. *United States*, 353 U. S. 53 (1957). While *Roviaro* was not decided on the basis of constitutional claims, its subsequent affirmation in *McCray* v. *Illinois*, 386 U. S. 300 (1967), where both due process and confrontation claims were considered by the Court, suggests that *Roviaro* would not have been decided differently if those claims had actually been called to the Court's attention.

Roviaro deals with the obligation of the prosecution to disclose to the defendant the name of an informer-eyewitness, and was cast in terms of the traditional governmental privilege to refuse disclosure of such an identity. The *Roviaro* Court held that the informer's identity had to be disclosed, but only after it concluded that the informer's testimony would be highly relevant:

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that [the informer] denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of re-

peated demands by the accused for his disclosure." 353 U. S., at 64–65.

"What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity," *McCray* v. *Illinois*, *supra*, at 311, despite the fact that criminal defendants otherwise have no access to such informers to determine what relevant information they possess. *Roviaro* supports the conclusion that while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.

In addition, it should be remembered that respondent was present throughout the commission of this crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. And, in light of the actual charge made in the indictment, it was only the status of Romero-Morales which was relevant to the defense. Romero-Morales, of course, remained fully available for examination by the defendant and his attorney. We thus conclude that the respondent can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses.[8]

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[8] Respondent's knowledge of the truth distinguishes this case from *United States* v. *Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807), a case cited by respondent in support of his argument that it is unreasonable to require him to explain the relevance of the missing testimony. In *Burr*, Chief Justice Marshall found it unreasonable to require Aaron Burr to explain the relevancy of General Wilkinson's letter to President Jefferson,

384-537 O - 83 - 10

B

Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim. Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). In another setting, we recognized that Jencks Act violations, wherein the Government withholds evidence required by statute to be disclosed, rise to the level of due process violations only when they so infect the fairness of the trial as to make it "more a spectacle or trial by ordeal than a disciplined contest." *United States* v. *Augenblick*, 393 U. S. 348, 356 (1969) (citations omitted). Such an absence of fairness is not made out by the Government's deportation of the witnesses in this case unless there is some explanation of how their testimony would have been favorable and material. See *United States* v. *Lovasco*, 431 U. S. 783 (1977); *United States* v. *Marion*, 404 U. S. 307 (1971).

IV

To summarize, the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the Government

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upon which the President's allegations of treason were based, precisely because Burr had never read the letter and was unaware of its contents. In this case, respondent observed the passengers, heard their comments, and is fully aware of the ways in which they influenced his knowledge about the status of Romero-Morales.

deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.

Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess, however, the defendant cannot be expected to render a detailed description of their lost testimony. But this does not, as the Court of Appeals concluded, relieve the defendant of the duty to make some showing of materiality. Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. In some cases such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense.[9] Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney. See Fed. Rule Evid. 603; Fed. Rule Crim. Proc. 47.

As in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses

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[9] In adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States.

only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972). In making such a determination, courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself. Because determinations of materiality are often best made in light of all of the evidence adduced at trial, judges may wish to defer ruling on motions until after the presentation of evidence.[10]

In this case the respondent made no effort to explain what material, favorable evidence the deported passengers would have provided for his defense. Under the principles set forth today, he therefore failed to establish a violation of the Fifth or Sixth Amendment, and the District Court did not err in denying his motion to dismiss the indictment. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment of the Court essentially for the reasons set forth by Judge Roney, in writing for a panel of the former Fifth Circuit, in *United States* v. *Avila-Dominguez*, 610 F. 2d 1266, 1269–1270, cert. denied *sub nom. Perez* v. *United States*, 449 U. S. 887 (1980). At least a "plausible theory" of how the testimony of the deported witnesses would be helpful to the defense must be offered. None was advanced here; therefore, the motion to dismiss the indictment was properly denied by the District Court.

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[10] The counsel of *United States* v. *Agurs*, 427 U. S. 97, 112–113 (1976), is helpful here:

"[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

JUSTICE O'CONNOR, concurring in the judgment.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

In short, the right to compulsory process is essential to a fair trial. Today's decision, I fear, may not protect adequately the interests of the prosecution and the defense in a fair trial, and may encourage litigation over whether the defendant has made a "plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense." *Ante*, at 873. A preferable approach would be to accommodate *both* the Government's interest in prompt deportation of illegal aliens *and* the defendant's need to interview alien witnesses in order to decide which of them can provide material evidence for the defense. Through a suitable standard, imposed on the federal courts under our supervisory powers, a practical accommodation can be reached without any increase in litigation.

I

One cannot discount the importance of the Federal Government's role in the regulation of immigration.[1] As the Court points out, Congress and the Immigration and Naturalization Service, the agency authorized to make such policy decisions,

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[1] Article I, § 8, cl. 4, states that Congress shall have the power "To establish an uniform Rule of Naturalization." See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) ("that the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

have decided that prompt deportation is the appropriate response to the tremendous influx of illegal aliens. *Ante*, at 864. The Court is also correct that the Federal Government has legitimate reasons for reducing the number of illegal aliens detained for possible use as material witnesses. Particularly because most of the detained aliens are never called to testify, we should be careful not to permit either needless human suffering or excessive burdens on the Federal Government. Under these circumstances, courts should be especially circumspect about interfering with congressional judgments.

Nevertheless, the constitutional obligation of the Executive to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, § 3, including the immigration laws, does not lessen the importance of affording the defendant the "fundamental fairness" inherent in due process, *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). Moreover, the defendant's express right in the Sixth Amendment to compel the testimony of "witnesses in his favor," requires recognition of the importance, both to the individual defendant and to the integrity of the criminal justice system, of permitting the defendant the opportunity to interview eyewitnesses to the alleged crime. A governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the Compulsory Process Clause.

II

The Court's solution to this apparent conflict between the Executive's duty to enforce the immigration laws and its duty not to impair the defendant's rights to due process and compulsory process is to permit the Government to deport potential alien witnesses, and to put the burden on the defendant of making a plausible showing that the deported aliens would have provided material and relevant evidence. The Court's approach thus permits the Government to make

a practice of deporting alien witnesses immediately, taking only the risk that the defendant will be able to show that the deported witnesses, whom the defendant's counsel never will be able to interview, would have provided useful testimony. In effect, to the extent that the Government has conflicting obligations, the defendant is selected to carry the burden of their resolution.

As the Court poses the issue today, the only alternatives are either to (1) permit routine deportation of witnesses and require the defendant to make some showing of prejudice, or (2) delay deportation so that defense counsel can interview the potential witnesses, and provide for automatic dismissal of the indictment if the witnesses are deported. There is, however, another alternative that would avoid unduly burdening either the Government or the defendant. The Court could require that deportation of potential alien witnesses be delayed for a very brief interval to allow defense counsel, as well as the Government, to interview them. That approach is somewhat similar to the Ninth Circuit's practice, originally described in *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (1971). Under the holding in that case, illegal alien witnesses were held in custody for a short period, an average of five days, following the appointment of counsel. During that time, defense counsel had the opportunity to interview the witnesses and determine whether any of them might provide material and relevant evidence. Following the interviews, a federal magistrate held a hearing to determine whether any of the witnesses could provide material evidence, and ordered deportation of those aliens who could not provide such testimony. On those occasions when the Government nevertheless deported potential witnesses before the materiality hearing was held, the District Court determined whether the deported witnesses could have been of some "conceivable benefit" to the defendant. If the defendant met that standard, the court dismissed the indictment.

The principal difficulty with the Ninth Circuit's approach was, as the Court notes, *ante*, at 866–867, that it required virtually no evidence that the deported witness' testimony would have been material to the defense. Under the Ninth Circuit's formulation, the Government's deportation of an alien witness resulted in virtually an automatic dismissal of the indictment.

In adopting a standard requiring brief detention of potential alien witnesses, the Court need not take so extreme a position. In *United States* v. *Avila-Dominguez*, 610 F. 2d 1266 (1980), for example, the Fifth Circuit followed the Ninth Circuit's rationale in concluding that a defendant's constitutional rights are violated if the Government deports an alien witness before the defendant has had an opportunity to interview him. The court nevertheless affirmed the defendant's conviction because he could not offer a "plausible theory" explaining how the witness' testimony would have been helpful to the defense. *Id.*, at 1270. The court thus adopted a more stringent test than the Ninth Circuit's "conceivable benefit" test.

The standard I propose is an amalgam of the approaches used by the Fifth and Ninth Circuits.[2] As a matter of course, the deportable aliens who are potential witnesses should be detained for a very brief period to afford Govern-

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[2] This Court has not hesitated to use its supervisory power over federal courts to set standards to ensure the fair administration of justice. For example, in *McCarthy* v. *United States*, 394 U. S. 459, 468–472 (1969), this Court, under its supervisory power, held that when a district court does not comply fully with Federal Rule of Criminal Procedure 11 in accepting a guilty plea, the plea must be set aside and the case remanded for the defendant to enter a new plea. The Court expressly rejected the rule, adopted by some Circuits, of holding a hearing to determine whether the defendant had entered his plea voluntarily with an understanding of the charge. See also *Marshall* v. *United States*, 360 U. S. 310, 313 (1959) (using its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts" in setting aside a criminal conviction because several jurors had read inadmissible news accounts of the defendant's past activities).

ment and defense counsel the opportunity to interview them. If, within that period, the defendant requests that certain aliens not be deported, a federal magistrate should hold a hearing to determine whether deportation of any of the witnesses should be deferred until after trial. As evidenced by the statistics provided by the respondent, similar procedures in the Ninth Circuit have produced very little litigation. See Brief for Respondent 30. Of course, the Government could be expected to abide by such a rule, but in the occasional event that it deports alien witnesses without affording the defendant any opportunity to interview them, the defendant should not be entitled to an automatic dismissal of the indictment; nor should the defendant be expected to prove prejudice—after all, the Government has deported his potential witnesses. Instead, I agree with the Court that sanctions should be available against the Government if the defendant sets forth some plausible theory explaining how the deported witnesses would have provided material evidence that was not simply cumulative of evidence readily available to the defendant.

III

In the case before us, the respondent made no plausible suggestion that the deported aliens possessed any material evidence that was not merely cumulative of other evidence. Under the standard I have proposed, the District Court properly denied the respondent's motion to dismiss the indictment. Accordingly, I concur in the judgment of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today's holding flaunts a transparent contradiction. On the one hand, the Court recognizes respondent's constitutional right, under the Compulsory Process Clause of the Sixth Amendment, to the production of all witnesses whose testimony would be relevant and material to his defense. *Ante*, at 867–869. But on the other hand, the Court holds

that the Government may deport illegal-alien eyewitnesses to respondent's alleged crime immediately upon their apprehension, before respondent or his attorney have had any opportunity to interview them—thus depriving respondent of the surest and most obvious means by which he could establish the materiality and relevance of such witnesses' testimony. *Ante*, at 872–873. Truly, the Court giveth, and the Court taketh away. But surely a criminal defendant has a constitutional right to interview eyewitnesses to his alleged crime before they are whisked out of the country by his prosecutor. The Court's decision today makes a mockery of that right. Accordingly, I dissent.

The premise of the Court's holding is that "the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses," *ante*, at 872; this governmental power is conditioned only upon the Executive's "good-faith determination" that those witnesses possess "no evidence favorable to the defendant in a criminal prosecution," *ibid.* The Court sets up this asserted "responsibility" of the Executive Branch as a counterweight to its responsibility for "apprehending and obtaining the conviction of those who have violated criminal statutes of the United States." *Ante*, at 863. Thus the Court presents this case as involving a governmental "dilemma," *ante*, at 865, in which the Executive Branch is caught between the conflicting demands of its "dual responsibility," *ante*, at 864. This supposed "dilemma" is a pure figment of the Court's imagination, repudiated by our precedents and by common sense.

The Executive Branch has many responsibilities, any of which may conflict with its duty to enforce the federal criminal law. For example, the Executive Branch has an obvious and imperative obligation to preserve the national security. But when the Executive Branch chooses to prosecute a violation of federal law, it incurs a constitutional responsibility manifestly superior to its other duties: namely, the respon-

sibility to ensure that the accused receives the due process of law. The Government simply cannot be heard to argue that the criminal defendant's rights may be infringed because of the Executive Branch's "other responsibilities": Given the vast and manifold character of those responsibilities, to accept such an argument would be to accede to the rapid evisceration of the constitutional rights of the accused.

This point is hardly a novel one. In *Jencks* v. *United States*, 353 U. S. 657 (1957), we noted that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession." *Id.*, at 670. But at the same time we noticed that

> "in criminal causes, '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .'" *Id.*, at 671, quoting *United States* v. *Reynolds*, 345 U. S. 1, 12 (1953).

We also quoted with approval from the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Andolschek*, 142 F. 2d 503 (1944), in which Judge Learned Hand said:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the docu-

ments may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Id.*, at 506.[1]

The principle affirmed in these precedents is directly applicable to this case. Of course the Government has a responsibility to execute our national immigration policy. But that responsibility does not conflict in the smallest degree with the Government's "duty to see that justice is done" to the criminal defendant whom it has chosen to prosecute. If the Government wishes to pursue criminal remedies against the accused, then its other "responsibilities" must yield before the rights to which an accused is constitutionally entitled.

Of course, the Government's duty to enforce the immigration laws should not be deferred indefinitely. But no inordinate delay is necessary in cases such as the one before us. The Southern District of California long ago adopted a procedure to enforce the *Mendez-Rodriguez* doctrine announced by the Court of Appeals for the Ninth Circuit in 1971.[2] The Southern District's procedure represents a practical and sensitive accommodation between a criminal defendant's constitutional rights under the Compulsory Process Clause and the Government's policy of prompt deportation of illegal aliens. Under that procedure, illegal-alien eyewitnesses are

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[1] See *United States* v. *Beekman*, 155 F. 2d 580, 583–584 (CA2 1946). See also *United States* v. *Burr*, 25 F. Cas. 187, 191 (No. 14,694) (CC Va. 1807) ("If this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. . . . [I]f the order be disobeyed by the plaintiff, judgment as in the case of a nonsuit may be entered against him"); *United States* v. *Nixon*, 418 U. S. 683, 709 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense").

[2] See *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (CA9 1971).

held in custody for a short period of time—about 10 days—after appointment of counsel for the criminal defendant. At the end of that period, the United States magistrate holds a material witness bail review hearing, pursuant to 18 U. S. C. § 3149. In the intervening time, counsel for the defendant may interview the witnesses, and determine whether they can provide testimony material to the defense. At the hearing, both prosecution and defense are required to show the materiality of each of the detained witnesses, or they are released and deported. Brief for Respondent 6–7; Brief for United States 13–14, 18. If this traditional Southern District procedure had been adhered to in the present case, the Government would have clearly discharged its constitutional obligation to afford respondent an opportunity to develop evidence bearing upon the materiality of the testimony of the witnesses to his alleged offense. In contrast, the Court permits the Government to adopt a wholly unilateral procedure that deprives respondent and future criminal defendants of any such opportunity.

The Court suggests that a criminal defendant should be able to "demonstrate either the presence or absence of the required materiality" even without having had an opportunity to interview the detained eyewitnesses. *Ante*, at 871. But this notion has been flatly rejected by our precedents. *Roviaro* v. *United States*, 353 U. S. 53 (1957), denied the Government's claimed privilege to withhold the identity of its informer, "John Doe," from the petitioner.[3] Roviaro, like respondent in the present case, was "present throughout the commission of this crime." *Ante*, at 871; see 353 U. S., at 64 ("So far as [Roviaro] knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was

[3] *Roviaro* represented an exercise of our supervisory jurisdiction. See *McCray* v. *Illinois*, 386 U. S. 300, 309 (1967). But as the Court concedes, *ante*, at 870, *Roviaro* would not have been decided differently if the Due Process and Confrontation Clause claims implicit in that case had been brought to the fore.

indicted"). But the Court in *Roviaro* refused to say, as the Court does today, that a criminal defendant "can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony" that he seeks. *Ante*, at 871. Rather, the Court in *Roviaro* required disclosure simply because John Doe's testimony "*might* have been helpful to the defense." 353 U. S., at 63–64 (emphasis added).

> "Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or the identity of the package [of heroin]. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' . . . to John Doe's car. The desirability of calling John Doe as a witness, *or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.*" *Id.*, at 64 (emphasis added).

Like Doe in *Roviaro*, the illegal aliens deported by the Government in the present case "played a prominent part" in respondent's alleged offense—if, indeed, they did not help to set it up without the knowledge of respondent. And they, like Doe, might have testified to respondent's "possible lack of knowledge" respecting essential elements of the crime charged against him.[4] Under *Roviaro*, *respondent*, not the

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[4] In order to obtain a conviction under 8 U. S. C. § 1324(a)(2), quoted *ante*, at 860, n. 1, the Government was required to show (1) that respondent transported an alien within the United States, (2) that the alien had not been lawfully admitted or was not lawfully entitled to enter, (3) that this was known to respondent, (4) that respondent knew that the alien's last entry was within three years, and (5) that respondent acted willfully in furtherance of the alien's violation of the law. *United States* v. *Gonzalez-Hernandez*, 534 F. 2d 1353, 1354 (CA9 1976). Since the third and fourth

Government, was entitled to decide whether or not the illegal-alien eyewitnesses in this case could give testimony material and relevant to the defense.

I dissent.

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elements of this statutory requirement bear upon respondent's state of mind, it is plain that the illegal aliens whom respondent was transporting might very well have been able to testify to his lack of knowledge on these critical points.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 81-202. Argued March 3, 1982—Decided July 2, 1982

In 1966, a boycott of white merchants in Claiborne County, Miss., was launched at a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP) attended by several hundred black persons. The purpose of the boycott was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing, but some acts and threats of violence did occur. In 1969, respondent white merchants filed suit in Mississippi Chancery Court for injunctive relief and damages against petitioners (the NAACP, the Mississippi Action for Progress, and a number of individuals who had participated in the boycott, including Charles Evers, the field secretary of the NAACP in Mississippi and a principal organizer of the boycott). Holding petitioners jointly and severally liable for all of respondents' lost earnings during a 7-year period from 1966 to the end of 1972 on three separate conspiracy theories, including the tort of malicious interference with respondents' businesses, the Chancery Court imposed damages liability and issued a permanent injunction. The Mississippi Supreme Court rejected two theories of liability but upheld the imposition of liability on the basis of the common-law tort theory. Based on evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses, the court held that the entire boycott was unlawful and affirmed petitioners' liability for all damages "resulting from the boycott" on the ground that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.

Held:

1. The nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment. Pp. 907–915.

(a) Through exercise of their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change. Pp. 907–912.

(b) While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case. Pp. 912–915.

2. Petitioners are not liable in damages for the consequences of their nonviolent, protected activity. Pp. 915–920.

(a) While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered. Pp. 915–918.

(b) Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Pp. 918–920.

3. The award for all damages "resulting from the boycott" cannot be sustained, where the record discloses that all of the respondents' business losses were not proximately caused by violence or threats of violence. Pp. 920–932.

(a) To the extent that the Mississippi Supreme Court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The court's ambiguous findings are inadequate to assure the "precision of regulation" demanded by that Amendment. Pp. 920–924.

(b) Regular attendance and participation at the meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability on the individual petitioners. Nor can liability be imposed on such individuals simply because they were either "store watchers" who stood outside the boycotted merchants' stores to record the names of black citizens who patronized the stores or members of a special group of boycott "enforcers." Pp. 924–926.

(c) For similar reasons, the judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made, because those speeches did not incite violence or specifically authorize the use of violence. His acts, being insufficient to impose liability on him, may not be used to impose liability on the NAACP, his principal. Moreover, there is no finding that Evers or any other NAACP member had either actual or apparent authority from the NAACP to commit acts of violence or to threaten violent conduct or that the NAACP ratified unlawful conduct. To impose liability on the NAACP without such a finding would impermissibly burden the rights of political association that are protected by the First Amendment. Pp. 926–932.

393 So. 2d 1290, reversed and remanded.

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STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., concurred in the result. MARSHALL, J., took no part in the consideration or decision of the case.

Lloyd N. Cutler argued the cause for petitioners. With him on the briefs were *James Robertson, Edward Tynes Hand, William R. Richardson, Jr., John Payton, Thomas I. Atkins, Charles E. Carter, William L. Robinson,* and *Frank R. Parker.*

Grover Rees III argued the cause for respondents. With him on the briefs were *Crane D. Kipp, Christopher J. Walker,* and *Dixon L. Pyles.**

JUSTICE STEVENS delivered the opinion of the Court.

The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Mississippi, that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical

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*Briefs of *amici curiae* urging reversal were filed by *John Vanderstar, Charles S. Sims,* and *Phyllis N. Segal* for the American Civil Liberties Union et al.; by *J. Albert Woll, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; and by *Paul S. Berger, David Bonderman, Leonard B. Simon,* and *Nathan Z. Dershowitz* for the American Jewish Congress.

[1] See *Krulewitch* v. *United States,* 336 U. S. 440, 447–449 (concurring opinion).

factors in the boycott's success presents us with the question whether the state court's judgment is consistent with the Constitution of the United States.

I

In March 1966, black citizens of Port Gibson, Miss., and other areas of Claiborne County presented white elected officials with a list of particularized demands for racial equality and integration.[2] The complainants did not receive a satisfactory response and, at a local NAACP meeting at the First Baptist Church, several hundred black persons voted to place a boycott on white merchants in the area. On October 31, 1969, several of the merchants filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity. We recount first the course of that litigation and then consider in more detail the events that gave rise to the merchants' claim for damages.

A

The complaint was filed in the Chancery Court of Hinds County by 17 white merchants.[3] The merchants named two corporations and 146 individuals as defendants: the National Association for the Advancement of Colored People (NAACP), a New York membership corporation; Mississippi Action for Progress (MAP), a Mississippi corporation that im-

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[2] Port Gibson is the county seat and largest municipality in Claiborne County.

[3] The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were aldermen in Port Gibson, Record 15111; Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, *id.*, at 15160; respondents Abraham and Hay had served on the school board, *id.*, at 14906, 14678; respondent Hudson served on the Claiborne County Democratic Committee, *id.*, at 840.

plemented the federal "Head Start" program; Aaron Henry, the President of the Mississippi Branch of the NAACP; Charles Evers, the Field Secretary of the NAACP in Mississippi; and 144 other individuals who had participated in the boycott.[4] The complaint sought injunctive relief and an attachment of property, as well as damages. Although it alleged that the plaintiffs were suffering irreparable injury from an ongoing conspiracy, no preliminary relief was sought.

Trial began before a chancellor in equity on June 11, 1973.[5] The court heard the testimony of 144 witnesses during an 8-month trial. In August 1976, the chancellor issued an opinion and decree finding that "an overwhelming preponderance of the evidence" established the joint and several liability of

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[4] The complaint also named 52 banks as "attachment defendants." The banks answered that the NAACP had $16,800 on deposit in Mississippi.

[5] As a result of the plaintiffs' prayer for an attachment in equity, jurisdiction existed in Chancery Court. The trial judge ruled: "It was incumbent upon this court to hear the case in full once jurisdiction was assumed. To have heard the portions of this matter sounding in equity, only, and to have transferred the questions of tort liability and damages to the circuit court would have been contrary to the maxim 'equity delights to do complete justice, and not by halves.'" App. to Pet. for Cert. 56b. The defendants thus were denied a jury trial on the liability issues. Although the court recognized that it had power to empanel a jury, it declined to exercise its discretion to do so. *Ibid.* The Mississippi nonresident attachment statute that provided the basis for equitable jurisdiction has since been declared unconstitutional by both Federal District Courts in Mississippi. *MPI, Inc.* v. *McCullough*, 463 F. Supp. 887 (ND Miss. 1978); *Mississippi Chem. Corp.* v. *Chemical Constr. Corp.*, 444 F. Supp. 925 (SD Miss. 1977).

Commencement of trial was delayed by collateral proceedings in federal court. See *Henry* v. *First National Bank of Clarksdale*, 50 F. R. D. 251 (ND Miss. 1970), rev'd, 444 F. 2d 1300 (CA5 1971), cert. denied, 405 U. S. 1019. The District Court entered a preliminary injunction restraining the state proceedings on the theory that the merchants sought to infringe the defendants' First Amendment rights. The Court of Appeals reversed, holding that the mere commencement of a private tort suit did not itself involve "state action" for purposes of 28 U. S. C. § 1343(3).

130 of the defendants on three separate conspiracy theories.[6] First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs' businesses, which did not necessarily require the presence of a conspiracy.[7] Second, the chancellor found a violation of a state

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[6] App. to Pet. for Cert. 2g. Of the original 148 named defendants, 16 were dismissed by stipulation of counsel (12 had died, 2 were minors, 1 was *non compos mentis*, and 1—the Reverend Dominic Cangemi—was dismissed by agreement without explanation). One defendant was dismissed because he had been misidentified in the complaint. The chancellor dismissed one defendant—state NAACP leader Aaron Henry—because "the complainants failed to meet the burden of proof as to [his] wrongdoing." *Id.*, at 28b. Thus, except for the defendants dismissed by stipulation, the plaintiffs prevailed on the merits in the trial court against all but one of the defendants.

[7] Although the bulk of the court's discussion of the defendants' common-law tort liability focused on the presence of a civil conspiracy, the chancellor did not appear to hold that a concerted refusal to deal—without more—was actionable under the common law of Mississippi. The court apparently based its first theory of liability on the ground that the "malicious interference by the defendants with the businesses of the complainants as shown by the evidence in this case is tortious *per se*, and this would be true even without the element of conspiracy." *Id.*, at 42b (footnote omitted). In Mississippi, "[e]ither an individual or a corporation, whether acting in conjunction with others, or not," may be liable in an action for "malicious interference with a trade or calling." *Memphis Laundry-Cleaners* v. *Lindsey*, 192 Miss. 224, 239, 5 So. 2d 227, 232 (1941). The chancellor in this case stated that the necessary element of malice is established by proof of "the intentional performance of an act harmful to another without just or lawful cause or excuse." App. to Pet. for Cert. 42b, n. 8.

The repeated references to the presence of a conspiracy might be explained by the court's finding that each of the defendants—with the exception of Aaron Henry—was jointly and severally liable for the plaintiffs' losses. As noted, an element of the plaintiffs' common-law action was the defendants' intentional performance of an "unprivileged" act harmful to another. The chancellor stated that the evidence clearly established that "certain defendants" had committed "overt acts which were injurious to the trade and business of complainants." *Id.*, at 39b. The court continued: "Where two or more persons conspire together, the conspiracy makes the wrongful act of each person the joint acts of them all," *id.*, at 41b; "[i]t

statutory prohibition against secondary boycotts, on the theory that the defendants' primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was directed.[8] Third, the court found a violation of Mississippi's antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed.[9] The chancellor specifically rejected the defendants' claim that their conduct was protected by the First Amendment.[10]

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follows that each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of the law, an act for which each is jointly and severally liable." *Ibid.* Thus, the presence of a conspiracy rendered all of the "conspirators" liable for the wrongful acts of any member of that conspiracy.

[8] See Miss. Code Ann. § 97-23-85 (1972). The chancellor found: "The testimony in the case at bar clearly shows that the principal objective of the boycott was to force the white merchants of Port Gibson and Claiborne County to bring pressure upon governing authorities to grant defendants' demands or, in the alternative, to suffer economic ruin." App. to Pet. for Cert. 51b. As noted, however, many of the merchants themselves were civic leaders. See n. 3, *supra*.

[9] See Miss. Code Ann. § 75-21-9 (1972). The court made clear that under this theory intentional participation in the concerted action rendered each defendant directly liable for all resulting damages. "As a legal principle, it is sufficient to show that the concert of action on the part of the defendants was deliberately invited, and that the defendants gave their adherence to the scheme and participated in it." App. to Pet. for Cert. 54b. The same was true of the court's secondary boycott theory; "since an illegal boycott is an invasion of a property right, the members of the boycotting combination are liable for the resulting damages." *Id.*, at 53b.

[10] In its discussion of the secondary boycott statute, the court rejected an argument that the statute was unconstitutional under the First and Fourteenth Amendments. Noting as a "basic premise" that "secondary boycotts are unlawful under both United States and Mississippi law," the court stated that "conduct and communication which are illegal are not protected

Five of the merchants offered no evidence of business losses. The chancellor found that the remaining 12 had suffered lost business earnings and lost good will during a 7-year period from 1966 to 1972 amounting to $944,699. That amount, plus statutory antitrust penalties of $6,000 and a $300,000 award of attorney's fees, produced a final judgment of $1,250,699, plus interest from the date of judgment and costs. As noted, the chancellor found all but 18 of the original 148 defendants jointly and severally liable for the entire judgment. The court justified imposing full liability on the national organization of the NAACP on the ground that it had failed to "repudiate" the actions of Charles Evers, its Field Secretary in Mississippi.

In addition to imposing damages liability, the chancellor entered a broad permanent injunction. He permanently enjoined petitioners from stationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obscene language to or about any person" because that person continued to patronize the respondents; from "picketing or patroling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property.[11]

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by the constitutional provisions relating to freedom of speech." *Id.*, at 46b. In imposing liability under the state restraint of trade statute, the chancellor added: "After a careful consideration of the constitutional claims of defendants, the Court finds that none of the acts or conduct of defendants was shielded or protected by the Constitution of the United States or the Constitution of the State of Mississippi." *Id.*, at 55b–56b. Finally, in assessing damages, the court stated: "Defendants base their defense on the concept that the right to boycott and inflict losses on complainants was a legally protected right afforded them under the laws and Constitution of the United States. This Court has hereinbefore found that the conduct of the defendants was unlawful and unprotected." *Id.*, at 62b.

[11] *Id.*, at 19g. Following the entry of judgment, the defendants moved for relief from Mississippi's 125-percent supersedeas bonding requirement. Although the Mississippi Supreme Court denied the motion, a federal court

In December 1980, the Mississippi Supreme Court reversed significant portions of the trial court's judgment. 393 So. 2d 1290. It held that the secondary boycott statute was inapplicable because it had not been enacted until "the boycott had been in operation for upward of two years."[12] The court declined to rely on the restraint of trade statute, noting that the "United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act, 15 U. S. C. § 1 (1970), after which our statute is patterned."[13] Thus, the court rejected two theories of liability that were consistent with a totally voluntary and nonviolent withholding of patronage from the white merchants.

The Mississippi Supreme Court upheld the imposition of liability, however, on the basis of the chancellor's common-law tort theory. After reviewing the chancellor's recitation of the facts, the court quoted the following finding made by the trial court:

> "In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards ('enforcers,' 'deacons,' or 'black hats') in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse

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enjoined execution of the Chancery Court judgment pending appeal. *Henry* v. *First National Bank*, 424 F. Supp. 633 (ND Miss. 1976), aff'd, 595 F. 2d 291 (CA5 1979), cert. denied, 444 U. S. 1074.

[12] 393 So. 2d, at 1300.

[13] *Id.*, at 1301.

> from the complainants." App. to Pet. for Cert. 39b (quoted 393 So. 2d, at 1300).

On the basis of this finding, the court concluded that the entire boycott was unlawful. "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other."[14] In a brief passage, the court rejected petitioners' reliance on the First Amendment:

> "The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." *Id.*, at 1301.

The theory of the Mississippi Supreme Court, then, was that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.[15] To the trial court, such a finding had not been necessary.[16]

Although the Mississippi Supreme Court affirmed the chancellor's basic finding of liability, the court held that re-

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[14] *Ibid.*

[15] The court did not specifically identify the evidence linking any of the defendants to such an agreement.

[16] As noted, liability under the secondary boycott and restraint of trade statutes could be found on the basis of an entirely voluntary and nonviolent agreement to withhold patronage. See n. 9, *supra*. It is not clear whether—in its imposition of tort liability—the trial court rested on a theory similar to that ultimately advanced by the Mississippi Supreme Court. In finding an unlawful civil conspiracy—which rendered each conspirator liable for the actions of others, see n. 7, *supra*—the chancellor arguably believed that it was necessary to connect all defendants to an agreement to use force or violence to effectuate the conspiracy. See App. to Pet. for Cert. 40b–41b. The chancellor made no factual finding, however, that such an agreement existed.

haunt the county courthouse to the infrequent appointment of blacks to county boards and committees; the overtly discriminatory pattern of paving county roads; the reluctance of the county to remedy black complaints, which forced blacks to take legal action to obtain school and grand jury desegregation; and the role played by the County Commissioners in the incorporation of an all-white private school to which they donated public funds for the purchase of band uniforms. *Id.*, at 77a–82a.

The District Court also considered the depressed socioeconomic status of Burke County blacks. It found that proportionately more blacks than whites have incomes below the poverty level. *Id.*, at 83a. Nearly 53% of all black families living in Burke County had incomes equal to or less than three-fourths of a poverty-level income. *Ibid.* Not only have blacks completed less formal education than whites, but also the education they have received "was qualitatively inferior to a marked degree." *Id.*, at 84a. Blacks tend to receive less pay than whites, even for similar work, and they tend to be employed in menial jobs more often than whites. *Id.*, at 85a. Seventy-three per cent of houses occupied by blacks lacked all or some plumbing facilities; only 16% of white-occupied houses suffered the same deficiency. *Ibid.* The District Court concluded that the depressed socioeconomic status of blacks results in part from "the lingering effects of past discrimination." *Ibid.*

Although finding that the state policy behind the at-large electoral system in Burke County was "neutral in origin," the District Court concluded that the policy "has been subverted to invidious purposes." *Id.*, at 90a. As a practical matter, maintenance of the state statute providing for at-large elections in Burke County is determined by Burke County's state representatives, for the legislature defers to their wishes on matters of purely local application. The court found that Burke County's state representatives "have retained a system which has minimized the ability of Burke County Blacks to participate in the political system." *Ibid.*

The trial court considered, in addition, several factors which this Court has indicated enhance the tendency of multimember districts to minimize the voting strength of racial minorities. See *Whitcomb* v. *Chavis*, 403 U. S., at 143–144. It found that the sheer geographic size of the county, which is nearly two-thirds the size of Rhode Island, "has made it more difficult for Blacks to get to polling places or to campaign for office." App. to Juris. Statement 91a. The court concluded, as a matter of law, that the size of the county tends to impair the access of blacks to the political process. *Id.*, at 92a. The majority vote requirement, Ga. Code § 34–1513 (Supp. 1980), was found "to submerge the will of the minority" and thus "deny the minority's access to the system." App. to Juris. Statement 92a. The court also found the requirement that candidates run for specific seats, Ga. Code § 34–1015 (1978), enhances appellees' lack of access because it prevents a cohesive political group from concentrating on a single candidate. Because Burke County has no residency requirement, "[a]ll candidates could reside in Waynesboro, or in 'lilly-white' neighborhoods. To that extent, the denial of access becomes enhanced." App. to Juris. Statement 93a.

None of the District Court's findings underlying its ultimate finding of intentional discrimination appears to us to be clearly erroneous; and as we have said, we decline to overturn the essential finding of the District Court, agreed to by the Court of Appeals, that the at-large system in Burke County has been maintained for the purpose of denying blacks equal access to the political processes in the county. As in *White* v. *Regester*, 412 U. S., at 767, the District Court's findings were "sufficient to sustain [its] judgment . . . and, on this record, we have no reason to disturb them."

IV

We also find no reason to overturn the relief ordered by the District Court. Neither the District Court nor the Court of Appeals discerned any special circumstances that would mili-

best copy available

tate against utilizing single-member districts. Where "a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" *Milliken* v. *Bradley*, 433 U. S. 267, 282 (1977) (emphasis deleted), quoting *Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974).[10]

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

I

Mobile v. *Bolden*, 446 U. S. 55 (1980), establishes that an at-large voting system must be upheld against constitutional attack unless maintained for a discriminatory purpose. In *Mobile* we reversed a finding of unconstitutional vote dilution because the lower courts had relied on factors insufficient as a matter of law to establish discriminatory intent. See *id.*, at 73 (plurality opinion of Stewart, J.). The District Court and Court of Appeals in this case based their findings of unconstitutional discrimination on the same factors held insufficient in *Mobile*. Yet the Court now finds their conclusion unexceptionable. The *Mobile* plurality also affirmed

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[10] Appellants contend that the District Court should not have divided Burke County into five districts but should have allowed appellants to devise a plan for subdividing the county and to submit their plan for preclearance under § 5 of the Voting Rights Act, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).

Appellants also contend that the doctrine of unconstitutional dilution of voting rights arising from an at-large election system does not apply to county governing bodies. We find no merit to this contention, having previously affirmed a judgment that at-large elections for the governing body of a parish (county) unconstitutionally diluted black voting strength. *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976).

that the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant." *Id.*, at 74, n. 20. Although the courts below did not answer that question in this case, the Court today affirms their decision.

Whatever the wisdom of *Mobile*, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But *Mobile* held that this *kind* of evidence was not enough. Such evidence, we found in *Mobile*, did not merely fall short, but "fell *far* short[,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial . . . discrimination.'" *Id.*, at 70 (emphasis added), quoting *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971). Because I believe that *Mobile* controls this case, I dissent.

II

The Court's decision today relies heavily on the capacity of the federal district courts—essentially free from any standards propounded by this Court—to determine whether at-large voting systems are "being maintained for the invidious purpose of diluting the voting strength of the black population." *Ante*, at 622. Federal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments. Inquiries of this kind not only can be "unseemly," see Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1164 (1978); they intrude the federal courts—with only the vaguest constitutional direction—into an area of intensely local and political concern.

Emphasizing these considerations, JUSTICE STEVENS, *post*, at 642–650, argues forcefully that the Court's focus of inquiry is seriously mistaken. I agree with much of what he says. As I do not share his views entirely, however, I write separately.

A

As I understand it, JUSTICE STEVENS' critique of the Court's approach rests on three principles with which I am in fundamental agreement.

First, it is appropriate to distinguish between "state action that inhibits an individual's right to vote and state action that affects the political strength of various groups." *Mobile* v. *Bolden*, *supra*, at 83 (STEVENS, J., concurring in judgment); see *post*, at 632, 637–638, n. 16. Under this distinction, this case is fundamentally different from cases involving direct barriers to voting. There is no claim here that blacks may not register freely and vote for whom they choose. This case also differs from one-man, one-vote cases, in which districting practices make a person's vote less weighty in some districts than in others.

Second, I agree with JUSTICE STEVENS that vote dilution cases of this kind are difficult if not impossible to distinguish—especially in their remedial aspect—from other actions to redress gerrymanders. See *post*, at 650–653.

Finally, JUSTICE STEVENS clearly is correct in arguing that the standard used to identify unlawful racial discrimination in this area should be defined in terms that are judicially manageable and reviewable. See *post*, at 633, 642–650. In the absence of compelling reasons of both law and fact, the federal judiciary is unwarranted in undertaking to restructure state political systems. This is inherently a political area, where the identification of a seeming violation does not necessarily suggest an enforceable judicial remedy—or at least none short of a system of quotas or group representation. Any such system, of course, would be antithetical to the principles of our democracy.

B

JUSTICE STEVENS would accommodate these principles by holding that subjective intent is irrelevant to the establishment of a case of racial vote dilution under the Fourteenth Amendment. See *post*, at 637. Despite sharing the concerns

from which his position is developed, I would not accept this view. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Because I am unwilling to abandon this central principle in cases of this kind, I cannot join JUSTICE STEVENS' opinion.

Nonetheless, I do agree with him that what he calls "objective" factors should be the focus of inquiry in vote-dilution cases. Unlike the considerations on which the lower courts relied in this case and in *Mobile*, the factors identified by JUSTICE STEVENS as "objective" in fact are direct, reliable, and unambiguous indices of discriminatory *intent*. If we held, as I think we should, that the district courts must place primary reliance on these factors to establish discriminatory intent, we would prevent federal-court inquiries into the *subjective* thought processes of local officials—at least until enough objective evidence had been presented to warrant discovery into subjective motivations in this complex, politically charged area. By prescribing such a rule we would hold federal courts to a standard that was judicially manageable. And we would remain faithful to the central protective purpose of the Equal Protection Clause.

In the absence of proof of discrimination by reliance on the kind of objective factors identified by JUSTICE STEVENS, I would hold that the factors cited by the Court of Appeals are too attenuated as a matter of law to support an inference of discriminatory intent. I would reverse its judgment on that basis.

JUSTICE STEVENS, dissenting.

Our legacy of racial discrimination has left its scars on Burke County, Georgia.[1] The record in this case amply sup-

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[1] Certain vestiges of discrimination—although clearly not the most pressing problems facing black citizens today—are a haunting reminder of an all too recent period of our Nation's history. The District Court found

ports the conclusion that the governing officials of Burke County have repeatedly denied black citizens rights guaranteed by the Fourteenth and Fifteenth Amendments to the Federal Constitution. No one could legitimately question the validity of remedial measures, whether legislative or judicial, designed to prohibit discriminatory conduct by public officials and to guarantee that black citizens are effectively afforded the rights to register and to vote. Public roads may not be paved only in areas in which white citizens live;[2] black citizens may not be denied employment opportunities in county government;[3] segregated schools may not be maintained.[4]

Nor, in my opinion, could there be any doubt about the constitutionality of an amendment to the Voting Rights Act that would require Burke County and other covered jurisdictions to abandon specific kinds of at-large voting schemes that perpetuate the effects of past discrimination. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 324. It might indeed be wise policy to accelerate the transition of minority groups to a position of political power commensurate with their voting strength by amending the Act to prohibit the use of multimember districts in all covered jurisdictions.

The Court's decision today, however, is not based on either its own conception of sound policy or any statutory command. The decision rests entirely on the Court's interpretation of the requirements of the Federal Constitution. Despite my sympathetic appraisal of the Court's laudable goals, I am unable to agree with its approach to the constitutional issue that

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that a segregated laundromat is operated within a few blocks of the county courthouse; at the courthouse itself, faded paint over restroom doors does not entirely conceal the words "colored" and "white."

[2] See *Dowdell* v. *City of Apopka*, 511 F. Supp. 1375 (MD Fla. 1981).

[3] 42 U. S. C. § 2000e–2.

[4] *Brown* v. *Board of Education*, 347 U. S. 483.

is presented. In my opinion, this case raises questions that encompass more than the immediate plight of disadvantaged black citizens. I believe the Court errs by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially manageable standard for adjudicating cases of this kind.

I

The Court's entry into the business of electoral reapportionment in 1962 was preceded by a lengthy and scholarly debate over the role the judiciary legitimately could play in what Justice Frankfurter described in *Colegrove* v. *Green*, 328 U. S. 549, as a "political thicket."[5] In that case, decided in 1946, the Court declined to entertain a challenge to single-member congressional districts in Illinois that had been cre-

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[5] In his much criticized opinion announcing the judgment of the Court, Justice Frankfurter wrote:

"Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

. . . . .

"Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on Demand of the executive Authority,' Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfilment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson*, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S., at 553–554, 556.

ated in 1901 and had become grossly unequal by reason of the great growth in urban population.[6] In dissent, Justice Black advocated the use of a statewide, at-large election of representatives; he argued that an at-large election "has an element of virtue that the more convenient method does not have—namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional." *Id.*, at 574.

In 1962, the Court changed course. In another challenge to the constitutionality of a 1901 districting statute, it held that the political question doctrine did not foreclose judicial review. *Baker* v. *Carr*, 369 U. S. 186. That decision represents one of the great landmarks in the history of this Court's jurisprudence.

Two aspects of the Court's opinion in *Baker* v. *Carr* are of special relevance to the case the Court decides today. First, the Court's scholarly review of the political question doctrine focused on the dominant importance of satisfactory standards for judicial determination.[7] Second, the Court's articulation

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[6] The districts ranged in population from 112,000 to 914,000 persons. *Id.*, at 557.

[7] The Court stated that the "nonjusticiability of a political question is primarily a function of the separation of powers." 369 U. S., at 210. It emphasized, however, that "the lack of satisfactory criteria for a judicial determination" was a dominant consideration in *Coleman* v. *Miller*, 307 U. S. 433, 454–455; that whether a foreign relations question is justiciable turns, in part, on "its susceptibility to judicial handling"; that in the presence of clearly definable criteria for decision "the political question barrier falls away"; and that "even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending." 369 U. S., at 210, 211, 214. *Luther* v. *Borden*, 7 How. 1, was distinguished, in part, because that case involved "the lack of criteria by which a court could determine which form of government was republican"; the Court stated that "the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize in-

of the relevant constitutional standard made no reference to subjective intent.[8] The host of cases that have arisen in the wake of *Baker* v. *Carr* have shared these two characteristics. They have formulated, refined, and applied a judicially manageable standard that has become known as the one-person, one-vote rule; they have attached no significance to the subjective intent of the decisionmakers who adopted or maintained the official rule under attack.

In reviewing the constitutionality of the structure of a local government, two quite different methods of analysis could be employed. The Court might identify the specific features of the government that raise constitutional concerns and decide whether, singly or in combination, they are valid. This is the approach the Court has used in testing the constitutionality of rules conditioning the right to vote on payment of a poll tax,[9] imposing burdens on independent candidates,[10] denying

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dependently in order to identify a State's lawful government." 369 U. S., at 222, 223. In concluding that the reapportionment question before it was justiciable, the Court emphasized that it would not be necessary "to enter upon policy determinations for which judicially manageable standards are lacking." *Id.*, at 226.

[8] The Court simply stated:

"Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Ibid.*

[9] *Harper* v. *Virginia Board of Elections*, 383 U. S. 663. The Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.*, at 666. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*, at 668. In dissent, Justice Black noted: "It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color." *Id.*, at 672.

[10] *Storer* v. *Brown*, 415 U. S. 724. The Court stated that, in determining the constitutionality of eligibility requirements for independent candi-

new residents or members of the Armed Forces the right to vote,[11] prohibiting crossovers in party primaries,[12] requiring political candidates to pay filing fees,[13] and disadvantaging minority parties in Presidential elections.[14] In none of these cases did the validity of the electoral procedure turn on whether the legislators who enacted the rule subjectively intended to discriminate against minority voters. Under the approach employed by the Court in those cases, the objective circumstances that led to a declaration that an election procedure was unconstitutional would invalidate a similar law wherever it might be found.

Alternatively, the Court could employ a subjective approach under which the constitutionality of a challenged procedure depends entirely on federal judges' appraisals of the reasons why particular localities have chosen to govern themselves in a particular way. The Constitution would simply protect a right to have an electoral machinery established and maintained without the influence of impermissible factors. Constitutional challenges to identical procedures in neighboring communities could produce totally different results, for the subjective motivations of the legislators who enacted the procedures—or at least the admissible evidence that might be discovered concerning such motivation—could be quite different.

In deciding the question presented in this case, the Court abruptly rejects the former approach and considers only the latter. It starts from the premise that Burke County's at-

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dates, the "inevitable question for judgment" is "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.*, at 742. See *Mandel* v. *Bradley*, 432 U. S. 173, 177; *id.*, at 181 (STEVENS, J., dissenting). See also *American Party of Texas* v. *White*, 415 U. S. 767, 795.

[11] *Dunn* v. *Blumstein*, 405 U. S. 330; *Carrington* v. *Rash*, 380 U. S. 89.

[12] *Kusper* v. *Pontikes*, 414 U. S. 51.

[13] *Lubin* v. *Panish*, 415 U. S. 709; *Bullock* v. *Carter*, 405 U. S. 134.

[14] *Williams* v. *Rhodes*, 393 U. S. 23.

large method of electing its five county commissioners is, on its face, unobjectionable. The otherwise valid system is unconstitutional, however, because it makes it more difficult for the minority to elect commissioners and because the majority that is now in power has maintained the system for that very reason. Two factors are apparently of critical importance: (1) the intent of the majority to maintain control; and (2) the racial character of the minority.[15]

I am troubled by each aspect of the Court's analysis. In my opinion, the question whether Burke County's at-large system may survive scrutiny under a purely objective analysis is not nearly as easy to answer as the Court implies. Assuming, however, that the system is otherwise valid, I do not believe that the subjective intent of the persons who adopted the system in 1911, or the intent of those who have since declined to change it, can determine its constitutionality. Even if the intent of the political majority were the controlling constitutional consideration, I could not agree that the only political groups that are entitled to protection under the Court's rule are those defined by racial characteristics.

II

At-large voting systems generally tend to maximize the political power of the majority. See *ante*, at 616.[16] There are,

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[15] The Court's articulation of the applicable standard in this case is somewhat puzzling. It states that this case is subject to "the standard of proof generally applicable to Equal Protection Clause cases." *Ante*, at 617. But later in the same paragraph, the Court indicates that its special requirement of a showing of discriminatory intent merely applies to equal protection cases "charging racial discrimination." *Ibid.* The Court seems to imply that plaintiffs in equal protection cases charging racial discrimination must surmount a special hurdle in order to prevail. Yet the Court has unequivocally stated that a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272.

[16] In the words of Chancellor Kent, the requirement of districting "was recommended by the wisdom and justice of giving, as far as possible, to the

however, many types of at-large electoral schemes. Three features of Burke County's electoral system are noteworthy, not in my opinion because they shed special light on the subjective intent of certain unidentified people, but rather because they make it especially difficult for a minority candidate to win an election. First, although the qualifications and the duties of the office are identical for all five commissioners, each runs for a separately designated position.[17]

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local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 J. Kent, Commentaries on American Law *230–*231, n. (c) (12th ed. 1873). See also *Mobile* v. *Bolden*, 446 U. S. 55, 105, n. 3 (MARSHALL, J., dissenting); *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–160.

The challenge to multimember or at-large districts is, of course, quite different from the challenge to the value of individual votes considered in *Reynolds* v. *Sims*, 377 U. S. 533. An at-large system is entirely consistent with the one-person, one-vote rule developed in that case. As Justice Stewart noted in *Mobile*, in considering the applicability of *Reynolds* and the cases that followed it:

"Those cases established that the Equal Protection Clause guarantees the right of each voter to 'have his vote weighted equally with those of all other citizens.' 377 U. S., at 576. The Court recognized that a voter's right to 'have an equally effective voice' in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts. There can be, of course, no claim that the 'one person, one vote' principle has been violated in this case, because the city of Mobile is a unitary electoral district and the Commission elections are conducted at large. It is therefore obvious that nobody's vote has been 'diluted' in the sense in which that word was used in the *Reynolds* case." 446 U. S., at 77–78 (plurality opinion).

See also *id.*, at 83 (STEVENS, J., concurring in judgment).

[17] This feature distinguishes Burke County's at-large electoral system from the municipal commission form of government popularized by reformers shortly after the turn of the century and known as the Galveston Plan or the Des Moines Plan. See n. 19, *infra*.

Second, in order to be elected, each commissioner must receive a majority of all votes cast in the primary and in the general election; if the leading candidate receives only a plurality, a runoff election must be held. Third, there are no residency requirements; thus, all candidates could reside in a single, all-white neighborhood.[18]

Even if one assumes that a system of local government in which power is concentrated in the hands of a small group of persons elected from the community at large is an acceptable—or perhaps even a preferred—form of municipal government,[19] it is not immediately apparent that these addi-

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[18] Other features of certain at-large electoral schemes that make it more difficult for a minority group to elect a favored candidate when bloc voting occurs—prohibitions against cumulative and incomplete voting—are not involved in this case. Prohibitions against cumulative or partial voting are generally inapplicable in electoral schemes involving numbered posts.

[19] "During its evolution as a progressive solution to municipal problems, the commission format was variously known as the Galveston plan, the Texas idea, and the Des Moines plan. Since Galveston invented the basic organization and Des Moines popularized the addition of related reform techniques, the new type of government is probably best described as the Galveston—Des Moines plan. So popular did the new idea become that towns could reap advertising benefits for being in the forefront of municipal innovation if they used the commission plan. Consequently, some cities boasted that they had the system, knowing full well that their charters had little resemblance to Galveston's. But there were certain essentials necessary before a city could claim commission status. Benjamin DeWitt, an early historian of the progressive movement, explained:

"'In every case, however, no matter how much charters may differ as to minor details, they have certain fundamental features in common. These fundamental features of commission charters are four:

"1. Authority and responsibility are centralized.

"2. The number of men in whom this authority and this responsibility are vested is small.

"3. These few men are elected from the city at large and not by wards or districts.

"4. Each man is at the head of a single department.'

"The most radical departure the new scheme made was the combination of legislative and executive functions in one body. The plan disregarded the federal model of separation of powers. Sitting together, the commis-

tional features that help to perpetuate the power of an entrenched majority are either desirable or legitimate.[20] If the only purpose these features serve—particularly when viewed in combination—is to assist a dominant party to maintain its political power, they are no more legitimate than the Tennessee districts described in *Baker* v. *Carr* as "*no* policy, but simply arbitrary and capricious action." 369 U. S., at 226 (emphasis in original). Unless these features are independently justified, they may be invalid simply because there is no legitimate justification for their impact on minority participation in elections.[21]

In this case, appellees have not argued—presumably because they assumed that this Court's many references to the requirement of proving an improper motive in equal protection cases are controlling in this new context—that the special features of Burke County's at-large system have such an

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sion was a typical policy- and ordinance-making council; but, separately, each commissioner administered a specific department on a day-to-day basis. The original Galveston charter provided for a mayor-president plus commissioners of finance and revenue, waterworks and sewerage, streets and public property, and fire and police. Later commission cities followed a similar division of responsibility." B. Rice, Progressive Cities: The Commission Government Movement in America, 1901–1920, pp. xiii–xiv (1977) (footnote omitted).

[20] It is noteworthy that these features apparently characterize many governmental units in jurisdictions that have been subjected to the strictures of the Voting Rights Act as the result of prior practices that excluded black citizens from the electoral process. See generally The Voting Rights Act: Unfulfilled Goals, A Report of the United States Commission on Civil Rights 38–50 (1981).

[21] No group has a right to proportional representation. See *Mobile* v. *Bolden*, 446 U. S., at 75–76 (plurality opinion); *id.*, at 122 (MARSHALL, J., dissenting). But in a representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are responsive to the entire electorate. For this reason, a challenged electoral procedure may not be justified solely on the ground that it serves to reduce the ability of a minority group to participate effectively in the electoral process.

adverse impact on the minority's opportunity to participate in the political process that this type of government deprives the minority of equal protection of the law. Nor have the appellants sought to identify legitimate local policies that might justify the use of such rules. As a result, this record does not provide an adequate basis for determining the validity of Burke County's governmental structure on the basis of traditional objective standards.[22]

If the governmental structure were itself found to lack a legitimate justification, inquiry into subjective intent would clearly be unnecessary. As JUSTICE MARSHALL stated in his dissent in *Mobile:* "Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest." 446 U. S., at 121.[23] Under the

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[22] The record nevertheless does indicate that the validity of the at-large system itself need not be decided in this case. For it is apparent that elimination of the majority runoff requirement and the numbered posts would enable a well-organized minority to elect one or two candidates to the County Board. That consequence could be achieved without replacing the at-large system itself with five single-member districts. In other words, minority access to the political process could be effected by invalidating specific rules that impede that access and without changing the basic structure of the local governmental unit. See *Mobile* v. *Bolden*, *supra*, at 80 (BLACKMUN, J., concurring in result).

[23] It is worth repeating the statement of Professor Ely noted by JUSTICE MARSHALL:

"The danger I see is the somewhat different one that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). In such cases the covert employment of a principle of selection that could not constitutionally be employed overtly is equally unconstitutional. However, *where what is denied is something to which*

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Court's analysis, however, the characteristics of the particular form of government under attack are virtually irrelevant. Not only would the Court's approach uphold an arbitrary—but not invidious—system that lacked independent justification, it would invalidate—if a discriminatory intent were proved—a local rule that would be perfectly acceptable absent a showing of invidious intent. The Court's standard applies not only to Burke County and to multimember districts, but to any other form of government as well.

III

Ever since I joined the Court, I have been concerned about the Court's emphasis on subjective intent as a criterion for constitutional adjudication.[24] Although that criterion is often

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the complainant has a substantive constitutional right—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant.* It may become important in court what justifications counsel for the state can *articulate* in support of its denial or non-provision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

[24] In *Washington* v. *Davis*, 426 U. S. 229, I wrote:

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." *Id.*, at 253 (concurring opinion).

regarded as a restraint on the exercise of judicial power, it may in fact provide judges with a tool for exercising power that otherwise would be confined to the legislature.[25] My principal concern with the subjective-intent standard, however, is unrelated to the quantum of power it confers upon the judiciary. It is based on the quality of that power. For in the long run constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment.

The facts of this case illustrate the ephemeral character of a constitutional standard that focuses on subjective intent. When the suit was filed in 1976, approximately 58 percent of the population of Burke County was black and approximately 42 percent was white. Because black citizens had been denied access to the political process—through means that have since been outlawed by the Voting Rights Act of 1965—and because there had been insufficient time to enable the registration of black voters to overcome the history of past injustice, the majority of registered voters in the county were white. The at-large electoral system therefore served, as a result of the presence of bloc voting, to maintain white control of the local government. Whether it would have continued to do so would have depended on a mix of at least three different factors—the continuing increase in voter registration among blacks, the continuing exodus of black residents from the county, and the extent to which racial bloc voting continued to dominate local politics.

If those elected officials in control of the political machinery had formed the judgment that these factors created a likelihood that a bloc of black voters was about to achieve sufficient strength to elect an entirely new administration, they

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[25] See Miller, If "The Devil Himself Knows Not the Mind of Man," How Possibly Can Judges Know the Motivation of Legislators?, 15 San Diego L. Rev. 1167, 1170 (1978).

might have decided to abandon the at-large system and substitute five single-member districts with the boundary lines drawn to provide a white majority in three districts and a black majority in only two. Under the Court's intent standard, such a change presumably would violate the Fourteenth Amendment. It is ironic that the remedy ordered by the District Court fits that pattern precisely.[26]

If votes continue to be cast on a racial basis, the judicial remedy virtually guarantees that whites will continue to control a majority of seats on the County Board. It is at least possible that white control of the political machinery has been frozen by judicial decree at a time when increased black voter registration might have led to a complete change of administration. Since the federal judge's intent was unquestionably benign rather than invidious—and, unlike that of state officials, is presumably not subject in any event to the Court's standard—that result has been accomplished without violating the Federal Constitution.

In the future, it is not inconceivable that the white officials who are likely to remain in power under the District Court's plan will desire to perpetuate that system and to continue to control a majority of seats on the County Board. Under this Court's standard, if some of those officials harbor such an intent for an "invidious" reason, the District Court's plan will itself become unconstitutional. It is not clear whether the invidious intent would have to be shared by all three white

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[26] The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age:

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

See *Lodge* v. *Buxton*, 639 F. 2d 1358, 1361, n. 4 (CA5 1981).

commissioners, by merely a majority of two, or by simply one if he were influential. It is not clear whether the issue would be affected by the intent of the two black commissioners, who might fear that a return to an at-large system would undermine the certainty of two black seats.[27] Of course, if the subjective intent of these officials were such as to mandate a change to a governmental structure that would permit black voters to elect an all-black commission—and if black voters did so—those black officials could not harbor an intent to maintain the system to keep whites from returning to power. In sum, as long as racial consciousness exists in Burke County, its governmental structure is subject to attack. Perhaps those more familiar than I with political maneuvering will be able to identify with greater accuracy and reliability those subjective intentions that are legitimate and those that are not. Because judges may not possess such expertise, however, I am afraid the Court is planting seeds that may produce an unexpected harvest.

The costs and the doubts associated with litigating questions of motive, which are often significant in routine trials, will be especially so in cases involving the "motives" of legislative bodies.[28] Often there will be no evidence that the gov-

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[27] In *Wright* v. *Rockefeller*, 376 U. S. 52, a group of minority voters in New York City challenged a districting scheme that placed most minority voters in one of four districts. They sought "a more even distribution of minority groups among the four congressional districts." *Id.*, at 58. Congressman Adam Clayton Powell intervened in the lawsuit and argued strenuously "that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." *Ibid.*

[28] Professor Karst has strongly criticized motivational analysis on the ground that it is inadequate to protect black citizens from unconstitutional conduct:

"[E]ven though the proof will center on the effects of what officials have done, the ultimate issue will be posed in terms of the goodness or the evil of the officials' hearts. Courts have long regarded such inquiries as unseemly, as the legislative investigation cases of the 1950's attest. The

ernmental system was *adopted* for a discriminatory reason.[29] The reform movement in municipal government, see n. 19, *supra*, or an attempt to comply with the strictures of *Reynolds* v. *Sims*, 377 U. S. 533, may account for the enactment of

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principal concern here is not that tender judicial sensitivities may be bruised, but that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect. Because an individual's behavior results from the interaction of a multitude of motives, and because racial attitudes often operate at the margin of consciousness, in any given case there almost certainly will be an opportunity for a governmental official to argue that his action was prompted by racially neutral considerations. When that argument is made, should we not expect the judge to give the official the benefit of the moral doubt? When the governmental action is the product of a group decision, will not that tendency toward generosity be heightened?" Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1164–1165 (1978) (footnote omitted).

To reject an examination into subjective intent is not to rule that the *reasons* for legislative action are irrelevant. "In my opinion, customary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is intended to achieve. The formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 856 (CA7 1972) (Stevens, J., dissenting). If a challenged law disadvantages minority citizens and its justifications—as evidenced by customary indicia of legislative intent—are insufficient to persuade a neutral observer that the law was enacted for legitimate, nondiscriminatory reasons, it is, in my opinion, invalid.

[29] As the Court of Appeals noted: "The general election laws in many jurisdictions were originally adopted at a time when Blacks had not receive[d] their franchise. No one disputes that such laws were not adopted to achieve an end, the exclusion of Black voting, that was the status quo. Other states' election laws, though adopted shortly after the enactment of the Fifteenth Amendment, are so old that whatever evidence of discriminatory intent may have existed, has long since disappeared. This case falls within that category. The focus then becomes the existence of a discriminatory purpose for the *maintenance* of such a system." 639 F. 2d, at 1363, n. 7.

countless at-large systems. In such a case the question becomes whether the system was *maintained* for a discriminatory purpose. Whose intentions control? Obviously not the voters, although they may be most responsible for the attitudes and actions of local government.[30] Assuming that it is the intentions of the "state actors" that is critical, how will their mental processes be discovered? Must a specific proposal for change be defeated? What if different motives are held by different legislators or, indeed, by a single official? Is a selfish desire to stay in office sufficient to justify a failure to change a governmental system?

The Court avoids these problems by failing to answer the very question that its standard asks. Presumably, according to the Court's analysis, the Burke County governmental structure is unconstitutional because it was maintained at some point for an invidious purpose. Yet the Court scarcely identifies the manner in which changes to a county governmental structure are made. There is no reference to any unsuccessful attempt to replace the at-large system with single-member districts. It is incongruous that subjective intent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned. Undoubtedly, the evidence relied on by the Court proves that racial prejudice has played an important role in the history of Burke County and has motivated many wrongful acts by various community leaders. But unless that evidence is sufficient to prove that *every* governmental action was motivated by a racial animus—and may be remedied by a federal court—the Court has failed under its own test to demonstrate that the governmental structure of Burke County was maintained for a discriminatory purpose.

Certainly governmental action should not be influenced by irrelevant considerations. I am not convinced, however,

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[30] Apart from the lack of "state action," the very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast.

that the Constitution affords a right—and this is the *only* right the Court finds applicable in this case—to have every official decision made without the influence of considerations that are in some way "discriminatory." Is the failure of a state legislature to ratify the Equal Rights Amendment invalid if a federal judge concludes that a majority of the legislators harbored stereotypical views of the proper role of women in society? Is the establishment of a memorial for Jews slaughtered in World War II unconstitutional if civic leaders believe that their cause is more meritorious than that of victimized Palestinian refugees? Is the failure to adopt a state holiday for Martin Luther King, Jr., invalid if it is proved that state legislators believed that he does not deserve to be commemorated? Is the refusal to provide Medicaid funding for abortions unconstitutional if officials intend to discriminate against women who would abort a fetus?[31]

A rule that would invalidate all governmental action motivated by racial, ethnic, or political considerations is too broad. Moreover, in my opinion the Court is incorrect in assuming that the intent of elected officials is invidious when they are motivated by a desire to retain control of the local political machinery. For such an intent is surely characteris-

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[31] A stereotypical reaction to particular characteristics of a disfavored group cannot justify discriminatory legislation. See, *e. g.*, *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (STEVENS, J., dissenting). It is nevertheless important to remember that the First Amendment protects an individual's right to entertain unsound and unpopular beliefs—including stereotypical beliefs about classes of persons—and to expound those beliefs publicly. There is a vast difference between rejecting an irrational belief as a justification for discriminatory legislation and concluding that neutral legislation is invalid because it was motivated by an irrational belief. Fresh air and open discussion are better cures for vicious prejudice than are secrecy and dissembling. No matter how firmly I might disagree with a legislator's motivation in casting a biased vote, I not only must respect his right to form his own opinions, cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63 (opinion of STEVENS, J.), but also would prefer a candid explanation of those opinions to a litigation-oriented silence.

tic of politicians throughout the country. In implementing that sort of purpose, dominant majorities have used a wide variety of techniques to limit the political strength of aggressive minorities. In this case the minority is defined by racial characteristics, but minority groups seeking an effective political voice can, of course, be identified in many other ways. The Hasidic Jews in Kings County, N. Y.,[32] the Puerto Ricans in Chicago,[33] the Spanish-speaking citizens in Dallas,[34] the Bohemians in Cedar Rapids,[35] the Federalists in Massachusetts,[36] the Democrats in Indiana,[37] and the Republicans in California[38] have all been disadvantaged by deliberate political maneuvers by the dominant majority. As I have stated, a device that serves no purpose other than to exclude minority groups from effective political participation is unlawful under objective standards. But if a political majority's intent to maintain control of a legitimate local government is sufficient to invalidate any electoral device that makes it more difficult for a minority group to elect candidates—regardless of the nature of the interest that gives the minority group cohesion—the Court is not just entering a "political thicket"; it is entering a vast wonderland of judicial review of political activity.

The obvious response to this suggestion is that this case involves a racial group and that governmental decisions that disadvantage such a group must be subject to special scrutiny under the Fourteenth Amendment. I therefore must

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[32] See *United Jewish Organization* v. *Carey*, 430 U. S. 144.

[33] See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830 (CA7 1972), cert. denied, 409 U. S. 893.

[34] See *White* v. *Regester*, 412 U. S. 755.

[35] See Rice, *supra* n. 19, at 78.

[36] The term "gerrymander" arose from an election district—that took the shape of a salamander—formed in Massachusetts by Governor Elbridge Gerry's Jeffersonian or Democratic-Republican Party. The phrase was coined by Gerry's opponents, the Federalists.

[37] See 39 Congressional Quarterly 758 (1981).

[38] See *id.*, at 941.

consider whether the Court's holding can legitimately be confined to political groups that are identified by racial characteristics.

IV

Governmental action that discriminates between individuals on the basis of their race is, at the very least, presumptively irrational.[39] For an individual's race is virtually always irrelevant to his right to enjoy the benefits and to share the responsibilities of citizenship in a democratic society. Persons of different races, like persons of different religious faiths and different political beliefs, are equal in the eyes of the law.

Groups of every character may associate together to achieve legitimate common goals. If they voluntarily identify themselves by a common interest in a specific issue, by a common ethnic heritage, by a common religious belief, or by their race, that characteristic assumes significance as the bond that gives the group cohesion and political strength. When referring to different kinds of political groups, this Court has consistently indicated that, to borrow JUSTICE BRENNAN's phrasing, the Equal Protection Clause does not make some groups of citizens more equal than others. See *Zobel* v. *Williams*, 457 U. S. 55, 71 (BRENNAN, J., concurring). Thus, the Court has considered challenges to discrimination based on "differences of color, race, nativity, religious opinions [or] political affiliations," *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; to redistricting plans that serve "to further racial or economic discrimination," *Whitcomb* v. *Chavis*, 403 U. S. 124, 149; to biases "tending to favor particular political interests or geographic areas." *Abate* v. *Mundt*, 403 U. S. 182, 187. Indeed, in its

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[39] Since I do not understand the Court's opinion to rely on an affirmative-action rationale, I put that entire subject to one side. If that were the rationale for the Court's holding, however, there would be no need to inquire into subjective intent.

opinion today the Court recognizes that the practical impact of the electoral system at issue applies equally to any "distinct minority, whether it be a racial, ethnic, economic, or political group." *Ante*, at 616.

A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause. Those groups are no more or no less able to pursue their interests in the political arena than are groups defined by other characteristics. Nor can it be said that racial alliances are so unrelated to political action that any electoral decision that is influenced by racial consciousness—as opposed to other forms of political consciousness—is inherently irrational. For it is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group's political interests. "The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. Thus the characteristic of the group which creates the need for protection is its political character." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting). It would be unrealistic to distinguish racial groups from other political groups on the ground that race is an irrelevant factor in the political process.

Racial consciousness and racial association are not desirable features of our political system. We all look forward to the day when race *is* an irrelevant factor in the political process. In my opinion, however, that goal will best be achieved by eliminating the vestiges of discrimination that motivate disadvantaged racial and ethnic groups to vote as identifiable units. Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a "bloc." In this respect, racial groups are

like other political groups. A permanent constitutional rule that treated them differently would, in my opinion, itself tend to perpetuate race as a feature distinct from all others; a trait that makes persons different in the eyes of the law. Such a rule would delay—rather than advance—the goal advocated by Justice Douglas:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." *Wright* v. *Rockefeller*, 376 U. S. 52, 67 (dissenting opinion).

My conviction that all minority groups are equally entitled to constitutional protection against the misuse of the majority's political power does not mean that I would abandon judicial review of such action. As I have written before, a gerrymander as grotesque as the boundaries condemned in *Gomillion* v. *Lightfoot*, 364 U. S. 339, is intolerable whether it fences out black voters, Republican voters, or Irish-Catholic voters. *Mobile* v. *Bolden*, 446 U. S., at 86 (opinion concurring in judgment). But if the standard the Court applies today extends to all types of minority groups, it is either so broad that virtually every political device is vulnerable or it is so undefined that federal judges can pick and choose almost at will among those that will be upheld and those that will be condemned.

There are valid reasons for concluding that certain minority groups—such as the black voters in Burke County, Georgia—should be given special protection from political oppression by the dominant majority. But those are reasons that justify the application of a legislative policy choice rather than a constitutional principle that cannot be confined to spe-

cial circumstances or to a temporary period in our history. Any suggestion that political groups in which black leadership predominates are in need of a permanent constitutional shield against the tactics of their political opponents underestimates the resourcefulness, the wisdom, and the demonstrated capacity of such leaders. I cannot accept the Court's constitutional holding.[40]

I respectfully dissent.

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[40] The Court does not address the statutory question whether the at-large system violates § 2 of the Voting Rights Act of 1965. Neither the District Court nor the Court of Appeals considered this issue. Since appellees have been granted full relief by the Court, I express no opinion on their statutory claims.

RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 80-1012. Argued April 21, 1982—Decided July 1, 1982*

A provision of California's alcoholic beverage laws states that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent" (designation statute). The statute apparently was enacted in response to the perceived extraterritorial effects of Oklahoma's "open wholesaling" statutes, whereby a licensed California importer who was unable to obtain distilled spirits through the distiller's established distribution system could obtain them from Oklahoma wholesalers. Prior to the designation statute's effective date, respondents sought an extraordinary writ from the California Court of Appeal to enjoin the enforcement of the statute. The court entered judgment for respondents, holding that the conduct contemplated by the statute was *per se* illegal under § 1 of the Sherman Act because it gave distillers the unfettered power to restrain competition by merely deciding who may or may not compete in handling the distillers' brands, and that thus the statute on its face was invalid pursuant to the Supremacy Clause of the Federal Constitution.

Held:

1. California's designation statute is not invalid on its face as being pre-empted by the Sherman Act. Pp. 659–662.

(a) A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of those laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed

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*Together with No. 80-1030, *Bohemian Distributing Co.* v. *Norman Williams Co. et al.;* and No. 80-1052, *Wine & Spirits Wholesalers of California* v. *Norman Williams Co. et al.*, also on certiorari to the same court.

under the rule of reason, the statute cannot be condemned in the abstract. Pp. 659–661.

(b) A distiller's invocation of California's statute would not be subject in all cases to a *per se* rule of illegality under the Sherman Act. A manufacturer's use of vertical nonprice restraints is not *per se* illegal. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36. California's designation statute merely enforces the distiller's decision to restrain intrabrand competition, preventing an unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain. The effect of the statute is simply to counteract the perceived extraterritorial effects of Oklahoma's alcoholic beverage laws, thus restoring the distiller's ability to determine which wholesalers may import its products into California. While the manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason, there is no basis for condemning the statute itself by force of the Sherman Act. Pp. 661–662.

2. The California statute is not pre-empted by § 5(a) of the Federal Alcohol Administration Act, which prohibits a distiller or wholesaler from establishing exclusive *retail* outlets. California's statute in no way requires exclusive retail outlets, and by its terms does not even require exclusive wholesale arrangements. Pp. 663–664.

3. The designation statute does not deny respondents due process of law. Respondents do not possess any constitutionally protected liberty or property interest in obtaining the distiller's permission to deal in its products, and thus the Due Process Clause is not offended by the wholesaler's inability to challenge the distiller's decisionmaking. P. 664.

4. Nor does the designation statute violate the Equal Protection Clause because it discriminates between designated and nondesignated wholesalers. The statute is rationally related to its legitimate purposes, enabling the distiller to place restraints on intrabrand competition in order to foster interbrand competition. P. 665.

108 Cal. App. 3d 348, 166 Cal. Rptr. 563, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 665.

John R. McDonough argued the cause for petitioners in Nos. 80–1030 and 80–1052. With him on the briefs for petitioner in No. 80–1052 were *Joseph A. Ball*, *Michael J.*

Maloney, *James Polish*, and *William T. Chidlaw*. *Frank Rothman*, *Christina A. Snyder*, and *George Miron* filed briefs for petitioner in No. 80–1030.

George J. Roth, Deputy Attorney General of California, argued the cause for petitioner in No. 80–1012. With him on the brief was *George Deukmejian*, Attorney General.

George G. Weickhardt argued the cause for respondents. With him on the brief was *Leland R. Selna, Jr.*†

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents in these cases obtained from the California Court of Appeal an extraordinary writ prohibiting the California Department of Alcoholic Beverage Control from enforcing an amendment to the State's liquor statutes. That court held that because the conduct contemplated by the amendment was *per se* illegal under the Sherman Act, the statute on its face was invalid pursuant to the Supremacy Clause of the United States Constitution. 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980). We conclude that the California Court of Appeal was mistaken in its application of antitrust and pre-emption principles, and we reverse its judgment.

I

Alcoholic beverages may be brought into California from outside the State for delivery or use within the State *only* if the beverages are consigned to a licensed importer. Cal. Bus. & Prof. Code Ann. § 23661 (West Supp. 1982). In 1979, the California Legislature amended the State's alcoholic beverage control laws to provide that a "licensed importer shall

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†Briefs of *amici curiae* urging reversal were filed by *Noble K. Gregory* and *Parker A. Maddux* for the Distilled Spirits Council of the United States, Inc.; by *Ralph J. Savarese* for Heublein, Inc.; and by *Macdonald Flinn*, *Douglas W. Metz*, and *Abraham Tunick* for the Wine and Spirits Wholesalers of America, Inc., et al.

Harry M. Snyder filed a brief for the Consumers Union of United States, Inc., as *amicus curiae* urging affirmance.

not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." § 23672. This challenged statute, which was to become effective on January 1, 1980, is understandably referred to as a "designation statute."[1]

California apparently enacted its designation statute in response to the effects of Oklahoma's alcoholic beverage laws. At the time, Oklahoma's statutes were understood to require any distiller or brand owner selling its products to Oklahoma wholesalers to sell to *all* wholesalers on a nondiscriminatory basis.[2] Because of the perceived extraterritorial effect of Oklahoma's "open-wholesaling" statutes, a licensed California importer who was unable to obtain distilled spirits through the distiller's established distribution system could obtain them from Oklahoma wholesalers. As a result, a distiller who desired to sell its products to Oklahoma wholesalers was unable to rely on contractual undertakings to determine which California wholesalers would handle its products. California's designation statute, therefore, sought to close off the "Oklahoma connection" to California importers not authorized by the distiller to deal in its products.[3]

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[1] Section 23672 is actually an amended version of a statute invalidated by the California Supreme Court in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), because its minimum price system constituted resale price maintenance in violation of the Sherman Act. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 100–102 (1980).

[2] Okla. Stat., Tit. 37, § 533 (1981).

[3] The Oklahoma Supreme Court, however, has recently closed off the "Oklahoma connection" by holding that the open-wholesaling statute does not apply to alcoholic beverages destined for consumption in other States. *Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Bd.*, 640 P. 2d 1351 (1982). What made the "Oklahoma connection" particularly attractive to California wholesalers was that Oklahoma required distillers to sell to Oklahoma wholesalers at the lowest price charged for its products anywhere in the United States. See Okla. Stat., Tit. 37, § 536.1 (1981). The demise of the "Oklahoma connection," however, has no bearing on our disposition of the legal issues in these cases.

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Prior to the effective date of the designation statute, respondents, liquor importers who were benefiting from the "Oklahoma connection," sought an extraordinary writ from the California Court of Appeal enjoining the enforcement of the designation statute. The Court of Appeal agreed with respondents that the designation statute on its face conflicted with § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1.[4] According to that court, the designation statute would result, in all cases, in a *per se* violation of the Sherman Act, because it "gives brand owners the unfettered power to restrain competition . . . by merely deciding who may and who may not compete." 108 Cal. App. 3d, at 356, 166 Cal. Rptr., at 569. The Court of Appeal distinguished *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), in which we held that vertical nonprice restraints are to be judged under the "rule of reason" rather than under a *per se* rule of illegality, on the ground that respondents did not attack the distiller's decision to refuse to do business with them, but "the state provided authority of the distillers to prohibit them from trading with others." 108 Cal. App. 3d, at 357, 166 Cal. Rptr., at 570.

The Supreme Court of California denied review. We granted certiorari, 454 U. S. 1080 (1981), and now reverse.

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[4] Although it did not phrase its conclusion in these terms, it is evident that the California Court of Appeal concluded that the designation statute was pre-empted by the Sherman Act. The court properly recognized that it had no jurisdiction to entertain a lawsuit brought pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15. 108 Cal. App. 3d 348, 354, n. 2, 166 Cal. Rptr. 563, 568, n. 2 (1980). Rather than seeking a private remedy against private parties, respondents in these cases sought to enjoin the enforcement of a state statute that they contend to be unconstitutional under the Supremacy Clause in its every application. Indeed, because respondents brought this suit prior to the effective date of the statute, respondents did not, and could not, challenge any vertical restraints actually employed by a distiller pursuant to the statute. Instead, respondents challenge the statute on its face without consideration of particular circumstances.

II

A

In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. See, *e. g.*, *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 110–111 (1978); *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 129–134 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 45–46 (1966).

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), we examined a statute that *required* members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation[3] of the Sher-

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[3] Under established antitrust principles, *per se* rules of illegality are appropriate only when they apply to practices "'which because of their perni-

man Act. *Id.*, at 102–103; see *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407–409 (1911).

By contrast, in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, *supra*, we rejected a facial attack upon § 9 of New York's Alcoholic Beverage Control Law,[6] which required retailers and wholesalers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the prices charged were no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. *Id.*, at 39–40. The Court found no clear repugnancy between § 9 and the federal antitrust laws:

> "The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. . . .
>
> "Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too specula-

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cious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 (1977), quoting *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). It is not surprising, therefore, that a statute which requires practices *per se* illegal under the Sherman Act may be subject to a facial challenge under the Supremacy Clause.

[6] As with the instant case, because the challenged statute had not as yet been put into effect, this Court in *Hostetter* was presented only with a facial challenge to its constitutionality.

tive in the present posture of this case . . . ." *Id.*, at 45–46 (citations omitted).

Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

It remains for us to determine whether a distiller's invocation of the designation statute would be subject in all cases to a *per se* rule of illegality under the Sherman Act.

B

We held in *GTE Sylvania* that a manufacturer's use of vertical nonprice restraints is not *per se* illegal. Because restraints on intrabrand competition may promote interbrand competition, we concluded that nonprice vertical restraints should be scrutinized under the rule of reason. 433 U. S., at 57–59. After our decision in *GTE Sylvania*, it cannot be said that every attempt by a manufacturer to restrain competition in its own products is illegal under the Sherman Act.

California's designation statute merely enforces the distiller's decision to restrain intrabrand competition. It permits the distiller to designate which wholesalers may import the distiller's products into the State. It prevents an unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain.

The designation statute does not *require* the distiller to impose vertical restraints of any kind; that is a matter for it to detebmine. The *number* of importers which may be designated by the distiller is not limited; the designated importer is not required to sell the imported brand to retailers within a specified area or from a specified location within the State.

It is irrelevant for our purposes that the distiller's ability to restrict intrabrand competition in California has the imprimatur of a state statute. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S., at 110–111.[7] The effect of the statute is simply to counteract the perceived extraterritorial effects of Oklahoma's alcoholic beverage laws, which, as once understood, operated to deprive the distiller of control over its distribution system nationwide. Thus, California's designation statute merely restored what Oklahoma had taken away: the distiller's ability to determine which wholesalers may import its products into California.

In these respects, therefore, we find these cases to be much like *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). As in *Hostetter*, upholding the validity of the designation statute will not insulate a distiller's invocation of the statute from scrutiny under the Sherman Act. The manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason.[8] There is no basis, however, for condemning the statute itself by force of the Sherman Act.[9]

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[7] This is merely another way of stating that the designation statute might have an anticompetitive effect when applied in concrete factual situations. See *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S., at 110–111. We have explained, however, that this is insufficient to declare the statute itself void on its face.

[8] It is certainly conceivable, however, that particular *conduct* pursuant to the statute might be subject to a challenge under one or more of the established *per se* rules of illegality.

[9] Because of our resolution of the pre-emption issue, it is not necessary for us to consider whether the statute may be saved from invalidation

III

Respondents seek to support the judgment of the Court of Appeal on three federal grounds not considered by the court below. None of these contentions have merit.

A

Respondents contend that the California designation statute is pre-empted by § 5(a) of the Federal Alcohol Administration Act, 49 Stat. 981, as amended, 27 U. S. C. § 205(a).[10] Section 5(a) prohibits a distiller or wholesaler from establishing exclusive *retail* outlets. See S. Rep. No. 1215, 74th Cong., 1st Sess., 6–7 (1935); H. R. Rep. No. 1542, 74th Cong., 1st Sess., 10–11 (1935). In other words, § 5(a) prohibits a distiller or wholesaler from requiring a *retailer* to buy only the distiller's or wholesaler's products to the exclusion of the products of other distillers or wholesalers. The statute does not prohibit a distiller from requiring its wholesalers to purchase the distiller's products from the distiller itself rather

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under the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or under the Twenty-first Amendment.

[10] Section 5(a) provides:

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

"(a) Exclusive outlet

"To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce." 27 U. S. C. § 205(a).

than from a third party.[11] California's statute in no way requires exclusive retail outlets. By its terms, the designation statute does not even require exclusive wholesale arrangements. One might be able to hypothesize an arrangement enforced by the designation statute that might be prohibited by § 5(a), but this is insufficient to invalidate a state statute pursuant to the Supremacy Clause. "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960).

B

Respondents contend that the designation statute denies them due process of law. According to respondents, California has established a "second tier of private licensing over the state's licensing process," and therefore procedural due process protections apply with regard to the distiller's designation decisions. Brief for Respondents 36.

We find this contention without merit. The designation statute merely enforces the distiller's decision to deny permission to a California wholesaler to deal in the distiller's products. We do not think that respondents possess any constitutionally protected liberty or property interest in obtaining the distiller's permission. Thus, the Due Process Clause is not offended by the wholesaler's inability to challenge the distiller's decisionmaking. What respondents are really challenging is the California Legislature's decision to give such a power to the distiller without establishing any criteria to govern the exercise of that power. The Due Process Clause does not authorize this Court to assess the wisdom of the California Legislature's decision. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 729–732 (1963).

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[11] See 27 CFR §§ 8.3, 8.11, 8.23 (1982).

C

Finally, respondents contend that the designation statute violates the Equal Protection Clause because it discriminates between designated and nondesignated wholesalers. There can be little doubt but that the designation statute is rationally related to the statute's legitimate purposes. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 461–470 (1981). The designation statute enables the distiller to place restraints on intrabrand competition in order to foster interbrand competition. It is not our province to determine whether or not California consumers would be better off had the California Legislature decided not to close off the "Oklahoma connection." See *Vance* v. *Bradley*, 440 U. S. 93, 109 (1979).

The judgment of the Court of Appeal is reversed, and these cases are remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, concurring in the judgment.

Under the California designation statute, each distiller is empowered to decide whether to regulate its product distribution within California by designating those importers that may sell its product. The statute contemplates a private market decision but provides a nonmarket mechanism for enforcing the decision. Hybrid restraints of this character require analysis that is different from a public regulatory scheme on the one hand, see, *e. g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117; *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35,[1] and a purely private restraint on

[1] The Court states that *Seagram & Sons* is "much like" these cases. *Ante*, at 652. Except for the fact that *Seagram & Sons* also involved a facial challenge against a state statute, the two cases are quite different. The New York statute involved in *Seagram & Sons* imposed a degree of

the other, see, *e. g.*, *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. We have twice held that hybrid price-fixing restraints are prohibited by the Sherman Act. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384; *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97. In both cases the private decision to fix prices was unsupervised by the State but made effective by state law.

The facts of *Schwegmann*, involving the Louisiana marketing practices of two out-of-state distributors of gin and whiskey, are particularly instructive. The distributors sought to control the retail prices of their products by obtaining from individual retailers a written agreement that they would comply with the minimum retail price schedules established by the distributors. These resale price maintenance agreements, which otherwise violated the Sherman Act, were rendered lawful by the Miller-Tydings Act and a Louisiana fair trade law. But a New Orleans retailer refused to sign such an agreement and sold the distributors' products at cutrate prices. The distributors responded by seeking to enjoin the retailer from selling the products at less than the minimum prices fixed by their schedules. The basis for their complaint was a Louisiana statute that condemned as unfair competition a sale at less than the price stipulated in a fair trade contract, even though the particular retailer was not a party to that contract. This Court held that the Sherman Act, as amended by the Miller-Tydings Act, precluded enforcement of the nonsigner provision.

Even though the private agreements to fix resale prices were not unlawful, *Schwegmann* held that the distributor could not place the same restraint on the market by using the

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public regulation of the market; it did not grant liquor distributors a degree of private regulatory power. The restraint on the market was, therefore, not of the hybrid character that distinguishes these cases from most antitrust cases.

state statute as a "*club*." 341 U. S., at 395 (emphasis in original). The Court's holding teaches that a state statute that facilitates the manufacturer's decision to impose a vertical restriction is not lawful simply because the Sherman Act permits the manufacturer, if it has sufficient power in the private market, to impose that same restriction without the aid of the statute. In other words, a statute that gives distributors additional power over the wholesale or retail market to impose an otherwise permissible restraint might not pass muster under the Sherman Act.[2]

The inquiry in these cases therefore cannot simply be whether the Sherman Act would have been violated had the distillers obtained the control over their California distribution systems without the aid of the designation statute. For the distillers' power to impose resale restrictions on California importers has been drastically affected first by the Oklahoma "open wholesaling" and "free export" provisions and second by the California designation statute enacted as a response to the Oklahoma laws. It may be that the amount of distiller control over California importers under the two statutes is not significantly greater than the amount that would exist if neither State intervened in the private market. Contrary to the Court's perception, *ante*, at 662,[3] however, the character of control is different. For the designation statute

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[2] Whereas *Schwegmann* best illustrates the different treatment accorded purely private restraints and hybrid restraints, perhaps *Midcal* best illustrates the different treatment accorded hybrid restraints and public regulation of the market. In *Midcal* a California statute required distributors of wine to file either fair trade contracts or price schedules with the State. All California retailers were required to sell wine at the price the distributors fixed. Relying upon *Schwegmann*, the Court invalidated the statute. Even though the State presumably could regulate the wine market by fixing retail prices itself, it could not empower private parties to undertake such regulation.

[3] "Thus, California's designation statute merely restored what Oklahoma had taken away: the distiller's ability to determine which wholesalers may import its products into California."

gives the distillers direct authority over California importers,[4] whereas in the private market the distillers must persuade Oklahoma wholesalers not to resell to California importers. It is possible that, absent the state laws, the distillers would have insufficient market power to obtain and enforce such agreements. The designation statute therefore may give the distillers more power over California importers than was taken away by the Oklahoma laws.

The validity of the designation statute obviously presents a more difficult question than was presented in *Schwegmann* and *Midcal*.[5] For in both cases the Court had the benefit of a conclusive presumption that resale price maintenance is anticompetitive. This case, however, not only involves a species of vertical nonprice restriction with respect to which there are no sure rules relating to effect on competition; it also involves a nonmarket enforcement mechanism that, according to *Schwegmann*, can make the difference between legality and illegality. The statute conceivably could create such an unacceptable and unnecessary risk of anticompetitive effect to result in its invalidation. The removal of the Oklahoma legal obstacle to the purely private imposition of vertical restrictions in the California liquor market significantly enhances this possibility.

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[4] Unless an importer is expressly designated, it may not lawfully sell the distiller's products within California.

[5] Under the Sherman Act, a manufacturer may choose the wholesalers with whom it will do business. It may also place certain reasonable restrictions on each wholesaler as a condition of doing business. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36. Subject to the exception recognized in *United States* v. *Colgate & Co.*, 250 U. S. 300, it may not, however, dictate the price at which the wholesaler must sell the product to retailers or to ultimate consumers. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. From these different rules governing the purely private decisions of manufacturers, it follows that a state statute that facilitates resale price maintenance and a state statute that facilitates other vertical restrictions are also subject to different antitrust analyses.

I agree with the Court that our price-fixing cases do not require the invalidation of the designation statute. The question on remand should be whether the statute's provision to distillers of an additional club over California importers affords distillers an unreasonable degree of unsupervised power to regulate their distribution practices that they would not otherwise enjoy under a free market. Because that question cannot be determined without a more sophisticated inquiry, I concur in the Court's judgment.

FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1348. Argued January 20, 1982—Decided July 1, 1982

After respondents had located the wreck of a 17th-century Spanish galleon off the Florida coast, Florida immediately claimed ownership of the galleon pursuant to a Florida statute. Contracts were then entered into between the Florida Division of Archives, as owner of the galleon and its cargo, and respondents, whereby respondents agreed to conduct underwater salvage operations in exchange for the Division's agreement to transfer ownership of 75% of the appraised value of all material recovered from the galleon to respondents. The contracts did not purport to transfer ownership of any property to the Division. Ultimately, many valuable artifacts of the galleon were discovered. In the meantime, in proceedings unrelated to the salvage operations, it was held in *United States* v. *Florida*, 420 U. S. 531, that, as against Florida, the United States was entitled to the lands, minerals, and other natural resources in the area in which the remains of the galleon had come to rest. Respondents thereafter filed an admiralty *in rem* action in the Federal District Court for the Southern District of Florida, naming the galleon as defendant but not the State of Florida and seeking a declaration of title to the galleon. Throughout the ensuing proceedings, in which the United States intervened and in which both the District Court and the Court of Appeals on appeal rejected the United States' claim to ownership of the galleon, some of the valuable artifacts remained in the custody of officials of the Florida Division of Archives in Tallahassee, which is located beyond the District Court's territorial jurisdiction. After the Court of Appeals' decision, respondents filed a motion in the District Court for an order commanding the United States Marshal to arrest and take custody of those artifacts and bring them within the court's jurisdiction. The District Court granted the motion and issued a warrant of arrest. Although the warrant was addressed to the state officials, the State itself filed a motion to quash the warrant, but the court denied this motion, ruling that the extraterritorial seizure was proper under Supplemental Admiralty Rule C(5), and issued an order to show cause why the State should not deliver the artifacts into the Marshal's custody. The State then argued that the Eleventh Amendment barred exercise of the District Court's jurisdiction, but the District Court rejected this argument,

holding that the State had waived the Eleventh Amendment as to any claim to the property, and that, apart from any such claim, the Eleventh Amendment did not bar the seizure of the artifacts and subsequent transfer to the Marshal's custody. On the merits, the court also rejected the State's claim to the property based on the salvage contracts with respondents. The Court of Appeals affirmed.

Held: The judgment is affirmed in part and reversed in part.

621 F. 2d 1340, affirmed in part and reversed in part.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded that:

1. The Eleventh Amendment did not bar the process issued by the District Court to secure possession of the artifacts held by the State officials. Pp. 683–699.

(a) The Eleventh Amendment, while barring an action directly against the State itself or any agency thereof, does not bar an action against a State official that is based on the theory that the official acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. The Eleventh Amendment, however, limits the relief that may be recovered in the latter kind of action; the judgment may not compel the State to use its funds to compensate the plaintiff for his injury. Pp. 683–690.

(b) Here, the process at issue is not barred by the Eleventh Amendment as a direct action against the State, because it was directed only at state officials. Neither the fact that the State elected to defend on behalf of the officials, nor the fact that the District Court purported to adjudicate the State's rights, deprives that court of jurisdiction that had been properly invoked over other parties. Pp. 691–692.

(c) The state officials named in the warrant of arrest do not have a colorable claim to possession of the artifacts, and thus may not invoke the Eleventh Amendment to block execution of the warrant. The salvage contracts, whether valid or not, provide no authority for the officials' refusal to surrender possession of the artifacts, and no statutory provision that even arguably would authorize the officials to retain the artifacts has been advanced. Pp. 692–697.

(d) The relief sought by respondents is not barred by the Eleventh Amendment but is consistent with the principles of *Edelman* v. *Jordan*, 415 U. S. 651. The warrant of arrest sought possession of specific property. It did not seek any attachment of state funds and would impose no burden on the state treasury. And respondents are not asserting a claim for damages against either the State or its officers. Pp. 697–699.

2. The proper resolution of the Eleventh Amendment issue does not require—or permit—a determination of the State's ownership of the arti-

facts, and hence the Court of Appeals improperly adjudicated the State's right to the artifacts. Pp. 699–700.

JUSTICE BRENNAN while agreeing with the opinion that the State of Florida has not established even a colorable claim to the artifacts, concluded that the Eleventh Amendment is inapplicable in this case because both respondents are Florida corporations and thus the suit was not "commenced or prosecuted against one of the United States by citizens of *another* State," as the Eleventh Amendment provides. Pp. 700–702.

JUSTICE WHITE, joined by JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concurred in the Court's judgment insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. P. 703, n.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and MARSHALL and BLACKMUN, JJ., joined. BRENNAN, J., filed an opinion conncurring in the judgment in part and dissenting in part, *post*, p. 700. WHITE, J., filed an opinion concurring in the judgment in part and dissenting in part, in which POWELL, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 702.

Susan Gamble Smathers, Assistant Attorney General of Florida, argued the cause *pro hac vice* for petitioner. With her on the briefs were *Jim Smith*, Attorney General, and *Sidney H. McKenzie III*.

David Paul Horan argued the cause and filed a brief for respondents.*

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*A brief for the State of Alabama et al. as *amici curiae* urging reversal was filed by *Rufus L. Edmisten*, Attorney General of North Carolina, *W. A. Raney, Jr.*, Special Deputy Attorney General, and *Daniel C. Oakley*, Assistant Attorney General; *Charles A. Graddick*, Attorney General of Alabama; *Wilson L. Condon*, Attorney General of Alaska; *Robert C. Hight, Jack E. Rump; Tany S. Hong*, Attorney General of Hawaii; *Tyrone C. Fahner*, Attorney General of Illinois; *William J. Guste, Jr.*, Attorney General of Louisiana; *Stephen H. Sachs*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *William A. Allain*, Attorney General of Mississippi; *Daniel R. McLeod*, Attorney General of South Carolina; *Mark White*, Attorney General of Texas; *Donald M. Bouton*, Acting Attorney General of the Virgin Islands; *Aviata F. Faalevao*, Attorney General of American Samoa; and *Jack Avery*, Attorney General of the Government of Guam.

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined.

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a 17th-century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The question presented is whether the Eleventh Amendment immunized the property from the federal court's process.

I

Battered by a tropical hurricane, the *Nuestra Senora de Atocha*, a Spanish galleon carrying a cargo of New World treasure to King Philip IV of Spain, sank in 1622, 40 nautical miles west of what is today Key West, Fla. After years of searching the ocean floor and studying Spanish archives in Seville, respondent Treasure Salvors[1] located the wreck site in the spring of 1971 near shoals known as the "Quicksands," nine and one-half nautical miles west of the Marquesas Keys.[2]

The State of Florida immediately claimed that the *Atocha* belonged to the State. The State claimed ownership pursuant to Fla. Stat. § 267.061(1)(b) (1974), which then provided:[3]

> "It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value *which have been abandoned on state-owned lands or*

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[1] The two respondents in this action, Treasure Salvors, Inc., and Armada Research Corp., were organized by the same parties. Throughout these proceedings they have been treated as a single entity referred to as "Treasure Salvors."

[2] The story of the *Atocha* and its discovery is recounted in Lyon, The Trouble with Treasure, 149 National Geographic 787 (1976).

[3] The statute since has been amended in a manner not relevant to this case.

> *state-owned sovereignty submerged lands* shall belong to the state with the title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection." (Emphasis added.)

Officials of the Florida Division of Archives threatened to arrest Mel Fisher, president of Treasure Salvors, and to confiscate the boats and equipment of Treasure Salvors if it commenced salvage operations on the *Atocha* without a salvage contract from the State. Under this threat of arrest, Treasure Salvors executed a one-year contract with the State that permitted it to conduct underwater salvage operations on the vessel.[4] Similar contracts were executed during each of the three succeeding years.

Each of the contracts was expressly predicated on the assumption that the *Atocha* was the property of the State of Florida because it had been found on submerged lands within the boundaries of the State. The contracts permitted Treasure Salvors "to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida." App. 20. After describing in metes and bounds an area claimed to be "lying and being in Monroe County, Florida," the contract provided that the shipwreck site "is to be worked for the purpose of salvaging abandoned vessels or the remains thereof including, but not limited to, relics, treasure trove and other materials related thereto and located thereupon and therein, *which abandoned material is the property of the State of Florida.*" *Id.*, at 22 (emphasis added). The contract further provided:

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[4] The District Court found that the contract was entered as a result of the "coercive acts of the Division of Archives in threatening arrest and confiscation." *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 522 (SD Fla. 1978). The State admits that if Treasure Salvors had salvaged without a contract arrests would have been made. Tr. of Oral Arg. 9.

"In payment for the Salvager's satisfactory performance and compliance with this Agreement, the Division will award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered hereunder, which payment shall be made at the time division of such material is made by the parties hereto. Said payment may be made in either recovered material or fair market value, or in a combination of both, at the option of the Division's director." *Id.*, at 32–33.

The bargain, in brief, was between the Division of Archives, as the owner of the *Atocha* and its cargo, and Treasure Salvors, as a contractor that agreed to perform services for the Division. Treasure Salvors agreed to pay the Division $1,200 each year, to post a performance bond, and to perform its work in a specified manner, all in exchange for the Division's agreement to transfer ownership of 75% of the proceeds of the operation—or its equivalent—to Treasure Salvors. The contracts did not purport to transfer ownership of any property to the Division of Archives; the State's claim to the property was predicated entirely on a provision of state law.

In its attempt to salvage the lost treasure of the *Atocha*, Treasure Salvors was immensely successful. The salvager held some of the artifacts at its headquarters in Key West, while state officials held the remainder at the Division of Archives in Tallahassee. All of the property was deemed to belong to the State, however, subject to a subsequent distribution in which Treasure Salvors would receive its 75% contractual share.

In proceedings unrelated to the salvage operation, the United States and the State of Florida were engaged in litigation to determine the seaward boundary of submerged lands in the Atlantic Ocean and the Gulf of Mexico in which the State had rights to natural resources. In February 1974, a Special Master filed a Report that defined Florida's

boundary landward of the site of the wreck of the *Atocha*. The State's objections to the Report were overruled. *United States* v. *Florida*, 420 U. S. 531 (1975).[5] A final decree was entered providing that, as against the State of Florida, the United States was entitled to the lands, minerals, and other natural resources in the area in which the remains of the *Atocha* had come to rest. *United States* v. *Florida*, 425 U. S. 791 (1976).[6]

After this Court overruled Florida's exceptions to the Special Master's Report, Treasure Salvors filed a complaint in the Federal District Court for the Southern District of Florida demanding that "Plaintiffs be put into possession of the ATOCHA and other property and that all other persons, firms, and corporations or government agencies be enjoined from interfering with Plaintiffs title, possession, and property," and that "Plaintiffs title be confirmed against all claimants and all the world." App. 9. The complaint invoked the court's admiralty and maritime jurisdiction pursuant to Federal Rule of Civil Procedure 9(h) and, as an admiralty action *in rem*, named the *Atocha* as defendant. Items recovered from the *Atocha* in Treasure Salvors' possession were duly served with process and brought into the custody of the court. Most of the remainder of the wreck and its valuable cargo lay buried under sand in international waters; state officials held other artifacts in Tallahassee. No attempt was made at this time to serve the artifacts in Tallahassee.

The United States intervened in the action as a party-defendant and filed a counterclaim seeking a declaratory judgment that the United States was the proper owner of the

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[5] In its exceptions to the Special Master's Report, the State contended that the Master should have recognized that the boundaries of the State extended to the boundaries defined in the State's 1868 Constitution, rather than to the limits specified in the Submerged Lands Act of 1953. See 420 U. S., at 532. This Court considered that exception and held that the Master had properly rejected the State's argument. *Id.*, at 533.

[6] This area is on the Continental Shelf of the United States, in international waters. *Treasure Salvors, Inc.* v. *Abandoned Sailing Vessel*, 408 F. Supp. 907, 909 (SD Fla. 1976).

Atocha.[7] The District Court rejected the Government's claim of ownership and held that "possession and title are rightfully conferred upon the finder of the res derelictae." *Treasure Salvors, Inc.* v. *Abandoned Sailing Vessel*, 408 F. Supp. 907, 911 (1976). The court entered judgment in favor of Treasure Salvors "against the United States of America and all other claimants." Record 270.[8]

The Court of Appeals affirmed the judgment of the District Court as against the United States, but modified its decree. *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (CA5 1978). The United States had argued that the District Court lacked *in rem* jurisdiction to determine rights of the parties to that portion of the *Atocha* lying beyond the territorial jurisdiction of the court. The Court of Appeals agreed that the District Court lacked *in rem* jurisdiction over those portions of the res located outside the district; the court noted that for a court to exercise admiralty *in rem* jurisdiction the res itself must be brought within the district and seized by the court. *Id.*, at 333. The appellate court held, however, that by intervening in the action and stipulating to the court's admiralty jurisdiction the Government had "waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the court's jurisdiction to determine

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[7] The United States asserted a right of ownership under several federal statutes and the common-law doctrine of "sovereign prerogative." The State of Florida did not intervene at this time. It had notice of the litigation, however, and both assisted the United States in the lawsuit and entered into preliminary negotiations with the United States Department of the Interior regarding disposition of the *Atocha*'s treasure in the event the Federal Government prevailed. See *Florida* v. *Treasure Salvors, Inc.*, 621 F. 2d 1340, 1343–1344 (CA5 1980).

[8] The court explained: "General principles of maritime and international law dictate that an abandonment constitutes a repudiation of ownership, and that a party taking possession under salvage operations may be considered a finder under the doctrine of 'animus revertendi,' i. e., the owner has no intention of returning. Ownership in the vessel would then vest in the finder by operation of law." 408 F. Supp., at 909 (citation omitted).

its interest in the extraterritorial portion of the vessel." *Id.*, at 335. The court concluded that jurisdiction thus existed to determine claims of the United States to those portions of the *Atocha* lying beyond the territorial jurisdiction of the court, but not claims of other parties who had not appeared and submitted to the jurisdiction of the court.[9] On the merits, the Court of Appeals rejected the statutory and common-law claims advanced by the United States.

Throughout these proceedings, valuable artifacts of the *Atocha* remained in the custody of officials of the Florida Division of Archives in Tallahassee. Since Tallahassee is located in the Northern District of Florida, these artifacts also were located beyond the territorial jurisdiction of the District Court. Immediately following the decision of the Court of Appeals, Treasure Salvors filed a motion in District Court for an order commanding the United States Marshal to arrest and take custody of these artifacts and bring them within the jurisdiction of the court. Record 318. That motion forms the basis of the present controversy.

The District Court issued a warrant to arrest.[10] Although

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[9] The court stated:

"[T]he district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation." 569 F. 2d, at 335–336 (footnote omitted).

[10] The warrant provided:

"WARRANT FOR ARREST IN REM

"THE PRESIDENT OF THE UNITED STATES OF AMERICA

"TO: THE MARSHAL OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

"GREETING:

"WHEREAS, on the 18th day of July, 1975, Treasure Salvors, Inc., a corporation and Armada Research Corporation, a corporation, filed a Com-

the warrant was addressed to two officers of the Division of Archives, the State itself filed a motion to quash the warrant, contending that the State of Florida was not a party in the case and had not waived the requirement that the court could exercise *in rem* jurisdiction only over that portion of the res within the territorial boundaries of the court. App. 43.[11] The State also sought and obtained an emergency stay from the Court of Appeals. Record 368. The District Court denied the motion to quash, ruling that the extraterritorial seizure was proper under Supplemental Admiralty Rule C(5).

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plaint under Rule 9(h) against the Unidentified Wrecked and Abandoned Sailing Vessel, her tackle, armament, apparel and cargo located with 2500 yards of a at coordinates 24° 31.5′ North Latitude and 82° 20′ West Longitude, said sailing vessel believed to be the NUESTRA SENORA DE ATOCHA for the reasons in said Complaint, and

"WHEREAS, in November of 1975 Notice of said claim was published in a newspaper of general circulation within the District, and

"WHEREAS, the State of Florida nor any of its agencies, agents, or employees, did appear in this cause to defend or prosecute any claim that they might have to any portions of said vessel that were in their possession, custody, care or control.

"NOW, THEREFORE, you are hereby commanded to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." App. 40–42.

[11] The State also asserted:

"A contract was entered into between Armada Research Corporation and the State of Florida on December 3, 1974 and was for a good and valid consideration. The contract alone determined the rights and obligations of the contracting parties and was in no way affected by [the decision of this Court in] United States v. Florida. This contract was fully executed and performed prior to the United States v. Florida." *Id.*, at 44.

In response to the State's assertion that the contracts determined the rights of the contracting parties, Treasure Salvors filed a supplemental complaint in federal court. Record 369. The complaint sought a declaratory judgment that the contracts between Treasure Salvors and the State were void.

App. 51.[12] Since the Court of Appeals had stayed execution of the warrant, the District Court issued an order to show cause why the State should not deliver the artifacts into the custody of the Marshal.[13]

In response to the order to show cause, the State raised several substantive issues in the District Court. Record 425. Contending that a supplemental complaint filed by Treasure Salvors, see n. 11, *supra*, demonstrated that the State of Florida was a defendant in the action, the State argued that the Eleventh Amendment barred an exercise of the court's jurisdiction. The State also repeated its arguments that the court lacked *in rem* jurisdiction in admiralty because the res was not present within the district and that the decision of this Court in *United States* v. *Florida* did not affect the State's "contractual" right to a share of the artifacts. Record 429–439.

The District Court rejected these arguments in a comprehensive memorandum. *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (1978). The court first held that, just as all claims of the

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[12] The court also held that, in light of the State's claim that it had a contractual right to 25% of the res, "the State of Florida has waived the general requirement that the *res* be within the territorial jurisdiction of the court and, further, has consented to the court's jurisdiction over its interest in any portions of the vessel." App. 59.

[13] The Court of Appeals then dissolved the emergency stay. *Id.*, at 65. The court ordered: "The United States Marshal may execute the warrant of arrest and upon doing so shall forthwith deliver custody of all of the items in question to a custodian who will take possession of them *in situ* and shall place them under lock or seal at their present location and hold them secure." *Id.*, at 68. The appellate court denied a motion for reconsideration that had contended that the District Court lacked jurisdiction. "The question of the jurisdiction of the District Court for the Southern District of Florida is for that court to determine in the first instance on the basis of such record as may be developed in that court." *Id.*, at 69. To expedite the litigation, Treasure Salvors agreed to permit the State to serve as substitute custodian. The warrant was executed and, with the State serving as custodian, the artifacts came into the control of the United States Marshal.

United States had been resolved in the earlier proceeding, all claims of the State were barred because the State of Florida had acted in privity with the United States in that proceeding. *Id.*, at 512; see n. 7, *supra*. Alternatively, the court held that the extraterritorial arrest of the salvaged articles was proper under Supplemental Admiralty Rule C(5) and that the court thus had obtained jurisdiction *in rem* to resolve ownership of the res. 459 F. Supp., at 518. On the merits, the court rejected on multiple grounds the State's contractual claim to the property. *Id.*, at 521.

At the conclusion of its memorandum opinion, the court rejected the State's Eleventh Amendment defense. *Id.*, at 526. The court first held that the State necessarily had waived the Amendment as to any claim to the property that it asserted in federal court. *Ibid.* The court then held that, apart from any claim advanced by the State, the Eleventh Amendment did not bar the seizure of the artifacts and subsequent transfer to the custody of the Marshal.[14]

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[14] The court asserted several grounds in support of this decision. Essentially, the court held: "There is no Eleventh Amendment bar to the mere arrest of articles of salvage unless the state is the owner. If the state is not the owner, the court may proceed." 459 F. Supp., at 527. The court concluded that ownership is thus a "jurisdictional" fact and, citing *United States* v. *Mine Workers*, 330 U. S. 258, noted that "[i]t is axiomatic that the federal courts have jurisdiction to determine jurisdiction." 549 F. Supp., at 527. The court held that no Eleventh Amendment bar existed because "[t]his Court finds as fact that the Division of Archives is not and never was the rightful owner of the articles of salvage from the ship *Atocha* that were seized by the ancillary warrant of arrest and which have been improperly removed and held by the Division of Archives; that the Division of Archives is not the owner of any right or interest in such property based upon the purported and invalid contract with Treasure Salvors; and that the Division of Archives was wrongfully withholding a portion of the *res* of the *Atocha* over which this Court was properly exercising *in rem* jurisdiction." *Ibid.*

On the basis of its memorandum, the court

"ORDERED and ADJUDGED and DECREED that Treasure Salvors, Inc. and Armada Research Corp. have full right and title to articles arrested and that they are entitled to possession and that the United States

The Court of Appeals affirmed. 621 F. 2d 1340 (CA5 1980). As had the District Court, see n. 14, *supra*, the court concluded that the Eleventh Amendment did not prevent the court from resolving the controverted claims to ownership of the res, since resolution of that dispute was essential to a determination of whether the Eleventh Amendment in fact barred an exercise of jurisdiction by the federal court. 621 F. 2d, at 1345.[15] The court then held that the extraterritorial process issued pursuant to Supplemental Admiralty Rule C(5) was proper, *id.*, at 1346, and that the State did not have a valid claim to the property. *Id.*, at 1349.[16]

The Florida Department of State filed a petition for writ of certiorari, presenting only one question: "Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state." Pet. for Cert. I. We granted the petition. 451 U. S. 982. We hold that the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent.

Marshal, who has possession and control of such articles, shall deliver them to Treasure Salvors, Inc. and Armada Research Corp." App. 85.

Pursuant to this order, Treasure Salvors eventually received—under certain restrictions—the artifacts that the State held as custodian for the court. Record 554.

[15] The court noted that this result was particularly compelling in admiralty *in rem* actions. The court reasoned that, since federal courts have exclusive jurisdiction over such actions, if the mere assertion of ownership by a State were sufficient to invoke the Amendment, petitioners such as Treasure Salvors would be stranded without a forum in which to litigate their claim. 621 F. 2d, at 1346, n. 19.

[16] The court neither affirmed nor reversed the District Court's holding that Florida was in privity with the United States and therefore bound by the earlier decision of the Court of Appeals. *Id.*, at 1344, n. 17.

II

Stripped of its procedural complexities and factual glamor, this case presents a narrow legal question. The District Court attempted to seize artifacts held by state officials and to bring the property within its admiralty *in rem* jurisdiction. Although the seizure in this case was extraterritorial, and thus involved an application of Supplemental Admiralty Rule C(5), the question presented for our decision would not be any different if the State merely resisted an attachment of property located within the district.

In response to the warrant of arrest, the State contended that it was immune from the federal process under the Eleventh Amendment.[17] It argued that the contracts executed with Treasure Salvors "alone determined the rights and obligations of the contracting parties . . . ." App. 44. The difficult question presented in this case is whether a federal court exercising admiralty *in rem* jurisdiction may seize property held by state officials under a claim that the property belongs to the State.[18]

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[17] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the Amendment does not literally apply to actions brought against a State by its own citizens, the Amendment long has been held to govern such actions. *Hans* v. *Louisiana*, 134 U. S. 1. See *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 280; *Edelman* v. *Jordan*, 415 U. S. 651, 662. Nor does the Amendment literally apply to proceedings in admiralty. Again, however, the Court has found it to govern certain admiralty actions. See *In re New York*, 256 U. S. 490, 500.

[18] The fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue; "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised at any point of the proceedings. *Edelman* v. *Jordan*, *supra*, at 678; see *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 467 ("The Eleventh Amendment declares a policy

A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity. *Alabama* v. *Pugh*, 438 U. S. 781. If the State is named directly in the complaint and has not consented to the suit, it must be dismissed from the action. *Id.*, at 782.[19] Of course, the fact that the State should have been dismissed from an action that has proceeded to judgment does not mean that the judgment may not stand against other parties who are not immune from suit.[20]

The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government. In *Ex parte Young*, 209 U. S. 123, the Court held that an action brought against a state official to enjoin the enforcement of an unconstitutional state statute is not a suit against a State barred by the Eleventh Amendment. In response to the argument that the official in such a case could act only as an officer of the State and that the suit therefore could be characterized only as an action against the State itself, the Court explained:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce

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and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court").

[19] But see *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts"); see also *Hutto* v. *Finney*, 437 U. S. 678; *Maher* v. *Gagne*, 448 U. S. 122.

[20] Thus, in *Alabama* v. *Pugh*, our holding that the State of Alabama and the Alabama Board of Corrections should have been dismissed as parties did not affect the substance of the relief granted against a number of Alabama officials responsible for the administration of its prison system.

an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce is a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159–160.

There is a well-recognized irony in *Ex parte Young;* unconstitutional conduct by a state officer may be "state action" for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh. Nevertheless, the rule of *Ex parte Young* is one of the cornerstones of the Court's Eleventh Amendment jurisprudence. See *Edelman* v. *Jordan*, 415 U. S. 651, 663–664; *Quern* v. *Jordan*, 440 U. S. 332, 337.

In *Tindal* v. *Wesley*, 167 U. S. 204, the Court applied the analysis later enshrined in *Ex parte Young* in a suit to recover property wrongfully held by state officials on behalf of the State of South Carolina. In *Tindal*, the plaintiff claimed title and a right of possession to certain real property held by a state official; the defendant answered that the property belonged to the State and asserted the Eleventh Amendment as a defense to the action. The Court described the issue presented for decision:

"So that the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and con-

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trol, is to be deemed an action against the State within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the State, and assert title and right of possession in the State. Can the court, in such an action, decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?" 167 U. S., at 212.

Relying extensively on the earlier decision in *United States* v. *Lee*, 106 U. S. 196,[21] the Court in *Tindal* held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and as-

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[21] In *Lee*, the plaintiff brought an action in ejectment in federal court to recover the Virginia estate of General Robert E. Lee. The estate had been acquired by the United States for nonpayment of taxes, although the taxes in fact had been tendered by a third party. Once in possession, the Government had established a federal military installation and a national cemetery on the property. The plaintiff brought suit against the governmental custodians of the estate, who pleaded the sovereign immunity of the United States as a defense. This Court upheld a trial court judgment in favor of the plaintiff, on the ground that the defendants' possession of the estate was unlawful. The Court held that a suit against the federal officers under such circumstances was not a suit against the sovereign. Although *Lee* involved the sovereign immunity of the United States, the Court in *Tindal* stated that "it cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States." 167 U. S., at 213.

serts that he is lawfully in possession on its behalf." 167 U. S., at 221. The Court refused to accept the proposition that the "doors of the courts of justice are . . . closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the State." *Id.*, at 222. In explaining the extent of its decision, the Court stated:

> "[T]he Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without the authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured . . . be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State." *Ibid.*[22]

In holding that the action was not barred by the Eleventh Amendment, the Court in *Tindal* emphasized that any judgment awarding possession to the plaintiff would not subse-

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[22] The Court continued:

"Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 236, 241, the citizen is remediless so long as the State, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated." *Id.*, at 222.

quently bind the State. "It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff," *id.*, at 223; "it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute." *Ibid.*

The rule of law set forth in *United States* v. *Lee* and *Tindal* v. *Wesley* was clarified in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. In that case the plaintiff brought suit against a Government official to compel specific performance of a contract.[23] The plaintiff theorized that by withholding delivery of property as required by the contract the agent had exceeded his official authority and could be sued in federal court. The Court in *Larson* stated that "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in a particular case, are constitutionally void." *Id.*, at 701–702. The Court held that the fact that an officer wrongfully withholds property belonging to another does not necessarily establish that he is acting beyond the permissible scope of his official capacity.[24] Since

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[23] The plaintiff had contracted to purchase surplus coal from the War Assets Administration; the Administrator of that agency had withheld delivery and entered a new contract to sell the coal on the ground that the plaintiff had failed to perform a condition precedent to delivery. The plaintiff contended that title to the coal had passed at the time the contract was made, so that the Administrator was wrongfully withholding property that belonged to him.

[24] The Court stated:

"The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet [the requirement that the action to be restrained or directed is not action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that

in *Larson* it was not alleged that the Government official had exceeded his statutory authority—indeed, the plaintiff had affirmatively contended that the officer had authority to bind the Government on the contract at issue[25]—or that the exercise of such authority was unconstitutional,[26] the Court held that the action was barred by sovereign immunity.

These cases make clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. In such an action, however, the Amendment places a limit on the relief that may be obtained by the plaintiff. If the action is allowed to proceed against the officer only because he acted without proper authority, the judgment may not compel the State to use its funds to compensate the plaintiff for the injury. In *Edelman* v. *Jordan*, 415 U. S. 651, the Court made clear that "a suit by pri-

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the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented." 337 U. S., at 693.

The Court explicitly rejected the argument that "the commission of a tort cannot be authorized by the sovereign." *Ibid.*; see also *id.*, at 695.

[25] The Court found that the Administrator "was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment." *Id.*, at 692. "A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." *Ibid.* The Court also noted that the "very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal." *Id.*, at 703.

[26] The Court held that there could be no claim that the Administrator's actions constituted an unconstitutional taking of property without compensation because the plaintiff had a remedy, in a suit for breach of contract, in the Court of Claims. *Id.*, at 703, n. 27.

vate parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*, at 663. See *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459; *Quern* v. *Jordan*, 440 U. S., at 337.[27] In determining the relief that may be granted if a state officer is found to have acted without valid statutory authority, the question is whether the relief "constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury.'" *Quern* v. *Jordan*, *supra*, at 346–347.

III

In light of the principles set forth above, the proper resolution of the Eleventh Amendment issue raised in this case requires an answer to each of three specific questions: (a) Is this action asserted against officials of the State or is it an action brought directly against the State of Florida itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by Treasure Salvors permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

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[27] This principle is not absolute. As noted, n. 19, *supra*, Congress may authorize a suit against a State—pursuant to § 5 of the Fourteenth Amendment—that would entail the payment of public funds from the state treasury. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445; *Hutto* v. *Finney*, 437 U. S. 678. Moreover, a prospective decree that has an "ancillary effect" on the state treasury "is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman* v. *Jordan*, 415 U. S., at 668; see also *Milliken* v. *Bradley*, 433 U. S. 267, 288. Finally, "[w]hile it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury . . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer* v. *Rhodes*, 416 U. S. 232, 238.

A

Treasure Salvors filed this admiralty *in rem* action in federal court, seeking a declaration of title to an abandoned sailing vessel that had been discovered on the ocean floor. The State of Florida was not named as a party and was not compelled to appear. Some of the property at issue, however, was held by officials of the Florida Division of Archives. Asserting that it was the rightful owner of the property, Treasure Salvors filed a motion "for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiffs' vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control." App. 11.[28] As requested, the District Court issued a warrant of arrest commanding the Marshal of the United States for the Southern District of Florida "to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." *Id.*, at 41–42. It is this process from which the State contends it is immune under the Eleventh Amendment.[29]

It is clear that the process at issue was directed only at state officials and not at the State itself or any agency of the State.[30] Neither the fact that the State elected to defend on

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[28] The motion identified L. Ross Morrell as the Director of the Division of Archives and James McBeth as the Bureau Chief of the Historical Museum of the Division of Archives. App. 15.

[29] As noted, the State immediately filed a motion to quash the warrant. *Id.*, at 43. Although that effort failed, the State asserted an Eleventh Amendment defense in its attempt to defeat a transfer of the property—and thus ultimate execution of the warrant—to Treasure Salvors. Record 422.

[30] As noted, n. 11, *supra*, Treasure Salvors filed a supplemental complaint seeking a declaratory judgment that its contracts with the State

behalf of its agents, nor the fact that the District Court purported to adjudicate the rights of the State, deprived the federal court of jurisdiction that had been properly invoked over other parties. See *Alabama* v. *Pugh*, 438 U. S. 781; n. 20, *supra*. The process thus is not barred by the Eleventh Amendment as a direct action against the State.

B

The second question that must be considered is whether the state officials named in the warrant acted without legitimate authority in withholding the property at issue. In Treasure Salvors' first response to the State's Eleventh Amendment argument, it contended:

> "If the Division of Archives were allowed to retain this property, its officials would be acting outside the scope of their authority under state law since the state statute under which they claim [does] not apply outside the states territory. The rationale of *Home Tel. & Tel. Co.* v. *Los Angeles*, [227 U. S. 278 (1913)] prohibits this result since to allow such action would be to deprive Treasure Salvors of their property without due process in viola-

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were void. This action might be characterized as an action against the State itself. The District Court emphasized, however, that "the warrant was *not* issued in response to Treasure Salvors' Supplemental Complaint for Declaratory Judgment and Other Relief which was filed April 17, 1978." 459 F. Supp., at 526 (emphasis in original).

The order to show cause entered by the District Court was addressed directly to the State of Florida. See App. 63. That order was issued, however, only after the State itself had filed a motion to quash the warrant. *Id.*, at 43 ("COMES NOW, the State of Florida, by and through the undersigned counsel, and moves this Court to set aside and quash the warrant for arrest in rem issued against the State of Florida at the request of Plaintiffs herein . . ."). The order to show cause did not alter the fact that the process resisted by the State on Eleventh Amendment grounds was directed only at state officials.

tion of the Fourteenth Amendment to the Constitution of the United States." Record 472.

Thus from the outset, Treasure Salvors has asserted that state officials do not have valid statutory authority to hold the property at issue.

In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, this Court held that the actions of a federal official in withholding the delivery of goods pursuant to his interpretation of a disputed provision of a contract constituted at most a tortious deprivation of property. The proper remedy for the plaintiff was not an action in district court to compel delivery, but a suit for breach of contract in the Court of Claims. Actions of the Government official pursuant to legitimate contractual authority were neither ultra vires nor unconstitutional.

From the outset of the proceedings at issue here, the State of Florida has advanced the contracts that it executed with Treasure Salvors as a defense to the federal court's attempt to secure possession of the artifacts held by the named state officials. It is noteworthy, however, that the State has never argued that the contracts conferred upon the State a right of ownership in the artifacts; the contracts simply "determined the rights and obligations of the contracting parties . . . ." App. 44. The State has argued that the contracts are valid and "in no way affected" by the decision of this Court in *United States* v. *Florida*, 420 U. S. 531. App. 44.[31]

We are not called upon in this case to determine "the rights and obligations" of two parties to a contract. The issue pre-

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[31] In this Court the State has asserted that the issue on the merits involves a determination of the validity of the contracts. See *post*, at 712, n. 9. But the State has not identified any language in the contracts that provides even a colorable basis for a claim that the State has an ownership interest in the artifacts.

sented is whether state officials had authority to refuse to surrender possession of the artifacts to the District Court. The salvage contracts are not relevant to that question unless they provide a basis upon which the officials may claim a right to withhold possession of the property. Unless the contracts determine rights of the parties to the property, they are collateral to the issue before us.

It is apparent that the State does not have even a colorable claim to the artifacts pursuant to these contracts. The contracts did not purport to transfer ownership of any artifacts to the State; they permitted Treasure Salvors "to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida," *id.*, at 20–21, "for the purpose of salvaging abandoned vessels or the remains thereof . . . *which abandoned material is the property of the State of Florida.*" *Id.*, at 22 (emphasis added). The contracts provided for the performance of services on property that was believed to belong *in toto* to the State of Florida, in exchange for which the State agreed to "award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered . . . ." *Id.*, at 33. The State did not "yield" its claim to 75% of the artifacts in order to receive an undisputed right to the remaining 25%; the State agreed to pay Treasure Salvors the equivalent of 75% of the proceeds in compensation for the difficult and expensive work undertaken by Treasure Salvors in retrieving from the floor of the ocean property that was believed to belong to the State.

The salvage contracts might well provide a basis for a claim to the property by Treasure Salvors; for the contracts did purport to transfer a portion of the artifacts *from* the State to Treasure Salvors in compensation for the latter's services. Treasure Salvors does claim a right to ownership, but based entirely on the fact that it was the finder of abandoned property and therefore entitled to the property independently of

the contracts.[32] Thus neither party's rights to ownership is affected in any way by the salvage contracts; whether the contracts are valid or not, they provide no authority for the refusal of state officials to surrender possession of the artifacts.

The authority of state officials to claim the artifacts was derived solely from Fla. Stat. § 267.061(1)(b) (1974), which provided:

> "It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value *which have been abandoned on state-owned lands or state-owned sovereignty submerged lands* shall belong to the state with the title thereto vested in the division of archives, history and records management of the department of state for the purpose of administration and protection." (Emphasis added.)

This Court has determined, however, that the *Atocha* was not found on "state-owned sovereignty submerged lands." Rather, it was discovered on the Outer Continental Shelf of the United States, beneath international waters.[33]

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[32] This case is thus unlike *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, in which the plaintiff asserted a right to the property pursuant to the very contract that it contended the Government official had breached without authority. Treasure Salvors claims ownership of the res on the ground that the property was abandoned by the former owner, and discovered by Treasure Salvors, on the Continental Shelf of the United States in international waters. See n. 8, *supra*.

[33] In this Court the State has advanced the argument that its boundaries for purposes of rightful ownership of sunken ships extend further than its boundaries for purposes of ownership of mineral resources. This argument was not raised in the petition for certiorari, is foreclosed by our prior determination of the State's boundaries, see n. 5, *supra*, and is refuted by the State's own conduct in this case. The State has never attempted to claim ownership of the property that Treasure Salvors has continued to recover since the expiration of the contracts. Given the State's vigorous de-

No statutory provision has been advanced that even arguably would authorize officials of the Division of Archives to retain the property at issue. Throughout this litigation, the State has relied solely on the contracts that it executed with Treasure Salvors as a defense to the federal court's process; those contracts were predicated entirely on a state statute that on its face is inapplicable in this case.[34] Actions of state officials in holding property on the assumption that it was found on state land and *for that reason* belongs to the State—when it is undisputed that the property was *not* found on state land—is beyond the authority of any reasonable reading of any statute that has been cited to us by the State.[35]

As recognized in *Larson*, "action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the

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fense of the relatively few artifacts at issue in this case, it is difficult to imagine that the State idly would permit Treasure Salvors to pirate other treasure that rightfully belonged to the State.

[34] The fact that the contracts were executed on the basis of a mistaken understanding concerning the ownership of the *Atocha* cannot, of course, provide Florida with a colorable claim of ownership. For if the mistake had not occurred, it would have been apparent from the outset that Treasure Salvors had no reason to enter into a contract with Florida or any other stranger to the transaction. The State of Florida has never contended that it would benefit from a reformation of the contracts; Treasure Salvors' position does not depend on any change in the terms of the contracts. The Eleventh Amendment analysis in this case does not require any consideration of the doctrine of mistake.

[35] Although the State in this case relies only on the disputed contracts—and not on any statutory provision—we note that Fla. Stat. § 267.061(2)(a) (1981) provides generally that it is the responsibility of the Division of Archives to "[l]ocate, acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof." Surely this section does not authorize state officials, however, to seize and hold historical artifacts at will wherever they are found.

plaintiff's property)" that is beyond the officer's statutory authority is not action of the sovereign, 337 U. S., at 701; a suit for specific relief against the officer is not barred by the Eleventh Amendment. This conclusion follows inevitably from *Ex parte Young*. If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity.

If a statute of the State of Florida were to authorize state officials to hold artifacts in circumstances such as those presented in this case, a substantial constitutional question would be presented. In essence, the State would have authorized state officials to retain property regardless of the manner in which it was acquired, with no duty to provide compensation for a public taking. If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign.

Thus, since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest. Of course, the warrant itself merely secures possession of the property; its execution does not finally adjudicate the State's right to the artifacts. See *Tindal* v. *Wesley*, 167 U. S., at 223. In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res.

C

Finally, it is clear that the relief sought in this case is consistent with the principles of *Edelman* v. *Jordan*, 415 U. S.

651. The arrest warrant sought possession of specific property. It did not seek any attachment of state funds and would impose no burden on the state treasury.

This case is quite different from *In re New York (I)*, 256 U. S. 490, and *In re New York (II)*, 256 U. S. 503, relied on by the State. In *In re New York (I)*, the plaintiff brought an action in federal court to recover damages caused by canal boats chartered by the State of New York. Pursuant to admiralty practice, the action was brought *in rem* against the vessels themselves. The owner of the vessels answered the complaint, contending that the action should be directed against the Superintendent of Public Works of the State of New York. The District Court agreed and ordered the Superintendent to appear and answer; in the event that he could not be found the court directed that "the goods and chattels of the State of New York used and controlled by him" should be attached. 256 U. S., at 496.

The Attorney General of the State appeared on behalf of the Superintendent and asserted the Eleventh Amendment as a defense to the action. This Court held that the District Court lacked jurisdiction to proceed against the Superintendent. The Court noted that "the proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not individually, but in his capacity as Superintendent of Public Works of the State of New York," *id.*, at 501; moreover, "[t]here is no suggestion that the Superintendent was or is acting under color of an unconstitutional law, or otherwise than in the due course of his duty under the constitution and laws of the State of New York." *Id.*, at 502. The Court concluded: "In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the State of New York, and therefore—since no consent has been given—beyond the jurisdiction of the courts of the United States." *Ibid.*

In *In re New York (II)*, the plaintiff filed an action in admiralty to recover damages caused by the negligent operation of a canal boat *owned* by the State of New York. The action was brought *in rem* and the vessel was arrested. This Court held, as it had in *In re New York (I)*, that the federal court lacked jurisdiction to adjudicate the claim. In broad language urged upon us here, the Court stated that property owned by a State and employed solely for governmental uses was exempt from seizure by admiralty process *in rem*. 256 U. S., at 511. The force of the holding in *In re New York (II)*, however, is that an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*.

In these cases the plaintiff did not claim an ownership interest in the vessels and did not question the State's assertion of ownership. The sole purpose of the attempted arrests was to enable the court to acquire jurisdiction over a damages claim that was otherwise barred by the Eleventh Amendment. In this case Treasure Salvors is not asserting a claim for damages against either the State of Florida or its officials. The present action is not an *in personam* action brought to recover damages from the State. The relief sought is not barred by the Eleventh Amendment.

IV

The Eleventh Amendment thus did not bar the process issued by the District Court to secure possession of artifacts of the *Atocha* held by the named state officials. The proper resolution of this issue, however, does not require—or permit—a determination of the State's ownership of the artifacts.

This resolution of the immunity issue is not consistent with the disposition of the Court of Appeals. The court properly held that the Eleventh Amendment did not bar execution of the warrant of arrest; in making that determination, however, the Court of Appeals improperly adjudicated the State's right to the artifacts. While such an adjudication would be justified if the State voluntarily advanced a claim to the artifacts, it may not be justified as part of the Eleventh Amendment analysis, the only issue before us.

For these reasons, the judgment of the Court of Appeals must be affirmed in part and reversed in part. To the extent that the court held that the Eleventh Amendment did not prohibit an execution of the warrant and transfer of the artifacts to Treasure Salvors, its judgment is affirmed. To the extent that the court determined the State's ownership of the artifacts as part of its Eleventh Amendment analysis, its judgment is reversed.

It is so ordered.

JUSTICE BRENNAN, concurring in the judgment in part and dissenting in part.

I agree with the plurality that the Eleventh Amendment prohibited neither an execution of the warrant nor a transfer to respondents of the artifacts at issue in this case. See *ante*, at 699 and this page. My rationale for this conclusion differs from the plurality's, however. Both respondents are corporations organized under the laws of the State of Florida. Thus this suit is not "commenced or prosecuted against one of the United States by citizens of *another* State." U. S. Const., Amdt. 11 (emphasis added). The plurality asserts that this constitutional provision "long has been held to govern" "actions brought against a State by *its own* citizens." *Ante*, at 683, n. 17 (emphasis added), citing *Hans* v. *Louisiana*, 134 U. S. 1 (1890). I have long taken the view that *Hans* did *not* rely upon the Eleventh Amendment, and that that Amendment does *not* bar federal court suits against a

State when brought by its own citizens. See *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 309–322 (1973) (dissenting opinion); *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (dissenting opinion). I adhere to this view, and I therefore believe that the Eleventh Amendment is wholly inapplicable in the present case.* To this extent, I am in agreement with the plurality's disposition.

I disagree, however, with the plurality's conclusion that the courts below erred when they "determined the State's ownership of the artifacts as part of [their] Eleventh Amendment analysis." *Ante*, at 700. The record before us plainly indicates that the State had a full opportunity to present its arguments respecting ownership of the artifacts at issue in this case when the action was in the District Court, and that that court held a full evidentiary hearing on the merits of these arguments. See *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 521 (SD Fla. 1978); 621 F. 2d 1340, 1344 (CA5 1980). The State's arguments were rejected in the District Court, and that rejection was affirmed by the Court of Appeals. The plurality today appears to agree with the courts below that the arguments available to the State on the merits were, and are, insubstantial. *Ante*, at 694–697. "No statutory provision has been advanced that *even arguably would authorize* officials of the Division of Archives to retain the property at issue," *ante*, at 696 (emphasis added), and "the State *does not have even a colorable claim to the artifacts*" pursuant to its contracts with respondents, *ante*, at 694 (emphasis added). Given such legal conclusions, I fail to see any need to reverse the determination by the courts below of the State's ownership, as the plurality prescribes, *ante*, at 700.

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*For this reason, I cannot agree with footnote 17 of the plurality's opinion. To the extent, however, that the plurality concludes that the judgment of the Court of Appeals should be affirmed because the State of Florida does not have even a colorable claim to the artifacts, I agree with its opinion.

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I do understand that the plurality does *not remand* this action for a determination of the State's ownership, and rather simply reverses the judgment below on this point. But the fact remains that the courts below have already determined the merits of the State's claim: Even if they were incorrect to make that determination at the time that they did, why should that fact *invalidate* that determination? Why should the State now get a second bite at the apple?

In sum, I would affirm the judgment of the Court of Appeals in its entirety.

JUSTICE WHITE, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in the judgment in part and dissenting in part.

The essence of this litigation is a dispute between the State of Florida and one of its citizens over ownership of treasure. The Eleventh Amendment precludes federal courts from entertaining such suits unless the State agrees to waive its Eleventh Amendment immunity. Because it is the State itself which purports to own the controverted treasure, and because the very nature of this suit, as defined in the complaint and recognized by both the District Court and Court of Appeals, is to determine the State's title to such property, this is not a case subject to the doctrine of *Ex parte Young*, 209 U. S. 123 (1908). In short, this is a suit against the State of Florida, without its permission. Moreover, were the suit to be characterized as one against only state agents, I would find that contract with the State provided a colorable basis upon which the agents could hold the property.

The Court of Appeals, like the District Court, thought that the jurisdictional issue raised by the State merged with a determination on the merits of the validity of the State's claim to the property. The appellate court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State.

By holding that "[t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent," *ante*, at 682, the Court properly rejects this novel conception of the Eleventh Amendment.* The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 621 F. 2d 1340, 1351 (CA5 1980). Although disagreeing with the Court of Appeals' Eleventh Amendment holding, the plurality nevertheless proceeds to conclude that the "State does not have even a colorable claim to the artifacts pursuant to [its] contracts" with respondents, *ante*, at 694, and that the state officials "have [no] colorable claim to possession of the artifacts." *Ante*, at 697. This for all practical purposes adjudicates the State's title, thus repeating the Eleventh Amendment error of the Court of Appeals.

JUSTICE STEVENS' plurality opinion rests precariously on two transparent fictions. First, it indulges in the fantasy that the enforcement of process by arrest of the res is somehow divorced from the action to determine the State's claim to the res—a position contradicted by our own most apposite precedents, the two *In re New York* cases, 256 U. S. 490 (1921), and 256 U. S. 503 (1921). That dubious proposition is parlayed by a second fiction—that Florida's Eleventh Amendment freedom from suit is meaningfully safeguarded by not formally rejecting the State's claim to the artifacts

*I therefore concur in the judgment of the Court only insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. On this point, all Members of the Court, except JUSTICE BRENNAN, are in agreement.

although federal agents may seize the contested property and federal courts may adjudicate its title. Neither of these novel propositions follows from *Ex parte Young, supra*. The rule of *Ex parte Young* is premised on the axiom that state officials cannot evade responsibility when their conduct "comes into conflict with the superior authority of [the] Constitution." *Id.*, at 159. Today, the plurality dilutes the probative force behind that cornerstone decision by extrapolating it to allow federal courts to decide a property dispute between a State and one of its citizens, without the State's consent. For these reasons, as explained below, I dissent in part.

I

The Suit Is Against the State

The case is directly traceable to Treasure Salvors' filing of a motion in District Court for an order commanding the United States Marshal to arrest and take custody of the contested artifacts and to bring them within the jurisdiction of the court. Record 318. The roots of the case, however, rest in the earlier *in rem* action brought by Treasure Salvors to establish its title to the wreck and its bounty. The District Court held that possession and title rested with Treasure Salvors. *Treasure Salvors, Inc.* v. *Abandoned Sailing Vessel*, 408 F. Supp. 907, 911 (SD Fla. 1976). The Court of Appeals affirmed Treasure Salvors' ownership of all objects within the District Court's jurisdiction and to those objects outside its territory with respect to the United States. *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (CA5 1978) *(Treasure Salvors I)*.

Treasure Salvors' subsequent request for an arrest warrant was predicated on this decision.[1] The warrant was to

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[1] "[T]he plaintiffs . . . pursuant to the Final Judgment rendered by this Court February 19, 1976 and the Appellate Opinion rendered by the United States Court of Appeals for the Fifth Circuit No. 76-2151, March

issue because it had already been decided that Treasure Salvors had "sole title and right to possession of the Defendant vessel." App. 13. Notwithstanding the Court of Appeals' limitation of its opinion to artifacts within the District Court's jurisdiction and to rights in the treasure asserted by the United States, Treasure Salvors sought enforcement of the judgment against the State of Florida. It did so on grounds that this Court's decision in *United States* v. *Florida*, 420 U. S. 521 (1975), removed Florida's right to the artifacts, and that Florida was privy to and bound by *Treasure Salvors I*.

> "Inasmuch as the State of Florida [and its officers] were privy to this litigation, it is clear that [the district court] confirmed to the Plaintiffs' . . . title to and right to immediate and sole possession of the vessel . . . together with all her . . . cargo, wherever the same may be found." App. 18 (emphasis deleted).

In short, Treasure Salvors requested seizure of the artifacts in order to enforce an earlier judgment against the State. This is reason enough to conclude that the suit, and the accompanying warrant for arrest of the articles, were actions invoking federal judicial power against the State and not merely its agents.

But even if this were not so, subsequent events reveal that the case is one against the State. After the State filed a motion to quash the warrant, Treasure Salvors filed a supplemental complaint requesting that the contract be held void; it also requested that the District Court rule "[t]hat the State has no right, title or interest" in any portions of the *Atocha* in its possession. Record 371. The District Court then entered an order to show cause addressed directly to the State

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13, 1978, move this Court for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiff's vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control." App. 11.

of Florida. App. 63. The State then argued that the Eleventh Amendment barred the suit. After rejecting all of the State's arguments, the District Court ordered that Treasure Salvors "have full right and title to articles arrested and that they are entitled to possession." *Id.*, at 85. The Court of Appeals affirmed this judgment.

I find the inescapable conclusion to be that this suit, as filed, litigated, and decided, was an action to determine the title of the State of Florida to the artifacts.[2] A suit of this type is at the heart of the Eleventh Amendment immunity.

The line of cases culminating in *Ex parte Young*, 209 U. S. 123 (1908), are not to the contrary. In both *United States* v. *Lee*, 106 U. S. 196 (1882), and *Tindal* v. *Wesley*, 167 U. S. 204 (1897), the suits were against individual agents and did not purport to conclude the rights of the Government. As the Court correctly notes, *Tindal* made plain that a judgment awarding possession to the plaintiff would not subsequently bind the Government. Here the entire point of the *in rem* proceeding is to apply the judgment in *Treasure Salvors I* to erase the State's claim to the treasure. This is the only basis for issuance of the arrest warrant; it was the relief expressly requested by the respondents, and the relief subsequently granted by the District Court and the Court of Appeals.

My position is supported by the precedents closest to the instant case: the *In re New York* cases, 256 U. S. 490 (1921), and 256 U. S. 503 (1921). The first *In re New York* decision arose from an *in rem* libel against the private owners of tugboats that had been in fault in collisions while chartered and operated by the State. The owners sought to bring in the Superintendent of Public Works who had entered into the

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[2] The fact that the District Court did not issue its arrest warrant in response to Treasure Salvors' amended complaint is of little significance. It is the complaint which defines the nature of an action, and once accepted, an amended complaint replaces the original. Moreover, the adjudication of title either reflects that the ownership claim followed from the original complaint or constituted action upon the amended complaint.

charters on the State's behalf. The issue before this Court was whether the State could, without its consent, be impleaded in admiralty process in an action against private parties. The Court held that the "proceedings against which prohibition is here asked," *i. e.*, the attempt to implead the State, "have no element of a proceeding *in rem* and are in the nature of an action *in personam*" against a state officer. The purpose of this distinction was not to suggest that *in rem* actions could be brought against the State, or even that the original libel was not a true *in rem* cause, but rather to highlight that impleading of a state official, no less than a direct action against the official, constituted a suit against a state officer in his "official capacity" and might require satisfaction out of the property of New York. 256 U. S., at 501.

The second *In re New York* decision, a sovereign immunity case, made clear that a State's immunity extended to admiralty actions *in rem*.

> "The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes." 256 U. S., at 511.

The plurality's reading of *In re New York (II)* is that an action "otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State." *Ante*, at 699.[3] Nothing in the language of Justice Pitney's opinion supports this interpretation. Moreover, the libel brought before the Court in that case was a true *in rem* action; an action in admiralty to recover damages caused by a ship is a classic *in rem* action, al-

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[3] The plurality confuses the matter further by treating the cases as bearing on the question of whether a burden is imposed on the state treasury. The *In re New York* cases pertain instead to the initial issue of whether the action is against the State.

though after the owners of the vessel are identified the libel often will be amended to include an *in personam* claim as well. G. Gilmore & C. Black, The Law of Admiralty 498 (2d ed. 1975) (Gilmore & Black). Therefore, *In re New York (II)* is as "true" an *in rem* action as the instant case.

The grounds of similarity between the cases are clear: in both cases *in rem* libels were filed and process by arrest was requested; in both suits the State by its Attorney General responded and indicated to the District Court that the property to be arrested was in the possession and ownership of the State, and therefore immune from seizure and attachment. In both cases, the District Court overruled the suggestion and awarded process *in rem*, authorizing the arrest of the res. When the seizure of the *Queen City* finally reached this forum, the Court stated that the property was exempt from seizure by admiralty process *in rem*.[4] The plurality's distinction aside, the cases can be distinguished on but a single relevant point: the fact that ownership of the res is contested here. That, of course, is the grounds on which the Court of

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[4] *In re New York (II)* was decided on straight sovereign immunity grounds: "[T]he record—aside from whether a suit in admiralty brought by private parties through process *in rem* against property owned by a State is not in effect a suit against the State, barred by the general principle applied in *Ex parte New York, No. 1*, No. 25, Original—presents the question whether the proceeding can be based upon the seizure of property owned by a State and used and employed solely for its governmental uses and purposes." The Court went on to decide the vessel was immune from admiralty process, based upon "the law of nations" and "general grounds of comity and policy." 256 U. S., at 510.

In re New York (II)'s resolution on sovereign immunity grounds has several implications. First, as with other sovereign immunity decisions, it is direct support for determining what constitutes a suit against the State. *Ante*, at 689, n. 26. Cf. *Tindal* v. *Wesley*, 167 U. S. 204, 213 (1897). Second, it undercuts the plurality's analysis that the case merely stops roundabout circumvention of *In re New York (I)* through "first attaching property that belonged to the State and then proceeding *in rem*." As the above quoted passage indicates, the *In re New York (II)* Court did not need to go so far in order to find the suit barred.

Appeals decided the case—a resolution which the plurality apparently rejects.

In re New York (I) indicates that the Eleventh Amendment will bar a suit that has the effect of proceeding against a state officer and involving the State's property. *In re New York (II)* squarely stands for the proposition that sovereign immunity bars process against a res in the hands of state officers. This is true even though an *in rem* action strictly proceeds against the vessel, and the owner of the vessel or artifacts is not an indispensable party. Significantly, *In re New York (II)* did not distinguish between the service of process to arrest the res and the thrust of the libel itself to determine the rights in the vessel. I follow that course in this case, and refuse to sever the attempt to arrest the artifacts from the attempt to decide their ownership.

The *In re New York* cases are particularly forceful because they reflect the special concern in admiralty that maritime property of the sovereign is not to be seized. This principle dates back to the English[5] and has not been significantly al-

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[5] Under English law, no warrant for arrest will issue against any vessel in the actual service of a recognized foreign government. Significantly, this is so even if the suit itself is not barred. See, *e. g.*, *The Messicano*, 32 T. L. R. 519 (1916). Where plaintiff sues *in rem* for possession "the writ will be dismissed, if a foreign recognized government claims the right to possession and is in the actual possession of the vessel, regardless of whether possession was rightfully or wrongfully obtained." Riesenfeld, Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine, 25 Minn. L. Rev. 1, 25 (1940). In *The Parlement Belge*, 5 P. D. 197, 220 (1880), the "leading authority" in England, it was held that "[i]f the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner." Moreover, after a ship was declared by the foreign sovereign "to be in his possession as sovereign and to be a public vessel of the state," it was "very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct." *Id.*, at 219.

tered in this country.[6] The *In re New York* cases are but the most apposite examples of the line of cases concerning *in rem* actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res. The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership of a res in its possession, to dismiss the suit or modify the judgment accordingly.[7]

Finally, the allowance of an *in rem* suit against arguably state-owned maritime property rests on the "personification" theory of the res—that the action runs against the *Atocha* and not the State of Florida. This distinction between *in rem* and *in personam* actions has been decisively rejected. As the fiction of the personality of the ship declined, Gilmore & Black 615, 804–805, *in rem* actions were given *in personam* effect, and *in personam* judgments barred subsequent *in rem* actions. *Id.*, at 802, 613–614. See, *e. g.*, *Burns Bros. v. Central R. Co. of New Jersey*, 202 F. 2d 910 (CA2 1953) (L. Hand, J.). In short, under long established admiralty law,

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[6] For early cases, see *United States* v. *Peters*, 3 Dall. 121 (1795); *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); *L'Invincible*, 1 Wheat. 238 (1816); *The Santissima Trinidad*, 7 Wheat. 283 (1822). In *The Siren*, 7 Wall. 152 (1869), the Court allowed a claim against the proceeds of the vessel when sold, but stressed that no claim could be enforced while the Government owned the vessel. In *The Western Maid*, 257 U. S. 419 (1922), the Court, per Justice Holmes, went further and refused to allow a claim against a Government-owned vessel as enforceable either during Government ownership or thereafter. Shortly thereafter, sovereign immunity was expanded to embrace ships engaged solely in commerce. *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U. S. 562 (1926).

[7] See Gilmore & Black 606–613. Only when a vessel is not in the sovereign's possession, is there controversy over the proper means by which the foreign government may assert its ownership. See *Compania Espanola de Nacegacion Maritima* v. *The Navemar*, 303 U. S. 68 (1938).

arrest of sovereign maritime property is not tolerated, and an *in rem* suit directed at government property is an action against the State.

II

Holding of the Treasure by State Officials Was Not Ultra Vires

Alternatively, if the arrest of the artifacts was not, without more, a suit against the State, the action was nevertheless against state agents acting within their authority and holding property for the State under a colorable claim of right. It is settled that the Eleventh Amendment bars actions which are in effect against the State, even though the State is not the nominal party. *Louisiana* v. *Jumel*, 107 U. S. 711, 719–723, 727–728 (1883).

Leaving aside other possible bases by which the state officials had authority to refuse to surrender possession of the artifacts, I address the salvage contracts entered between the State and Treasure Salvors. Under the contracts, which were renewed annually, Treasure Salvors was to conduct underwater salvage on Florida lands. By the terms of the contract, Treasure Salvors received 75% of the artifacts recovered. The State was to retain 25% of the representative artifacts. This arrangement was renewed on three occasions, the last contract being entered into on December 3, 1974. It was during that contract's duration that we decided *United States* v. *Florida*, 420 U. S. 531 (1975), which established Florida's boundaries along lines which placed the *Atocha* in international waters.

If it were not for this decision, it would be beyond cavil that Florida owned one-fourth of the artifacts pursuant to its ownership of the submerged land on which the *Atocha* rested as well as the contracts. It is also beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents. *Larson* v. *Domestic & Foreign*

Commerce Corp., 337 U. S. 682 (1949). The plurality does not take issue with this proposition.[7]

The plurality treats this as a different case for two reasons. The first is that the State has never, in so many words, argued that the contracts conferred upon the State a right of ownership in the artifacts. *Ante*, at 693. While this may be true in the sense that Florida believed that it owned the artifacts even aside from the contracts, it is not true that Florida has not asserted that the contracts create an independent right to the treasure. Florida has repeatedly and expressly made precisely such a claim.[8]

The plurality's second argument is that the "State does not have even a colorable claim to the artifacts pursuant to these contracts." *Ante*, at 694. I disagree with this conclusion. The wording of the contract is reasonably interpretable as providing for a division of the recovered treasure. The intention of the parties upon the making of the contract, of course, govern the interpretation of the instrument. If *United States* v. *Florida*, *supra*, had placed the *Atocha* within Florida waters, it could not reasonably be argued that the contract did not constitute a valid basis for the State's

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[7] "In *Larson* . . . this Court held that the actions of a federal official in withholding the delivery of goods pursuant to his interpretation of a disputed provision of a contract constituted at most a tortious deprivation of property. . . . Actions of the Government official pursuant to legitimate contractual authority were neither ultra vires nor unconstitutional." *Ante*, at 693.

[8] "At issue in the present case is both a contract and property right of the State of Florida to the artifacts previously in its possession . . . ." Brief for Petitioner 32; "The issue on the merits was whether the State had property rights to artifacts in its Archives—that is, whether the contract to which the state was a party was valid." *Id.*, at 60. "The State of Florida has not claimed a lien on the artifacts; it has claimed ownership—through fully executed contracts." Reply Brief for Petitioner 16–17. "The contract alone determined the rights and obligations of the contracting parties and was in no way affected by United States v. Florida." State's Motion to Quash Warrant for Arrest in Rem. App. 44.

claim to 25% of the artifacts. Both Treasure Salvors and the State entered the contracts on the assumption that the *Atocha* rested in Florida waters. As it happened, the *Florida* decision upset that mutual assumption. This does not, however, inexorably mean that the contracts are so invalid as to render possession of the artifacts ultra vires.[10] Admiralty law may provide that such a mistake is not grounds for rescission of fully performed contracts in these circumstances.[11] The plurality's contention that the language of the contracts does not purport to transfer artifacts from Treasure Salvors to the State utterly ignores the concept of mistake. The notion of mistake would be read out of contract law if courts expected a contract, written under mistaken assumptions, to read as if the mistake had not occurred.

Whether the contracts are ultimately valid is beside the point. The existence of a colorable contractual claim to the artifacts, the presence of statutory authority for the State to enter into the contracts, and the ability to raise a mistake-of-law defense not rejectible on its face, is all that need be shown to indicate that possession of the artifacts by the state officials was not ultra vires. Although it would be too much

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[10] The plurality also suggests that the contracts "were predicated entirely on a state statute that on its face is inapplicable in this case." *Ante*, at 696. This no more than restates the plurality's characterization of the contracts. But it does highlight that the contracts' validity is called into question only by a mistaken assumption of law—the statute's "inapplica[bility]" after *United States* v. *Florida*, 420 U. S. 531 (1975).

[11] The inherent uncertainty in contracts for salvage have led admiralty courts to find few reasons that would justify reformation of a contract. See *The Elfrida*, 172 U. S. 186, 196 (1898) ("We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception"). Gilmore & Black 582 ("Whether the gamble turns well or badly for the salvor, the 'no cure no pay' contract is everywhere recognized as enforceable, absent such invalidating causes as fraud and duress").

to suggest that our Eleventh Amendment is crystal clear in all respects, this is, at least, the teaching of our most recent cases.

Larson v. *Domestic & Foreign Commerce Corp.*, *supra*, is most directly apposite. There a private corporation brought suit in Federal District Court against the Administrator of the War Assets Administration, an agency of the United States Government, in his official capacity. The claim was that the Administration had sold certain surplus coal to the plaintiff, but had refused to deliver it and had made a new contract to sell it to others. A declaration was sought that the first contract was valid, the second contract invalid, and appropriate injunctive relief was requested. The Court held that the suit was against the United States and the District Court was therefore without jurisdiction to entertain it. The Court's decision rested on the Administrator's statutory authority to enter a binding contract to sell coal, and the absence of a claim that the failure to deliver the coal constituted a taking of private property. The Court refused to pass upon the validity of the contract itself, *i. e.*, whether the initial contract with the plaintiff was breached.[12]

Larson established that where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions. "The officer is not doing the business which the sovereign has empowered him to do . . . . His actions are *ultra vires* his authority

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[12] The plurality's attempt to distinguish *Larson* is puzzling. It notes that while the plaintiff in *Larson* asserted a right to the property pursuant to the very contract it contended the Government official had breached, here Treasure Salvors claims ownership on grounds entirely independent of the contracts. This is a distinction without meaning: it is the State's claim to the property which is significant, the basis for Treasure Salvors' claim is quite beside the point. The relevant comparison is that the federal official in *Larson* was arguably without authority to enter a contract to sell coal that he had already sold just as the State was arguably without authority to enter a contract respecting salvage on lands outside its waters.

and therefore may be made the object of specific relief." 337 U. S., at 689. Similarly, unconstitutional actions by state officers could not be considered the work of the sovereign and were not protected by the shield of sovereign immunity. The *Larson* Court rejected, however, a third proposed category of official actions amenable to suit.[13] It was urged upon the Court that if an "officer . . . wrongly takes or holds spe-

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[13] The plurality acknowledges that *Larson* clarified the understanding of earlier cases such as *Tindal* v. *Wesley*, 167 U. S. 204 (1897), and *United States* v. *Lee*, 106 U. S. 196 (1882). Dicta in both *Tindal* and *Lee* are cited by the Court to suggest that a federal court may adjudicate the validity of a title in order to determine whether the case is a suit against the State. It is precisely this aspect of the cases that *Larson* "clarified." A court may go only so far as to ascertain whether an official has a colorable basis for his action—to go farther is to, in effect, try the case on the jurisdictional issue and "is equivalent to asserting that suits against the state are permitted by the eleventh amendment if the result is that the state loses." *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 621 F. 2d 1340, 1351 (CA5 1980) (Rubin, J., dissenting).

The inapplicability of *United States* v. *Lee* was made clear in *Malone* v. *Bowdoin*, 369 U. S. 643 (1962), a case involving an attempt to eject a Forest Service Officer from land occupied by him solely in his official capacity under a claim of title in the United States. The plaintiffs argued they were the rightful owners of the land. The Court held that the suit was an impermissible action against the United States, and stated:

"While not expressly overruling *United States* v. *Lee*, *supra*, the Court in *Larson* limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted *Lee* as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U. S. at 696. So construed, the *Lee* case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.' *Id.*, at 697." *Id.*, at 647–648.

An *in rem* admiralty action, like an ejectment suit, is an action to determine title to property, and, here, like in *Bowdoin*, there is no claim of an unconstitutional taking without adequate compensation. Indeed, Treasure Salvors may be able to bring an *in personam* action in state court to determine ownership of the treasure.

cific property to which the plaintiff has title," then his action is illegal and the officer may be sued. The Court found the theory erroneous:

> "The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign." *Id.*, at 693.

This is a *Larson* case. Florida entered into the contract pursuant to an indisputably valid state statute, Fla. Stat. § 267.061(1)(b) (1974), providing title to treasure trove abandoned on state-owned submerged lands. The Court relies heavily, as it must, on the subsequent determination that the wreck of the *Atocha* was in international waters. This, of course, was not settled law at the time the contracts were entered and executed. Before concluding that the state officials' exercise of rights under the contracts was ultra vires, it is necessary to reach the merits of the contract, and dispose of the mistake-of-law contention. Similarly, the scattershot reasoning of the District Court in refusing to honor the contract—characterization of the mistake as one of fact, treatment of the contract as void for coercion and lack of consideration—constitutes an adjudication of the merits of the contracts. *At the time the contracts were entered and executed* they were not ultra vires or otherwise so plainly invalid as not to offer a colorable basis for possession of the artifacts.

It is significant that the analysis pursued by the plurality in this respect is little different from that of the Fifth Circuit in deciding the merits in order to ascertain jurisdiction over the matter. As indicated earlier, the plurality performs the task under a different rubric, but the result is equally objectionable. A colorable basis for the exercise of authority by state officials may not ultimately be a valid one, but it does serve to invoke the Eleventh Amendment. That is the lesson of *Larson* and we should adhere to it.

III

The plurality begins by stating that "[s]tripped of its procedural complexities and factual glamor, this case presents a narrow legal question." *Ante*, at 683. Be that as it may, the answer supplied by the plurality is anything but narrow. If the plurality means all that it says today, the consequences will be unfortunate. Given that all property of the State must be held by its officers, and assuming a jurisdictional basis, there is no item within state possession whose ownership cannot be made the subject of federal litigation by the expedient of arrest or attachment. The State must then defend on the merits: it must persuade a federal court that its officers were justified in holding the controverted property. We see today that this inquiry will be tantamount to deciding the question of title itself. Moreover, the State's immunity from suit is stripped away on land as well as sea: the plurality notes that the question presented would not be any different if the State merely resisted an attachment of property. *Ibid.*

The plurality hardly conceals its view of Florida's claim to the artifacts or the equities involved in this litigation. Yet the Eleventh Amendment teaches that a federal court has no right to offer its opinion on a local dispute between a State and its citizens unless the State consents. In sum, the disposition of this case can only be explained by "procedural complexities and factual glamor." If so, the decision has earned a fitting sobriquet: aberration.

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MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-406. Argued March 22, 1982—Decided July 1, 1982

Held: The policy of petitioner Mississippi University for Women (MUW), a state-supported university which has from its inception limited its enrollment to women, of denying otherwise qualified males (such as respondent) the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 723–733.

(a) The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 150. The test must be applied free of fixed notions concerning the roles and abilities of males and females. Pp. 723–727.

(b) The single-sex admissions policy of MUW's School of Nursing cannot be justified on the asserted ground that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. Rather than compensating for discriminatory barriers faced by women, MUW's policy tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. Moreover, the State has not shown that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men. Thus, the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Pp. 727–731.

(c) Nor can the exclusion of men from MUW's School of Nursing be justified on the basis of the language of § 901(a)(5) of Title IX of the Education Amendments of 1972, which exempts from § 901(a)'s general pro-

hibition of gender discrimination in federally funded education programs the admissions policies of public institutions of undergraduate higher education "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." It is not clear that, as argued by the State, Congress enacted the statute pursuant to its power granted by § 5 of the Fourteenth Amendment to enforce that Amendment, and thus placed a limitation upon the broad prohibitions of the Equal Protection Clause. Rather, Congress apparently intended, at most, to create an exemption from Title IX's requirements. In any event, Congress' power under § 5 "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10. Pp. 731–733.

646 F. 2d 1116 and 653 F. 2d 222, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., *post*, p. 733, and BLACKMUN, J., *post*, p. 733, filed dissenting opinions. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 735.

Hunter M. Gholson argued the cause for petitioners. With him on the briefs were *Bill Allain*, Attorney General of Mississippi, and *Ed Davis Noble, Jr.*, Assistant Attorney General.

Wilbur O. Colom argued the cause for respondent. With him on the brief was *W. Wayne Drinkwater, Jr.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.

I

The facts are not in dispute. In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and Col-

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**Zona Fairbanks Hostetler, Suellen Terrill Keiner, Phyllis N. Segal, Marcia D. Greenberger*, and *Judith L. Lichtman* filed a brief for the National Women's Law Center et al. as *amici curiae* urging affirmance.

lege for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. 1884 Miss. Gen. Laws, Ch. 30, § 6. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women.[1]

In 1971, MUW established a School of Nursing, initially offering a 2-year associate degree. Three years later, the school instituted a 4-year baccalaureate program in nursing and today also offers a graduate program. The School of Nursing has its own faculty and administrative officers and establishes its own criteria for admission.[2]

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program.[3] Although he was otherwise qualified, he

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[1] The charter of MUW, basically unchanged since its founding, now provides:

"The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life." Miss. Code Ann. § 37-117-3 (1972).

Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females. Cf. *Vorchheimer* v. *School District of Philadelphia*, 532 F. 2d 880 (CA3 1975), aff'd by an equally divided Court, 430 U. S. 703 (1977).

[2] Record, Exhibit 1, 1980–1981 Bulletin of Mississippi University for Women 31–34, 212–229.

[3] With a baccalaureate degree, Hogan would be able to earn a higher salary and would be eligible to obtain specialized training as an anesthetist. Tr. 18.

was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit. Tr. 26.[4]

Hogan filed an action in the United States District Court for the Northern District of Mississippi, claiming the single-sex admissions policy of MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. Hogan sought injunctive and declaratory relief, as well as compensatory damages.

Following a hearing, the District Court denied preliminary injunctive relief. App. to Pet. for Cert. A4. The court concluded that maintenance of MUW as a single-sex school bears a rational relationship to the State's legitimate interest "in providing the greatest practical range of educational opportunities for its female student population." *Id.*, at A3. Furthermore, the court stated, the admissions policy is not arbitrary because providing single-sex schools is consistent with a respected, though by no means universally accepted, educational theory that single-sex education affords unique benefits to students. *Ibid.* Stating that the case presented no issue of fact, the court informed Hogan that it would enter summary judgment dismissing his claim unless he tendered a factual issue. When Hogan offered no further evidence, the District Court entered summary judgment in favor of the State. Record 73.

The Court of Appeals for the Fifth Circuit reversed, holding that, because the admissions policy discriminates on the basis of gender, the District Court improperly used a "rational relationship" test to judge the constitutionality of the policy. 646 F. 2d 1116, 1118 (1981). Instead, the Court of Appeals stated, the proper test is whether the State has carried the heavier burden of showing that the gender-based classification is substantially related to an important govern-

[4] Dr. James Strobel, President of MUW, verified that men could audit the equivalent of a full classload in either night or daytime classes. *Id.*, at 39–40.

mental objective. *Id.*, at 1118, 1119. Recognizing that the State has a significant interest in providing educational opportunities for all its citizens, the court then found that the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest. *Id.*, at 1119. Holding that the policy excluding Hogan because of his sex denies him equal protection of the laws, the court vacated the summary judgment entered against Hogan as to his claim for monetary damages, and remanded for entry of a declaratory judgment in conformity with its opinion and for further appropriate proceedings. *Id.*, at 1119–1120.

On rehearing, the State contended that Congress, in enacting § 901(a)(5) of Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681 *et seq.*, expressly had authorized MUW to continue its single-sex admissions policy by exempting public undergraduate institutions that traditionally have used single-sex admissions policies from the gender discrimination prohibition of Title IX.[5] Through that provision, the State argued, Congress limited the reach of the Fourteenth Amendment by exercising

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[5] Section 901(a) of Title IX, Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681(a), provides in part:

"(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

"(1) . . . in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

. . . .

"(5) . . . in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex. . . ."

its power under § 5 of the Amendment.[6] The Court of Appeals rejected the argument, holding that § 5 of the Fourteenth Amendment does not grant Congress power to authorize States to maintain practices otherwise violative of the Amendment. 653 F. 2d 222 (1981).

We granted certiorari, 454 U. S. 962 (1981), and now affirm the judgment of the Court of Appeals.[7]

II

We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed* v. *Reed*, 404 U. S. 71, 75 (1971). That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.[8] *Caban* v. *Mo-*

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[6] Section 5 of the Fourteenth Amendment provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[7] Although some statements in the Court of Appeals' decision refer to all schools within MUW, see 646 F. 2d, at 1119, the factual underpinning of Hogan's claim for relief involved only his exclusion from the nursing program, Complaint ¶ 8–10, and the Court of Appeals' holding applies only to Hogan's individual claim for relief. 646 F. 2d, at 1119–1120. Additionally, during oral argument, counsel verified that Hogan sought only admission to the School of Nursing. Tr. of Oral Arg. 24. Because Hogan's claim is thus limited, and because we review judgments, not statements in opinions, *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956), we decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.

[8] Without question, MUW's admissions policy worked to Hogan's disadvantage. Although Hogan could have attended classes and received credit in one of Mississippi's state-supported coeducational nursing programs, none of which was located in Columbus, he could attend only by driving a considerable distance from his home. Tr. 19–20, 63–65. A similarly situ-

hammed, 441 U. S. 380, 394 (1979); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979). Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461 (1981); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979). The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 150 (1980).[9]

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free

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ated female would not have been required to choose between forgoing credit and bearing that inconvenience. Moreover, since many students enrolled in the School of Nursing hold full-time jobs, Deposition of Dean Annette K. Barrar 29–30, Hogan's female colleagues had available an opportunity, not open to Hogan, to obtain credit for additional training. The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan "a burden he would not bear were he female." *Orr* v. *Orr*, 440 U. S. 268, 273 (1979).

[9] In his dissenting opinion, JUSTICE POWELL argues that a less rigorous test should apply because Hogan does not advance a "serious equal protection claim." *Post*, at 742. JUSTICE BLACKMUN, without proposing an alternative test, labels the test applicable to gender-based discrimination as "rigid" and productive of "needless conformity." *Post*, at 734, 735. Our past decisions establish, however, that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.

Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect. See *Stanton* v. *Stanton*, 421 U. S. 7, 13 (1975).

of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See *Frontiero* v. *Richardson*, 411 U. S. 677, 684–685 (1973) (plurality opinion).[10]

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the

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[10] History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function. In 1873, this Court remained unmoved by Myra Bradwell's argument that the Fourteenth Amendment prohibited a State from classifying her as unfit to practice law simply because she was female. *Bradwell* v. *Illinois*, 16 Wall. 130 (1873). In his opinion concurring in the judgment, Justice Bradley described the reasons underlying the State's decision to determine which positions only men could fill:

"It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.*, at 142.

In a similar vein, the Court in *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948), upheld a legislature's right to preclude women from bartending, except under limited circumstances, on the ground that the legislature could devise preventive measures against "moral and social problems" that result when women, but apparently not men, tend bar. Similarly, the many protective labor laws enacted in the late 19th and early 20th centuries often had as their objective the protection of weaker workers, which the laws assumed meant females. See generally B. Brown, A. Freedman, H. Katz, & A. Price, Women's Rights and the Law 209–210 (1977).

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validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.[11] The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," *Craig* v. *Boren*, 429 U. S. 190, 198 (1976), to establish a link between objective and classification.[12]

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[11] For instance, in *Stanton* v. *Stanton*, *supra*, this Court invalidated a state statute that specified a greater age of majority for males than for females and thereby affected the period during which a divorced parent was responsible for supporting his children. We did not question the importance or validity of the State's interest in defining parents' obligation to support children during their minority. On analysis, however, we determined that the purported relationship between that objective and the gender-based classification was based upon traditional assumptions that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl." 421 U. S., at 14–15. Once those traditional notions were abandoned, no basis for finding a substantial relationship between classification and objective remained.

[12] See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr* v. *Orr*, *supra* (only men could be ordered to pay alimony following divorce); *Craig* v. *Boren*, 429 U. S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton* v. *Stanton*, *supra* (women reached majority at an earlier age than did men); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973) (determination of spouse's dependency based upon gender of member of Armed Forces claiming dependency benefits); *Reed* v. *Reed*, 404 U. S. 71 (1971) (statute preferred men to women as administrators of estates).

Applying this framework, we now analyze the arguments advanced by the State to justify its refusal to allow males to enroll for credit in MUW's School of Nursing.

III

A

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. Brief for Petitioners 8.[13] As applied to the School of Nursing, we find the State's argument unpersuasive.

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[13] In the reply brief, the State understandably retreated from its contention that MUW was founded to provide opportunities for women which were not available to men. Reply Brief for Petitioners 4. Apparently, the impetus for founding MUW came not from a desire to provide women with advantages superior to those offered men, but rather from a desire to provide white women in Mississippi access to state-supported higher learning. In 1856, Sally Reneau began agitating for a college for white women. Those initial efforts were unsuccessful, and, by 1870, Mississippi provided higher education only for white men and black men and women. E. Mayes, History of Education in Mississippi 178, 228, 245, 259, 266, 270 (1899) (hereinafter Mayes). See also S. Neilson, The History of Mississippi State College for Women 4–5 (unpublished manuscript, 1952) (hereinafter Neilson). In 1882, two years before MUW was chartered, the University of Mississippi opened its doors to women. However, the institution was in those early years not "extensively patronized by females; most of those who come being such as desire to qualify themselves to teach." Mayes, at 178. By 1890, the largest number of women in any class at the University had been 23, while nearly 350 women enrolled in the first session of MUW. *Id.*, at 178, 253. Because the University did not solicit the attendance of women until after 1920, and did not accept women at all for a time between 1907 and 1920, most Mississippi women who attended college attended MUW. Neilson, at 86. Thus, in Mississippi, as elsewhere in the country, women's colleges were founded to provide some form of higher education for the academically disenfranchised. See generally 2 T. Woody, A History of Women's Education in the United States 137–223 (1929); L. Baker, I'm Radcliffe! Fly Me! The Seven Sisters and the Failure of Women's Education 22, 136–141 (1976).

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. See *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975). However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, *Reed* v. *Reed*, 404 U. S. 71 (1971), to achieve administrative efficiency, *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), or to balance the burdens borne by males and females.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. We considered such a situation in *Califano* v. *Webster*, 430 U. S. 313 (1977), which involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, we upheld the statutory scheme, noting that it took into account that women "as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity. *Id.*, at 318.

A similar pattern of discrimination against women influenced our decision in *Schlesinger* v. *Ballard*, *supra*. There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a 9-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allow-

ing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. U. S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred: 1969–1970, Institutional Data 388 (1972). That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide. U. S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred, 1959–1960: Bachelor's and Higher Degrees 135 (1960). As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female.[14] United States Bureau of Census, 1981 Statistical Abstract of the United States 402 (1981).

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.[15] By assuring

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[14] Relatively little change has taken place during the past 10 years. In 1980, women received more than 94 percent of the baccalaureate degrees conferred nationwide, National Center for Education Statistics, 1981 Digest of Education Statistics 121 (1981), and constituted 96.5 percent of the registered nurses in the labor force. United States Bureau of Census, 1981 Statistical Abstract of the United States 402 (1981).

[15] Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages. Hearings Before

that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. See *Stanton* v. *Stanton*, 421 U. S. 7 (1975). Thus, we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.[16]

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

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the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination 510–511, 517–518, 523 (Apr. 1980). To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit. Cf. *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975).

[16] Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination. Cf. *Califano* v. *Webster*, 430 U. S. 313, 318 (1977) (legislative history of the compensatory statute revealed that Congress "directly addressed the justification for differing treatment of men and women" and "purposely enacted the more favorable treatment for female wage earners . . ."). The State has provided no evidence whatever that the Mississippi Legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training. Indeed, the only statement of legislative purpose is that in § 37–117–3 of the Mississippi Code, see n. 1, *supra*, a statement that relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification. *E. g.*, *Orr* v. *Orr*, 440 U. S. 268 (1979); *Stanton* v. *Stanton*, 421 U. S. 7 (1975).

MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. Deposition of Dr. James Strobel 56–60 and Deposition of Dean Annette K. Barrar 24–26. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, Deposition of Nancy L. Herban 4, that the presence of men in the classroom would not affect the performance of the female nursing students, Tr. 61 and Deposition of Dean Annette K. Barrar 7–8, and that men in coeducational nursing schools do not dominate the classroom. Deposition of Nancy Herban 6. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Accordingly, we hold that MUW's policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment.[17]

B

In an additional attempt to justify its exclusion of men from MUW's School of Nursing, the State contends that MUW is

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[17] JUSTICE POWELL's dissent suggests that a second objective is served by the gender-based classification in that Mississippi has elected to provide women a choice of educational environments. *Post*, at 742–744. Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

the direct beneficiary "of specific congressional legislation which, on its face, permits the institution to exist as it has in the past." Brief for Petitioners 19. The argument is based upon the language of § 901(a) in Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681(a). Although § 901(a) prohibits gender discrimination in education programs that receive federal financial assistance, subsection 5 exempts the admissions policies of undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" from the general prohibition. See n. 5, *supra*. Arguing that Congress enacted Title IX in furtherance of its power to enforce the Fourteenth Amendment, a power granted by § 5 of that Amendment, the State would have us conclude that § 901(a)(5) is but "a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment." Brief for Petitioners 20.

The argument requires little comment. Initially, it is far from clear that Congress intended, through § 901(a)(5), to exempt MUW from any constitutional obligation. Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX.

Even if Congress envisioned a constitutional exemption, the State's argument would fail. Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the Amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion . . . ." *Ex parte Virginia*, 100 U. S. 339, 346 (1880). Congress' power under § 5, however, "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10 (1966). Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Four-

teenth Amendment. See, *e. g.*, *Califano* v. *Goldfarb*, 430 U. S. 199, 210 (1977); *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968).

The fact that the language of § 901(a)(5) applies to MUW provides the State no solace: "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803)." *Younger* v. *Harris*, 401 U. S. 37, 52 (1971).

IV

Because we conclude that the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

CHIEF JUSTICE BURGER, dissenting.

I agree generally with JUSTICE POWELL's dissenting opinion. I write separately, however, to emphasize that the Court's holding today is limited to the context of a professional nursing school. *Ante*, at 723, n. 7, 727. Since the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, see *ante*, at 729–731, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.

JUSTICE BLACKMUN, dissenting.

Unless Mississippi University for Women wished to preserve a historical anachronism, one only states the obvious when he observes that the University long ago should have replaced its original statement of purpose and brought its corporate papers into the 20th century. It failed to do so and, perhaps in partial consequence, finds itself in this litigation, with the Court's opinion, *ante*, at 719–720, and n. 1, now

taking full advantage of that failure, to MUW's embarrassment and discomfiture.

Despite that failure, times have changed in the intervening 98 years. What was once an "Institute and College" is now a genuine university, with a 2-year School of Nursing established 11 years ago and then expanded to a 4-year baccalaureate program in 1974. But respondent Hogan "wants in" at this particular location in his home city of Columbus. It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to males at Jackson and at Hattiesburg. Mississippi thus has not closed the doors of its educational system to males like Hogan. Assuming that he is qualified—and I have no reason whatsoever to doubt his qualifications—those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek.

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice. JUSTICE POWELL in his separate opinion, *post*, p. 735, advances this theme well.

While the Court purports to write narrowly, declaring that it does not decide the same issue with respect to "separate but equal" undergraduate institutions for females and males, *ante*, at 720, n. 1, or with respect to units of MUW other than its School of Nursing, *ante*, at 723, n. 7, there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or reli-

gion) and relegate ourselves to needless conformity. The ringing words of the Equal Protection Clause of the Fourteenth Amendment—what JUSTICE POWELL aptly describes as its "liberating spirit," *post*, at 741—do not demand that price.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.

It is undisputed that women enjoy complete equality of opportunity in Mississippi's public system of higher education. Of the State's 8 universities and 16 junior colleges, all except MUW are coeducational. At least two other Mississippi universities would have provided respondent with the nursing curriculum that he wishes to pursue.[1] No other

[1] "[T]wo other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing—the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of

male has joined in his complaint. The only groups with any personal acquaintance with MUW to file *amicus* briefs are female students and alumnae of MUW. And they have emphatically rejected respondent's arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefited.

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must *travel* to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of "inconvenience." *Ante*, at 724, n. 8. This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of "sexual stereotype" reasoning that has no application whatever to the respondent or to the "wrong" of which he complains. At best this is anomalous. And ultimately the anomaly reveals legal error—that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an *additional* choice for women. Moreover, I believe that Mississippi's educational system should be upheld in this case even if this inappropriate method of analysis is applied.

I

Coeducation, historically, is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms. At the college level, for instance, until recently some of the most prestigious colleges and universi-

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Mississippi in Jackson, 147 miles from Columbus . . . ." Brief for Respondent 3. See also Tr. of Oral Arg. 8.

ties—including most of the Ivy League—had long histories of single-sex education. As Harvard, Yale, and Princeton remained all-male colleges well into the second half of this century, the "Seven Sister" institutions established a parallel standard of excellence for women's colleges. Of the Seven Sisters, Mount Holyoke opened as a female seminary in 1837 and was chartered as a college in 1888. Vassar was founded in 1865, Smith and Wellesley in 1875, Radcliffe in 1879, Bryn Mawr in 1885, and Barnard in 1889. Mount Holyoke, Smith, and Wellesley recently have made considered decisions to remain essentially single-sex institutions. See Carnegie Commission on Higher Education, Opportunities for Women in Higher Education 70–75 (1973) (Carnegie Report), excerpted in B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law 1013, 1014 (1975) (Babcock). Barnard retains its independence from Columbia, its traditional coordinate institution. Harvard and Radcliffe maintained separate admissions policies as recently as 1975.[2]

The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy. It cannot be disputed, for example, that the highly qualified women attending the leading women's colleges could have earned admission to virtually any college of their choice.[3] Women attending such colleges have cho-

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[2] The history, briefly summarized above, of single-sex higher education in the Northeast is duplicated in other States. I mention only my State of Virginia, where even today Hollins College, Mary Baldwin College, Randolph Macon Woman's College, and Sweet Briar College remain all women's. Each has a proud and respected reputation of quality education.

[3] It is true that historically many institutions of higher education—particularly in the East and South—were single-sex. To these extents, choices were by no means universally available to all men and women. But choices always were substantial, and the purpose of relating the experience of our country with single-sex colleges and universities is to document what should be obvious: generations of Americans, including scholars, have thought—wholly without regard to any discriminatory animus—that there were distinct advantages in this type of higher education.

sen to be there, usually expressing a preference for the special benefits of single-sex institutions. Similar decisions were made by the colleges that elected to remain open to women only.[4]

The arguable benefits of single-sex colleges also continue to be recognized by students of higher education. The Carnegie Commission on Higher Education has reported that it "favor[s] the continuation of colleges for women. They provide an element of diversity . . . and [an environment in which women] generally . . . speak up more in their classes, . . . hold more positions of leadership on campus, . . . and . . . have more role models and mentors among women teachers and administrators." Carnegie Report, quoted in K. Davidson, R. Ginsburg, & H. Kay, Sex-Based Discrimination 814 (1975 ed.). A 10-year empirical study by the Cooperative Institutional Research Program of the American Counsel of Education and the University of California, Los Angeles, also has affirmed the distinctive benefits of single-sex colleges and universities. As summarized in A. Astin, Four Critical Years 232 (1977), the data established that

> "[b]oth [male and female] single-sex colleges facilitate student involvement in several areas: academic, interaction with faculty, and verbal aggressiveness. . . . Men's and women's colleges also have a positive effect on intellectual self-esteem. Students at single-sex colleges are more satisfied than students at coeducational col-

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[4] In announcing Wellesley's decision in 1973 to remain a women's college, President Barbara Newell said that "[t]he research we have clearly demonstrates that women's colleges produce a disproportionate number of women leaders and women in responsible positions in society; it does demonstrate that the higher proportion of women on the faculty the higher the motivation for women students." Carnegie Report, in Babcock, at 1014. Similarly rejecting coeducation in 1971, the Mount Holyoke Trustees Committee on Coeducation reported that "the conditions that historically justified the founding of women's colleges" continued to justify their remaining in that tradition. *Ibid.*

leges with virtually all aspects of college life . . . . The only area where students are less satisfied is social life."[5]

Despite the continuing expressions that single-sex institutions may offer singular advantages to their students, there is no doubt that coeducational institutions are far more numerous. But their numerical predominance does not establish—in any sense properly cognizable by a court—that individual preferences for single-sex education are misguided or illegitimate, or that a State may not provide its citizens with a choice.[6]

II

The issue in this case is whether a State transgresses the Constitution when—within the context of a public system that offers a diverse range of campuses, curricula, and educa-

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[5] In this Court the benefits of single-sex education have been asserted by the students and alumnae of MUW. One would expect the Court to regard their views as directly relevant to this case:

"[I]n the aspect of life known as courtship or mate-pairing, the American female remains in the role of the pursued sex, expected to adorn and groom herself to attract the male. Without comment on the common sense or equities of this social arrangement, it remains a sociological fact.

"An institution of collegiate higher learning maintained exclusively for women is uniquely able to provide the education atmosphere in which some, but not all, women can best attain maximum learning potential. It can serve to overcome the historic repression of the past and can orient a woman to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis. Consequently, many such institutions flourish and their graduates make significant contributions to the arts, professions and business." Brief for Mississippi University for Women Alumnae Association as *Amicus Curiae* 2–3.

[6] "[T]he Constitution does not require that a classification keep abreast of the latest in educational opinion, especially when there remains a respectable opinion to the contrary . . . . Any other rule would mean that courts and not legislatures would determine all matters of public policy." *Williams* v. *McNair*, 316 F. Supp. 134, 137 (SC 1970) (footnote omitted), summarily aff'd, 401 U. S. 951 (1971).

tional alternatives—it seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college. In my view, the Court errs seriously by assuming—without argument or discussion—that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was designed to free women from "archaic and overbroad generalizations . . . ." *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975). In no previous case have we applied it to invalidate state efforts to *expand* women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

The cases cited by the Court therefore do not control the issue now before us. In most of them women were given no opportunity for the same benefit as men.[7] Cases involving male plaintiffs are equally inapplicable. In *Craig* v. *Boren*, 429 U. S. 190 (1976), a male under 21 was not permitted to buy beer anywhere in the State, and women were afforded no choice as to whether they would accept the "statistically measured but loose-fitting generalities concerning the drinking

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[7] See *Kirchberg* v. *Feenstra*, 450 U. S. 455, 456 (1981) (invalidating statute "that gave husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980) (invalidating law under which the benefits "that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner"); *Stanton* v. *Stanton*, 421 U. S. 7 (1975) (invalidating statute that provided a shorter period of parental support obligation for female children than for male children); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 645 (1975) (invalidating statute that failed to grant a woman worker "the same protection which a similarly situated male worker would have received"); *Frontiero* v. *Richardson*, 411 U. S. 677, 683 (1973) (invalidating statute containing a "mandatory preference for male applicants"); *Reed* v. *Reed*, 404 U. S. 71, 74 (1971) (invalidating an "arbitrary preference established in favor of males" in the administration of decedent's estates).

tendencies of aggregate groups." *Id.*, at 209. A similar situation prevailed in *Orr* v. *Orr*, 440 U. S. 268, 279 (1979), where men had no opportunity to seek alimony from their divorced wives, and women had no escape from the statute's stereotypical announcement of "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role . . . ."[8]

By applying heightened equal protection analysis to this case,[9] the Court frustrates the liberating spirit of the Equal Protection Clause. It prohibits the States from providing women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the *victims* of an illegal, stereotyped perception of the role of women in our society. The Court reasons this way in a case in which no woman has complained, and the only complainant is a man who advances no claims on behalf of anyone else. His claim, it should be recalled, is not that he is being denied a substantive educational opportunity, or even the right to attend an all-male or a coeducational col-

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[8] See also *Caban* v. *Mohammed*, 441 U. S. 380 (1979) (invalidating law that both denied men the opportunity—given to women—of blocking the adoption of his illegitimate child by means of withholding his consent, and that did not permit women to counter the statute's generalization that the maternal role is more important to women than the paternal role is to men).

[9] Even the Court does not argue that the appropriate standard here is "strict scrutiny"—a standard that none of our "sex discrimination" cases ever has adopted. Sexual segregation in education differs from the tradition, typified by the decision in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), of "separate but equal" *racial* segregation. It was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the *sole* alternative. MUW stands in sharp contrast. Of Mississippi's 8 public universities and 16 public junior colleges, only MUW considers sex as a criterion for admission. Women consequently are free to select a coeducational education environment for themselves if they so desire; their attendance at MUW is not a matter of coercion.

lege. See Brief for Respondent 24.[10] It is *only* that the colleges open to him are located at inconvenient distances.[11]

III

The Court views this case as presenting a serious equal protection claim of sex discrimination. I do not, and I would sustain Mississippi's right to continue MUW on a rational-basis analysis. But I need not apply this "lowest tier" of scrutiny. I can accept for present purposes the standard applied by the Court: that there is a gender-based distinction that must serve an important governmental objective by means that are substantially related to its achievement. *E. g., Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 150 (1980). The record in this case reflects that MUW has a historic position in the State's educational system dating back to 1884. More than 2,000 women presently evidence their preference for MUW by having enrolled there. The choice is

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[10] The Court says that "any gender-based classification provides one class a benefit or choice not available to the other class . . . ." *Ante*, at 731, n. 17. It then states that the issue "is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit *only* upon *one* class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Ibid.* (emphasis added). This is *not* the issue in this case. Hogan is not complaining about any benefit conferred upon women. Nor is he claiming discrimination because Mississippi offers no all-male college. As his brief states: "Joe Hogan does not ask to attend an all-male college which offers a Bachelor of Science in Nursing; he asks only to attend MUW." Brief for Respondent 24. And he asks this only for his personal convenience.

[11] Students in respondent's position, in "being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution." *Heaton* v. *Bristol*, 317 S. W. 2d 86, 99 (Tex. Civ. App. 1958), cert. denied, 359 U. S. 230 (1959), quoted in *Williams* v. *McNair*, 316 F. Supp., at 137.

one that discriminates invidiously against no one.[12] And the State's purpose in preserving that choice is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason—certainly none of constitutional dimension—to conclude that no substantial state interest is served when such a choice is made available.

In arguing to the contrary, the Court suggests that the MUW is so operated as to "perpetuate the stereotyped view of nursing as an exclusively women's job." *Ante*, at 729. But as the Court itself acknowledges, *ante*, at 720, MUW's School of Nursing was not created until 1971—about 90 years after the single-sex campus itself was founded. This hardly supports a link between nursing as a woman's profession and MUW's single-sex admission policy. Indeed, MUW's School of Nursing was not instituted until more than a decade *after* a separate School of Nursing was established at the coeducational University of Mississippi at Jackson. See University of Mississippi, 1982 Undergraduate Catalog 162. The School of Nursing makes up only one part—a relatively small part[13]—of MUW's diverse modern university campus and curriculum. The other departments on the MUW campus offer a typical range of degrees[14] and a typical range of sub-

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[12] "'Such a plan (i. e., giving the student a choice of a "single-sex" and coeducational institutions) exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefit of the best, most varied system of higher education that the State can supply.'" *Williams* v. *McNair*, *supra*, at 138, n. 15, quoting *Heaton* v. *Bristol*, *supra*, at 100.

[13] For instance, the School of Nursing takes up 15 pages of MUW's 234 page course catalog. See Mississippi University for Women, 81/82 Bulletin 185–200.

[14] *E. g.*, Bachelor of Arts; Bachelor of Science; Master of Arts; Master of Science. See *id.*, at 40. MUW also offers special preprofessional pro-

jects.[15] There is no indication that women suffer fewer opportunities at other Mississippi state campuses because of MUW's admission policy.[16]

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.[17]

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grams in law, dentistry, medicine, pharmacy, physical therapy, and veterinary medicine. *Ibid.*

[15] MUW's Bulletin on its Table of Contents lists the following subjects (offered in its School of Arts and Sciences): Air Force ROTC; Art; Behavioral Sciences; Biological Sciences; Business and Economics; Cooperative Education; English and Foreign Languages; Health, Physical Education, Recreation, and Dance; History, Journalism and Broadcasting; Mathematics; Music; Physical Sciences; and Speech Communication. See *id.*, at 3.

[16] For instance, the catalog for the coeducational University of Mississippi lists in its general description the "Sarah Isom Center for Women's Studies," which is described as "dedicated to the development of curriculum and scholarship about women, the dissemination of information about their expanding career opportunities, and the establishment of mutual support networks for women of all ages and backgrounds." University of Mississippi, 1982 Undergraduate Catalog 13–14. This listing precedes information about the University's Law and Medical Centers. *Id.*, at 14–15.

[17] The Court argues that MUW's means are not sufficiently related to its goal because it has allowed men to audit classes. The extent of record information is that men have audited 138 courses in the last 10 years. Brief for Respondent 21. On average, then, men have audited 14 courses a year. MUW's current annual catalog lists 913 courses offered in *one* year. See Mississippi University for Women, 81/82 Bulletin *passim*.

It is understandable that MUW might believe that it could allow men to audit courses without materially affecting its environment. MUW charges tuition but gives no academic credit for auditing. The University evidently is correct in believing that few men will choose to audit under such circumstances. This deviation from a perfect relationship between means and ends is insubstantial.

IV

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning. The Court answers that there is discrimination—not just that which may be tolerable, as for example between those candidates for admission able to contribute most to an educational institution and those able to contribute less—but discrimination of constitutional dimension. But, having found "discrimination," the Court finds it difficult to identify the victims. It hardly can claim that women are discriminated against. A constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the State of Mississippi. In essence he insists that he has a right to attend a college in his home community. This simply is not a sex discrimination case. The Equal Protection Clause was never intended to be applied to this kind of case.[18]

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[18] The Court, in the opening and closing sentences and note 7 of its opinion, states the issue in terms only of a "professional nursing school" and "decline[s] to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment." This would be a welcome limitation if, in fact, it leaves MUW free to remain an all-women's university in each of its other schools and departments—which include four schools and more than a dozen departments. Cf. nn. 13–15, *supra*. The question the Court does not answer is whether MUW may remain a women's university in every respect except its School of Nursing. This is a critical question for this University and its responsible board and officials. The Court holds today that they have deprived Hogan of constitutional rights because MUW is adjudged guilty of sex discrimination. The logic of the Court's entire opinion, apart from its statements mentioned above, appears to apply sweepingly to the entire University. The exclusion of men

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from the School of Nursing is repeatedly characterized as "gender-based discrimination,' subject to the same standard of analysis applied in previous sex discrimination cases of this Court. Nor does the opinion anywhere deny that this analysis applies to the entire University.

The Court nevertheless purports to decide this case "narrow[ly]." Normally and properly we decide only the question presented. It seems to me that in fact the issue properly before us is the single-sex policy of the University, and it is this issue that I have addressed in this dissent. The Court of Appeals so viewed this case, and unambiguously held that a single-sex state institution of higher education no longer is permitted by the Constitution. I see no principled way—in light of the Court's rationale—to reach a different result with respect to other MUW schools and departments. But given the Court's insistence that its decision applies only to the School of Nursing, it is my view that the Board and officials of MUW may continue to operate the remainder of the University on a single-sex basis without fear of personal liability. The standard of such liability is whether the conduct of the official "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). The Court today leaves in doubt the reach of its decision.

U.S. GOVERNMENT PRINTING OFFICE : 1983 O - 379-677 : QL 3

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

INDEX

(Vol. 458 U. S., Part 3)

AIDERS AND ABETTORS AS SUBJECT TO DEATH PENALTY. See Constitutional Law.

ALCOHOLIC BEVERAGES. See Schools.

ALIENS. See Constitutional Law.

BOYCOTT OF WHITE MERCHANTS BY BLACKS. See Constitutional Law.

CAPITAL PUNISHMENT. See Constitutional Law; Stays.

CHILD PORNOGRAPHY. See Constitutional Law.

COMMERCE CLAUSE. See Constitutional Law.

COMPULSORY PROCESS FOR OBTAINING WITNESSES. See Constitutional Law.

CONSTITUTIONAL LAW. See also State Gross Receipts Taxes.

Commerce Clause—Ground water—Removal from State—Validity of Nebraska statute.—Commerce Clause is violated by a Nebraska statute conditioning grant of a required state permit to transport ground water from any well in Nebraska for use in an adjoining State on latter's grant of reciprocal rights to transport ground water from that State for use in Nebraska. Sporhase v. Nebraska ex rel. Douglas, p. 941.

Cruel and unusual punishment—Death penalty—Aiders and abettors.—Eighth and Fourteenth Amendments were violated by imposition, under Florida law, of death penalty upon petitioner, who was convicted as a constructive aider and abettor and hence a principal in first-degree murder, but who was not present at robbery and killings and did not intend that victims be killed or anticipate that lethal force would be employed during robbery. Enmund v. Florida, p. 782.

Due process—Conviction for transporting illegal aliens—Deportation of alien witnesses.—Respondent, who was convicted under a federal statute prohibiting knowing transportation of an alien who had entered country illegally within three years prior to date of transportation, failed to establish a violation of Fifth Amendment right to due process or Sixth Amendment right to compulsory process for obtaining witnesses on asserted ground that deportation of some of illegal aliens involved deprived respondent of

CONSTITUTIONAL LAW—Continued.

opportunity to interview them to determine whether they could aid in his defense. United States v. Valenzuela-Bernal, p. 858.

Freedom of speech—Boycott of white merchants—Liability for merchants' business losses.—Nonviolent elements of petitioner organizations' and individuals' activities in connection with a boycott and picketing of white merchants to obtain equality and racial justice were entitled to First Amendment protection, and thus petitioners were not liable in damages to respondent white merchants, under state law, for business losses resulting from petitioners' activities. NAACP v. Claiborne Hardware Co., p. 886.

Freedom of speech—Child pornography—Validity of New York statute.—First Amendment is not violated by a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under age of 16 by distributing material that depicts such a performance, as applied to respondent bookstore owner who was convicted for selling films depicting young boys masturbating or as applied to others who distribute similar material. New York v. Ferber, p. 747.

CONTEMPT. See Stays.

CRIMINAL LAW. See Constitutional Law; Stays.

CRUEL AND UNUSUAL PUNISHMENT. See Constitutional Law.

DEATH PENALTY. See Constitutional Law; Stays.

DEPORTATION OF ALIEN WITNESSES. See Constitutional Law.

DISCRIMINATION AGAINST BLACKS. See Constitutional Law.

DISCRIMINATION BASED ON RACE. See Constitutional Law.

DISPROPORTIONALITY OF DEATH PENALTY FOR AIDERS AND ABETTORS. See Constitutional Law.

DUE PROCESS. See Constitutional Law.

EIGHTH AMENDMENT. See Constitutional Law.

EXCESSIVENESS OF DEATH PENALTY FOR AIDERS AND ABETTORS. See Constitutional Law.

EXPULSION OF STUDENT FOR INTOXICATION. See Schools.

FAIR TRIAL. See Constitutional Law.

FEDERAL-STATE RELATIONS. See Constitutional Law; State Gross Receipts Taxes.

FIFTH AMENDMENT. See Constitutional Law.

FIRST AMENDMENT. See Constitutional Law.

FLORIDA. See Constitutional Law; Stays.

FOURTEENTH AMENDMENT. See Constitutional Law.

FREEDOM OF ASSEMBLY. See Constitutional Law.

FREEDOM OF ASSOCIATION. See Constitutional Law.

FREEDOM OF SPEECH. See Constitutional Law.

GROSS RECEIPTS TAXES. See State Gross Receipts Taxes.

GROUND WATER. See Constitutional Law.

INDIAN COMMERCE CLAUSE. See State Gross Receipts Taxes.

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT. See State Gross Receipts Taxes.

INTERSTATE COMMERCE. See Constitutional Law.

INTOXICATING LIQUORS. See Schools.

MASSACHUSETTS. See Stays.

NEBRASKA. See Constitutional Law.

NEW MEXICO. See State Gross Receipts Taxes.

NEW YORK. See Constitutional Law.

OBSCENITY. See Constitutional Law.

PICKETING OF WHITE MERCHANTS BY BLACKS. See Constitutional Law.

PORNOGRAPHY. See Constitutional Law.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See State Gross Receipts Taxes.

PRISONERS. See Stays.

PROTECTION OF WITNESSES. See Stays.

RACIAL DISCRIMINATION. See Constitutional Law.

REMOVAL OF GROUND WATER FROM STATE. See Constitutional Law.

SAFETY OF WITNESSES. See Stays.

SCHOOLS.

Expulsion of student for intoxication—Construction of School Board's rule.—Where respondent student, who had been on school premises while intoxicated, was expelled for violation of petitioner School Board's rule providing for mandatory suspension for remainder of semester if a student has on school premises used "drugs," Board's interpretation of rule was reasonable, since alcohol is a "drug," and federal courts, in respondent's suit for injunctive relief, were not authorized to construe rule as not covering alcohol. Board of Ed. of Rogers, Ark. v. McCluskey, p. 966.

SEXUAL PERFORMANCES BY CHILDREN. See Constitutional Law.

SIXTH AMENDMENT. See Constitutional Law.

STATE GROSS RECEIPTS TAXES.

Tax on Indian school board's contractor—Validity of New Mexico law.—Federal law pre-empts New Mexico's tax imposed on gross receipts that appellant non-Indian construction company received from appellant tribal school board for construction of a school for Indian children on reservation. Ramah Navajo School Board v. Bureau of Revenue of New Mexico, p. 832.

STAYS.

District Court judgment—Transfer of prisoner—Witness protection program.—Application to stay District Court's judgment denying a preliminary injunction to prohibit federal officials from transferring applicant, who was in federal custody under witness protection program, from one federal detention center to another, is denied. Beltran v. Smith (REHNQUIST, J., in chambers), p. 1303.

Florida Supreme Court judgment—Death penalty.—Application to stay Florida Supreme Court's judgment upholding applicant's murder conviction and death sentence, no execution date having yet been set, is denied. White v. Florida (POWELL, J., in chambers), p. 1301.

State-court judgment—Criminal contempt conviction.—Application to stay Massachusetts Supreme Judicial Court's judgment affirming applicant's criminal contempt conviction and his 90-day sentence is denied. Corsetti v. Massachusetts (BRENNAN, J., in chambers), p. 1306.

STUDENT'S EXPULSION FOR INTOXICATION. See Schools.

TAXES. See State Gross Receipts Taxes.

TRANSFER OF PRISONERS. See Stays.

TRANSPORTING ILLEGAL ALIENS. See Constitutional Law.

WATER RIGHTS. See Constitutional Law.

WITNESS PROTECTION PROGRAM. See Stays.

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 458 U. S., Parts 1, 2, and 3)

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

	Page
Abbott & Associates, Inc.; Illinois *v.*	1103
ABC Containerline, N.V. *v.* Kingston Shipping Co.	1108
Adams *v.* Howerton	1111
Advance Ross Electronics Corp. *v.* Green	1108
Aetna Ins. Co.; Roy Wilt & Son *v.*	1108
Aetna Ins. Co.; Wilt *v.*	1108
Ahmed *v.* Eikerenkoetter	1116
Akron *v.* Akron Center for Reproductive Health, Inc.	1104
Akron; Akron Center for Reproductive Health, Inc. *v.*	1104
Akron Center for Reproductive Health, Inc. *v.* Akron	1104
Akron Center for Reproductive Health, Inc.; Akron *v.*	1104
Alabama *v.* Graddick	1106
Alexander; McDonald *v.*	1124
Alfred L. Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Barez	592
Allied International, Inc. *v.* Longshoremen	1120
American Consulting Assn., Inc.; J & M Design Co. *v.*	1112
American Consulting Assn., Inc.; Spencer *v.*	1112
American Laundry Press Co. *v.* OK NYO Rexrode	1103
American Society of Mechanical Engineers *v.* Hydrolevel Corp.	1116
Anderson *v.* Flateau	1123
Andrews *v.* United States	1108
Arkansas *v.* Mississippi	1119,1122

Page
Arthur Treacher's Fish & Chips, Inc. *v.* Horstmyer 1107
Arthur Young & Co. *v.* Summer 1106
ASARCO Inc. *v.* Idaho State Tax Comm'n 307
Ashcroft *v.* National Organization for Women, Inc. 1102
Ashcroft *v.* Planned Parenthood Assn. of Kansas City 1104
Ashcroft; Planned Parenthood Assn. of Kansas City *v.* 1104
Associated Gen. Contractors of Cal. *v.* Cal. Council of Carpenters 1128
Attorney General *v.* Black Panther Party 1118
Attorney General; Reynolds *v.* 1110
Attorney General; Sporhase *v.* 941
Attorney General; Weigang *v.* 1103
Attorney General of Mich.; Lake Carriers' Assn. *v.* 1116
Attorney General of Mo. *v.* National Organization for Women, Inc. . 1102
Attorney General of Mo. *v.* Planned Parenthood Assn. of K. C. .. 1104
Attorney General of Mo.; Planned Parenthood Assn. of K. C. *v.* .. 1104
Baker *v.* Zant 1115
Barez; Alfred L. Snapp & Son, Inc. *v.* 613
Barez; Bramkamp *v.* 1121
Bearden *v.* Georgia 1105
Bechtel Power Corp. *v.* Pennsylvania 375
Beltran *v.* Smith 1303
Berger *v.* United States 1132
Binkley Co.; Williams Enterprises, Inc. *v.* 1107
Black *v.* East Ohio Gas Co. 1132
Blackburn; Wilkerson *v.* 1105,1131
Black Panther Party; Moore *v.* 1118
Black Panther Party; Smith *v.* 1118
Board of Ed., Hendrick Hudson Central School Dist. *v.* Rowley .. 176
Board of Ed. of Los Angeles; Crawford *v.* 527
Board of Ed. of Rogers, Ark. *v.* McCluskey 966,1132
Board of Governors, FRS; Option Advisory Service, Inc. *v.* 1108
Board of Trustees of Insts. of Higher Ed. *v.* Miss. Council on H. R. 1116
Boehm, *In re* 1125
Bohemian Distributing Co. *v.* Norman Williams Co. 654
Bonds, *In re* 1127
Bramkamp *v.* Puerto Rico *ex rel.* Barez 1121
Brewer *v.* Indiana 1122,1132
Brisbois, *In re* 1127
Bronze Shields, Inc. *v.* New Jersey Dept. of Civil Service 1122
Buchanan; Kallenberger *v.* 1124
Bullard; Estelle *v.* 1120
Bureau of Revenue of N. M.; Ramah Navajo School Bd., Inc. *v.* . 832
Burlington Northern R. Co.; Tatum *v.* 1111
Burroughs Corp.; Kramarsky *v.* 1130

Page
Bush *v.* Lucas 1104
Butcher *v.* United States 1133
California *v.* Glendale Federal Savings & Loan Assn. 1121
California; Romano *v.* 1109
California *v.* Shirley 1125
California *v.* Texas 1119,1131
California; Villareal *v.* 1109
California *ex rel.* State Lands Comm'n *v.* United States 1131
California Federal Savings & Loan Assn. *v.* Romagnoli 1117
California Federal Savings & Loan Assn. *v.* Tan 1117
California State Council of Carpenters; Assoc. Gen. Contractors *v.* 1128
Campbell, *In re* 1133
Campbell *v.* Civiletti 1116
Capps *v.* New Mexico 1107
Carpentersville; Fiala *v.* 1132
Carter *v.* Dayton Bd. of Ed. 1131
Casari *v.* First Federal Savings & Loan Assn. of Lincoln 1106
Certain Named & Unnamed Undocumented Alien Children; Texas *v.* 1131
Chadha; Immigration and Naturalization Service *v.* 1120
Chaney *v.* Warden 1116
Chastain *v.* Davis 1118
Chemical Construction Corp.; Kremer *v.* 1133
City. See name of city.
Civiletti; Campbell *v.* 1116
Claiborne Hardware Co.; NAACP *v.* 886
Clements *v.* Fashing 1133
Click *v.* Idaho *ex rel.* Evans 1131
Collins; Hunt *v.* 1132
Combs *v.* United States 1111
Commissioner; Sutain *v.* 1110,1133
Commissioner of Internal Revenue. See Commissioner.
Commodity Futures Trading Comm'n; Monex International Ltd. *v.* 1103
Commonwealth. See name of Commonwealth.
Connecticut; Frazier *v.* 1112
Connick *v.* Myers 1130
Container Corp. of America *v.* Franchise Tax Bd. 1129
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania 375
Cook *v.* United States 1116
Corriz; Naranjo *v.* 1123
Corsetti *v.* Massachusetts 1306
County. See name of county.
Coward *v.* United States 1116
Crawford *v.* Board of Ed. of Los Angeles 527
Davis; Chastain *v.* 1118

Page
Dawson *v.* New York 1112
Dayton Bd. of Ed.; Carter *v.* 1131
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 141
Delaware; Doe *v.* 1117
Delaware Valley Citizens' Council for Clear Air; Pennsylvania *v.* .. 1125
Delta Air Lines; Kramarsky *v.* 1130
Delta Air Lines; Pfister *v.* 1124
Devine *v.* Illinois 1109
Director, OWCP *v.* Perini North River Associates 1129
Director of penal or correctional institution. See name or title of director.
District Court of Colo., Seventeenth Judicial Dist. *v.* Marks 1107
District Judge. See U. S. District Judge.
District of Columbia Court of Appeals *v.* Feldman 1105
District of Columbia Court of Appeals; Feldman *v.* 1106
District of Columbia Court of Appeals; Hickey *v.* 1106
Doe *v.* Delaware 1117
Doe; Plyler *v.* 1131
Douglas; Sporhase *v.* 941
Dykema *v.* United States 1132
East Ohio Gas Co.; Black *v.* 1132
Eikerenkoetter; Ahmed *v.* 1116
Electrical Workers; Lord *v.* 1106
Enmund *v.* Florida 782
Equal Employment Opportunity Comm'n; Ford Motor Co. *v.* 219
Estelle *v.* Bullard 1120
Estelle *v.* Moore 1111
Estelle; Norris *v.* 1109
Estelle *v.* Von Burleson 1121
Etlin *v.* Robb 1112
Evans; Click *v.* 1131
Fannon *v.* Florida 1107
Fashing; Clements *v.* 1133
Federal Election Comm'n *v.* National Right to Work Committee 1130
Federal Energy Regulatory Comm'n; Harvey *v.* 1132
Federal Energy Regulatory Comm'n *v.* Mississippi 1131
Federal Home Loan Bank Bd. *v.* Gulf Federal S. & L. Assn. 1121
Feldman, *In re* 1125
Feldman *v.* District of Columbia Court of Appeals 1106
Feldman; District of Columbia Court of Appeals *v.* 1105
Fendler, *In re* 1128
Ferber; New York *v.* 747
Fernandes; Limmer *v.* 1124
Fiala *v.* Carpentersville 1132

Page
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 141
First Federal Savings & Loan Assn. of Lincoln; Casari *v.* 1106
First Pennsylvania Bank N. A. *v.* Zeffiro 1131
First Tennessee Bank N. A. Memphis; Smith *v.* 1105
First Tennessee Bank N. A. Memphis; Sullivan *v.* 1105
Fishman, *In re* 1126
Flateau; Anderson *v.* 1123
Florida; Enmund *v.* 782
Florida; Fannon *v.* 1107
Florida; Francois *v.* 1122
Florida; Messer *v.* 1116
Florida; Sireci *v.* 1116
Florida; White *v.* 1301
Florida Dept. of Labor and Employment Security; Paschal *v.* 1116
Florida Dept. of State *v.* Treasure Salvors, Inc. 670
Florida Public Employees Relations Comm'n; Paschal *v.* 1132
Ford *v.* Kentucky 1103
Ford Motor Co. *v.* Equal Employment Opportunity Comm'n 219
Fox; Glendale Federal Savings & Loan Assn. *v.* 1121
Franchise Tax Bd.; Container Corp. of America *v.* 1129
Francois *v.* Florida 1122
Frazier *v.* Connecticut 1112
F. W. Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 354
Garner; Memphis Bank & Trust Co. *v.* 1131
Gates; Illinois *v.* 1127
Gault *v.* United States 1109
General Building Contractors Assn., Inc. *v.* Pennsylvania 375
Georgia; Bearden *v.* 1105
Georgia; Gilreath *v.* 1116
Gillespie; United States *v.* 1111
Gillette Co. *v.* Miner 1130
Gilman Paper Co.; Wilder *v.* 1107
Gilmore *v.* Pennsylvania 1103
Gilreath *v.* Georgia 1116
Glasgow, Inc. *v.* Pennsylvania 375
Glendale Federal Savings & Loan Assn.; California *v.* 1121
Glendale Federal Savings & Loan Assn. *v.* Fox 1121
Glendale Federal Savings & Loan Assn. *v.* Gross 1117
Glendale Federal Savings & Loan Assn. *v.* Hehir 1117
Gloeckner, *In re* 1127
Glover-El *v.* Illinois 1110
Goldfarb *v.* United States 1108
Governor of Idaho; Click *v.* 1131
Governor of Tenn.; McDonald *v.* 1124

Page
Governor of Tex. *v.* Fashing 1133
Governor of Va.; Etlin *v.* 1112
Grace; Springdale School Dist. No. 50 of Washington County *v.* 1118
Grace & Co. *v.* Rubber Workers 1105
Graddick; Alabama *v.* 1106
Graham *v.* New York 1101
Green; Advance Ross Electronics Corp. *v.* 1108
Griffin *v.* Oceanic Contractors, Inc. 564
Gross; Glendale Federal Savings & Loan Assn. *v.* 1117
Guice, *In re* 1104
Gulf Federal S. & L. Assn.; Federal Home Loan Bank Bd. *v.* 1121
Hale *v.* United States 1124
Hammersmith, *In re* 1126
Hampton Roads Shipping Assn. *v.* Longshoremen 1105
Harrington *v.* Tennessee 1132
Harris *v.* Housewright 1110
Harris County; Xerox Corp. *v.* 1130
Harvey *v.* Federal Energy Regulatory Comm'n 1132
Hathorn *v.* Lovorn 1131
Hehir; Glendale Federal Savings & Loan Assn. *v.* 1117
Herman & McLean *v.* Huddleston 1129
Hickey *v.* District of Columbia Court of Appeals 1106
Hogan; Mississippi Univ. for Women *v.* 718
Hogan *v.* Pennsylvania 1110
Holland, *In re* 1104
Hollywood Motor Car Co.; United States *v.* 263
Hondo Boats, Inc. *v.* McCraine 1105
Hood *v.* United States 1109
Hoover *v.* Mississippi 1132
Horizons Apartments Associates, Ltd. *v.* Lee County 1124
Horstmyer; Arthur Treacher's Fish & Chips, Inc. *v.* 1107
Housewright; Harris *v.* 1110
Howard *v.* New Jersey Dept. of Civil Service 1122
Howell *v.* Steffey 1110
Howerton; Adams *v.* 1111
Huddleston; Herman & McLean *v.* 1129
Huey *v.* Teledyne, Inc. 1106
Hunt *v.* Collins 1132
Hydrolevel Corp.; American Society of Mechanical Engineers *v.* 1116
Hyman *v.* South Carolina 1122,1132
Idaho *ex rel.* Evans; Click *v.* 1131
Idaho State Tax Comm'n; ASARCO Inc. *v.* 307
Ieva *v.* Stamford 1106
Ieva; Stamford *v.* 1106

Page
Illinois *v.* Abbott & Associates, Inc. 1103
Illinois; Devine *v.* 1109
Illinois *v.* Gates 1127
Illinois; Glover-El *v.* 1110
Illinois; Thompson *v.* 1109
Immigration and Naturalization Service *v.* Chadha 1120
Immigration and Naturalization Service; U. S. House of Reps. *v.* 1120
Immigration and Naturalization Service; U. S. Senate *v.* 1120
Indiana; Brewer *v.* 1122,1132
Ingram *v.* Smith 1110
In re. See name of party.
Insurance Comm'r of N. H.; Sharon Steel Corp. *v.* 1101
International. For labor union, see name of trade.
Iron Arrow Honor Society *v.* Schweiker 1102
Irwin *v.* Montgomery County 1106
Jackson *v.* Leeke 1110
Jim McNeff, Inc. *v.* Todd 1120
J & M Design Co. *v.* American Consulting Assn., Inc. 1112
Johnson *v.* Johnson 1107
Johnson; Mariscal *v.* 1112
J. P. Stevens & Co. *v.* National Labor Relations Bd. 1118
Kallenberger *v.* Buchanan 1124
Kelley; Lake Carriers' Assn. *v.* 1116
Kelly *v.* United States 1109
Kentucky; Ford *v.* 1103
Kingston Shipping Co.; ABC Containerline, N.V. *v.* 1108
Klein; Rennie *v.* 1119
Kramarsky *v.* Burroughs Corp. 1130
Kramarsky *v.* Delta Air Lines 1130
Kramarsky *v.* Metropolitan Life Ins. Co. 1130
Kremer *v.* Chemical Construction Corp. 1133
Kulwiec, *In re* 1104,1133
Kush *v.* Rutledge 1120
Labor Union. See name of trade.
Lake Carriers' Assn. *v.* Kelley 1116
Land & Leisure, Inc. *v.* Summer 1106
Langkam, *In re* 1125
Lawrence; Mitchell *v.* 1123
Lee County; Horizons Apartments Associates, Ltd. *v.* 1124
Leeke; Jackson *v.* 1110
Lehman *v.* Lycoming County Children's Services Agency 502
Leighton; Wright *v.* 1116
Levine, *In re* 1126
Lieberman, *In re* 1127

Page
Limmer *v.* Fernandes 1124
Limmer *v.* Santani 1124
Local. For labor union, see name of trade.
Lodge; Rogers *v.* 613
Longshoremen; Allied International, Inc. *v.* 1120
Longshoremen; Hampton Roads Shipping Assn. *v.* 1105
Longval; Meachum *v.* 1102
Lord *v.* Electrical Workers 1106
Loretto *v.* Teleprompter Manhattan CATV Corp. 419
Lovorn; Hathorn *v.* 1131
Lucas; Bush *v.* 1104
Lycoming County Children's Services Agency; Lehman *v.* 502
Marathon Pipe Line Co.; Northern Pipeline Construction Co. *v.* 50
Marathon Pipe Line Co.; United States *v.* 50
Marinello *v.* New York City 1108
Mariscal *v.* Johnson 1112
Marks; District Court of Colo., Seventeenth Judicial Dist. *v.* 1107
Marquez-Amaya; United States *v.* 1118
Maselli *v.* State Bd. of Equalization of Cal. 1132
Massachusetts; Corsetti *v.* 1306
Massachusetts Council of Construction Employers, Inc.; White *v.* 1129
Mayor of Boston *v.* Massachusetts Council of Constr. Employers 1129
Mathis *v.* United States 1116
McAllen Bag & Supply Co.; Vasquez *v.* 1122
McCarthy; United States *ex rel.* Miller *v.* 1109,1132
McCluskey; Board of Ed. of Rogers, Ark. *v.* 966,1132
McCraine; Hondo Boats, Inc. *v.* 1105
McDonald *v.* Alexander 1124
McGraw-Edison Co. *v.* Sikes 1108
McNeff, Inc. *v.* Todd 1120
Meachum *v.* Longval 1102
Memphis Bank & Trust Co. *v.* Garner 1131
Messer *v.* Florida 1116
Metropolitan Edison Co. *v.* People Against Nuclear Energy 1128
Metropolitan Life Ins. Co.; Kramarsky *v.* 1130
Michigan *v.* Thomas 259
Michigan; Yeo *v.* 1132
Miller *v.* McCarthy 1109,1132
Miller *v.* New York 1102
Miller *v.* United States 1110
Miner; Gillette Co. *v.* 1130
Mississippi; Arkansas *v.* 1119,1122
Mississippi; Federal Energy Regulatory Comm'n *v.* 1131
Mississippi; Hoover *v.* 1132

Page
Mississippi Council on Hum. Rel.; Trustees of Insts. of Higher Ed. *v.* 1116
Mississippi Univ. for Women *v.* Hogan 718
Mitchell *v.* Lawrence 1123
Monex International Ltd. *v.* Commodity Futures Trading Comm'n 1103
Montgomery *v.* United States 1116
Montgomery County; Irwin *v.* 1106
Moore *v.* Black Panther Party 1118
Moore; Estelle *v.* 1111
Moreau; Oppenheim *v.* 1107
Moreno; Toll *v.* 1
Morgan Drive Away, Inc. *v.* Samford 1122
Morris *v.* Slappy 1103
Morrow; Thompson *v.* 1116
Myers; Connick *v.* 1130
Nadel, *In re* 1126
Nadler, *In re* 1127
Naranjo *v.* Corriz 1123
NAACP *v.* Claiborne Hardware Co. 886
National Black Police Assn., Inc.; Velde *v.* 591
National Broadcasting Co.; Niemi *v.* 1108, 1132
National Labor Relations Bd.; J. P. Stevens & Co. *v.* 1118
National Labor Relations Bd.; Shepard *v.* 1131
National Organization for Women, Inc.; Ashcroft *v.* 1102
National Right to Work Committee; Federal Election Comm'n *v.* 1130
Nebeker *v.* United States 1111
Nebraska; South Dakota *v.* 276
Nebraska *ex rel.* Douglas; Sporhase *v.* 941
Neustein *v.* United States 1132
New Jersey Dept. of Civil Service; Bronze Shields, Inc. *v.* 1122
New Jersey Dept. of Civil Service; Howard *v.* 1122
New Mexico; Capps *v.* 1107
New Mexico; Stevens *v.* 1109
New York; Dawson *v.* 1112
New York *v.* Ferber 747
New York; Graham *v.* 1101
New York; Miller *v.* 1102
New York City; Marinello *v.* 1108
New York Shipping Assn. *v.* Waterfront Comm'n of N. Y. Harbor 1101
New York State Chiropractic Assn. *v.* Pireno 119
Niemi *v.* National Broadcasting Co. 1108, 1132
Nieves *v.* United States 1132
Norman Williams Co.; Bohemian Distributing Co. *v.* 654
Norman Williams Co.; Rice *v.* 654
Norman Williams Co.; Wine & Spirits Wholesalers of California *v.* 654

Page
Norris *v.* Estelle 1109
North Dakota *v.* United States 1129
Northern Pipeline Construction Co. *v.* Marathon Pipe Line Co. 50
Northwestern Bell Telephone Co.; Occhino *v.* 1133
Occhino *v.* Northwestern Bell Telephone Co. 1133
Oceanic Contractors, Inc.; Griffin *v.* 564
Ohio; Scott *v.* 1108
OK NYO Rexrode; American Laundry Press Co. *v.* 1103
Olson; Smith *v.* 1125
Olson *v.* United States 1110
Oppenheim *v.* Moreau 1107
Option Advisory Service, Inc. *v.* Board of Governors, FRS 1108
Paglianite, *In re* 1125
Pan American Savings & Loan Assn. *v.* Panko 1117
Panko; Pan American Savings & Loan Assn. *v.* 1117
Panzirer; Price Waterhouse *v.* 1105
Panzirer *v.* Wolf 1107
Paschal *v.* Florida Dept. of Labor and Employment Security 1116
Paschal *v.* Florida Public Employees Relations Comm'n 1132
Pennsylvania; Bechtel Power Corp. *v.* 375
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 375
Pennsylvania *v.* Delaware Valley Citizens' Council for Clean Air 1125
Pennsylvania; General Building Contractors Assn., Inc. *v.* 375
Pennsylvania; Gilmore *v.* 1103
Pennsylvania; Glasgow, Inc. *v.* 375
Pennsylvania; Hogan *v.* 1110
Pennsylvania; Porter *v.* 1121
Pennsylvania; United Engineers & Constructors, Inc. *v.* 375
People Against Nuclear Energy; Metropolitan Edison Co. *v.* 1128
Pepsi-Cola Bottling Co. of St. Louis, Mo.; Williams *v.* 1133
Perini North River Associates; Director, OWCP *v.* 1129
Perry *v.* Perry 1109
Pfister *v.* Delta Air Lines 1124
Pireno; New York State Chiropractic Assn. *v.* 119
Pireno; Union Labor Life Ins. Co. *v.* 119
Planned Parenthood Assn. of Kansas City *v.* Ashcroft 1104
Planned Parenthood Assn. of Kansas City; Ashcroft *v.* 1104
Plante *v.* Scott 1101
Plyler *v.* Doe 1131
Pope *v.* United States 1110
Porter *v.* Pennsylvania 1121
Price Waterhouse *v.* Panzirer 1105
Puerto Rico *ex rel.* Barez; Alfred L. Snapp & Son, Inc. *v.* 592
Puerto Rico *ex rel.* Barez; Bramkamp *v.* 1121

Page
Quiros *v.* United States 1111
Ramah Navajo School Bd., Inc. *v.* Bureau of Revenue of N. M. 832
Raymond, James & Associates, Inc. *v.* Summer 1106
Rennie *v.* Klein 1119
Resnick, *In re* 1125
Reynolds *v.* Attorney General 1110
Rheaume *v.* Saffell 1106
Rice *v.* Norman Williams Co. 654
Rice *v.* United States 1111
Ritter *v.* Ritter 1132
Robb; Etlin *v.* 1112
Rogers *v.* Lodge 613
Romagnoli; California Federal Savings & Loan Assn. *v.* 1117
Romano *v.* California 1109
Rowley; Board of Ed., Hendrick Hudson Central School Dist. *v.* 176
Roy Wilt & Son *v.* Aetna Ins. Co. 1108
Rubber Workers; W. R. Grace & Co. *v.* 1105
Ruppel *v.* United States 1107,1132
Rutledge; Kush *v.* 1120
Saffell; Rheaume *v.* 1106
Samford; Morgan Drive Away, Inc. *v.* 1122
Sanborn *v.* Wolfel 1102
Sands, *In re* 1126
Santani; Limmer *v.* 1124
Scanlon *v.* Tokarcik 1121
Schweiker; Iron Arrow Honor Society *v.* 1102
Scott *v.* Ohio 1108
Scott; Plante *v.* 1101
Seattle School Dist. No. 1; Washington *v.* 457
Secretary of Health and Human Services; Iron Arrow Honor Soc. *v.* 1102
Secretary of Interior *v.* Western Nuclear, Inc. 1104
Secretary of State of Colo.; Kallenberger *v.* 1124
Shabazz, *In re* 1104
Sharon Steel Corp. *v.* Insurance Comm'r of N. H. 1101
Shepard *v.* National Labor Relations Bd. 1131
Sher; United States *v.* 1121
Shirley; California *v.* 1125
Sholly; U. S. Nuclear Regulatory Comm'n *v.* 1128
Sikes; McGraw-Edison Co. *v.* 1108
Simopoulos *v.* Virginia 1104,1128
Sireci *v.* Florida 1116
Slappy; Morris *v.* 1103
Smith; Beltran *v.* 1303
Smith *v.* Black Panther Party 1118

384-537 O—82——2: QL 3

Page
Smith *v.* First Tennessee Bank N. A. Memphis 1105
Smith; Ingram *v.* 1110
Smith *v.* Olson 1125
Smith *v.* United States 1110
Smith; Weigang *v.* 1103
Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Barez 592
Snyder *v.* United States 1111
South Carolina; Hyman *v.* 1122,1132
South Dakota *v.* Nebraska 276
Spencer *v.* American Consulting Assn., Inc. 1112
Spiro, *In re* 1128
Spivey; Zant *v.* 1111
Sporhase *v.* Nebraska *ex rel.* Douglas 941
Springdale School Dist. No. 50 of Washington County *v.* Grace .. 1118
Stamford *v.* Ieva 1106
Stamford; Ieva *v.* 1106
State. See name of State.
State Bd. of Equalization of Cal.; Maselli *v.* 1132
State Lands Comm'n *v.* United States 1131
Steffey; Howell *v.* 1110
Stern, *In re* 1126
Stevens *v.* New Mexico 1109
Stevens & Co. *v.* National Labor Relations Bd. 1118
Stine *v.* United States 1110
Sullivan *v.* First Tennessee Bank N. A. Memphis 1105
Summer; Arthur Young & Co. *v.* 1106
Summer; Land & Leisure, Inc. *v.* 1106
Summer; Raymond, James & Associates, Inc. *v.* 1106
Sundock, *In re* 1128
Superintendent of penal or correctional institution. See name or title of superintendent.
Sutain *v.* Commissioner 1110,1133
Tan; California Federal Savings & Loan Assn. *v.* 1117
Tatum *v.* Burlington Northern R. Co. 1111
Taxation and Revenue Dept. of N. M.; F. W. Woolworth Co. *v.* .. 354
Teledyne, Inc.; Huey *v.* 1106
Teleprompter Manhattan CATV Corp.; Loretto *v.* 419
Tennessee; Harrington *v.* 1132
Texas; California *v.* 1119,1131
Texas *v.* Certain Named & Unnamed Undocumented Alien Children 1131
Thomas; Michigan *v.* 259
Thomas; Wedra *v.* 1109
Thompson *v.* Illinois 1109
Thompson *v.* Morrow 1116

Page
Thompson *v.* Woltenberg 1132
Todd; Jim McNeff, Inc. *v.* 1120
Tokarcik; Scanlon *v.* 1121
Toll *v.* Moreno 1
Trapp, *In re* 1116
Treacher's Fish & Chips, Inc. *v.* Horstmyer 1107
Treasure Salvors, Inc.; Florida Dept. of State *v.* 670
Troy *v.* United States 1111
Union. For labor union, see name of trade.
Union Labor Life Ins. Co. *v.* Pireno 119
United Engineers & Constructors, Inc. *v.* Pennsylvania 375
United States. See name of other party.
U. S. District Judge; Wright *v.* 1116
United States *ex rel.* Miller *v.* McCarthy 1109,1132
U. S. House of Representatives *v.* INS 1120
U. S. Nuclear Regulatory Comm'n *v.* Sholly 1128
U. S. Senate *v.* INS 1120
Valenzuela-Bernal; United States *v.* 858
Vasquez *v.* McAllen Bag & Supply Co. 1122
Velde *v.* National Black Police Assn., Inc. 591
Village. See name of village.
Villareal *v.* California 1109
Virginia; Simopoulos *v.* 1104,1128
Virginia; Weisen *v.* 1107
Von Burleson; Estelle *v.* 1121
Wade *v.* United States 1116
Wajert, *In re* 1125
Warden. See also name of warden.
Warden; Chaney *v.* 1116
Washington *v.* Seattle School Dist. No. 1 457
Waterfront Comm'n of New York Harbor; N. Y. Shipping Assn. *v.* 1101
Watt *v.* Western Nuclear, Inc. 1104
Wedra *v.* Thomas 1109
Weigang, *In re* 1103
Weigang *v.* Smith 1103
Western Nuclear, Inc.; Watt *v.* 1104
White *v.* Florida 1301
White *v.* Massachusetts Council of Construction Employers, Inc. . 1129
Wiesen *v.* Virginia 1107
Wilder *v.* Gilman Paper Co. 1107
Wilkerson *v.* Blackburn 1105,1131
Williams *v.* Pepsi-Cola Bottling Co. of St. Louis, Mo. 1133
Williams *v.* United States 279
Williams Co.; Bohemian Distributing Co. *v.* 654

Page
Williams Co.; Rice *v.* 654
Williams Co.; Wine & Spirits Wholesalers of California *v.* 654
Williams Enterprises, Inc. *v.* Binkley Co. 1107
Wilson *v.* Wilson 1107
Wilt *v.* Aetna Ins. Co. 1108
Wilt & Son *v.* Aetna Ins. Co. 1108
Wine & Spirits Wholesalers of California *v.* Norman Williams Co. 654
Wolf; Panzirer *v.* 1107
Wolfel; Sanborn *v.* 1102
Woltenberg; Thompson *v.* 1132
Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 854
W. R. Grace & Co. *v.* Rubber Workers 1105
Wright *v.* Leighton 1116
Xerox Corp. *v.* Harris County 1130
Yeo *v.* Michigan 1132
Young & Co. *v.* Summer 1106
Zant; Baker *v.* 1115
Zant *v.* Spivey 1111
Zeffiro; First Pennsylvania Bank N. A. *v.* 1131

NEW YORK v. FERBER

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 81-55. Argued April 27, 1982—Decided July 2, 1982

A New York statute prohibits persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance. The statute defines "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. Respondent bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the Appellate Division of the New York Supreme Court affirmed. The New York Court of Appeals reversed, holding that the statute violated the First Amendment as being both underinclusive and overbroad. The court reasoned that in light of the explicit inclusion of an obscenity standard in a companion statute banning the knowing dissemination of similarly defined material, the statute in question could not be construed to include an obscenity standard, and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment.

Held: As applied to respondent and others who distribute similar material, the statute in question does not violate the First Amendment as applied to the States through the Fourteenth Amendment. Pp. 753–774.

(a) The States are entitled to greater leeway in the regulation of pornographic depictions of children for the following reasons: (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child, easily passes muster under the First Amendment; (2) the standard of *Miller* v. *California*, 413 U. S. 15, for determining what is legally obscene is not a satisfactory solution to the child pornography problem; (3) the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis;* and (5) recognizing and classifying child pornography as a category of material outside the First Amendment's protection is not incompatible with this Court's decisions dealing with what speech is unprotected. When a definable class of material, such as that covered by the New

York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection. Pp. 756–764.

(b) The New York statute describes a category of material the production and distribution of which is not entitled to First Amendment protection. Accordingly, there is nothing unconstitutionally "underinclusive" about the statute, and the State is not barred by the First Amendment from prohibiting the distribution of such unprotected materials produced outside the State. Pp. 764–766.

(c) Nor is the New York statute unconstitutionally overbroad as forbidding the distribution of material with serious literary, scientific, or educational value. The substantial overbreath rule of *Broadrick* v. *Oklahoma*, 413 U. S. 601, applies. This is the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, *supra*, at 615–616. Pp. 766–774.

52 N. Y. 2d 674, 422 N. E. 2d 523, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 774. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 775. BLACKMUN, J., concurred in the result. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 777.

Robert M. Pitler argued the cause for petitioner. With him on the briefs was *Mark Dwyer*.

Herald Price Fahringer argued the cause for respondent. With him on the brief was *Paul J. Cambria, Jr.**

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*Briefs of *amici curiae* urging reversal were filed by *Edmund J. Burns* and *William A. Cahill, Jr.*, for Covenant House; and by *John J. Walsh* for Morality in Media, Inc.

Michael A. Bamberger filed a brief for the American Booksellers Association, Inc., et al., as *amici curiae* urging affirmance.

Bruce A. Taylor filed a brief for Charles H. Keating, Jr., et al., as *amici curiae*.

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.[1] The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.[2]

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[1] "[C]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." S. Rep. No. 95-438, p. 5 (1977). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age . . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.*, at 6. In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., 41-42 (1977).

[2] In addition to New York, 19 States have prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene. Ariz. Rev. Stat. Ann. § 13-3553 (Supp. 1981-1982); Colo. Rev. Stat. § 18-6-403 (Supp. 1981); Del. Code Ann., Tit. 11, §§ 1108, 1109 (1979); Fla. Stat. § 847.014 (1981); Haw. Rev. Stat. § 707-751 (Supp. 1981); Ky. Rev. Stat. §§ 531.320, 531.340-531.360 (Supp. 1980); La. Rev. Stat. Ann. § 14:81.1(A)(3) (West Supp. 1982); Mass. Gen.

New York is one of the 20. In 1977, the New York Legislature enacted Article 263 of its Penal Law. N. Y. Penal Law, Art. 263 (McKinney 1980). Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance:

> "A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child,

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Laws Ann., ch. 272, § 29A (West Supp. 1982–1983); Mich. Comp. Laws Ann. § 750.145c(3) (1982–1983); Miss. Code Ann. § 97–5–33(4) (Supp. 1981); Mont. Code Ann. § 45–5–625 (1981); N. J. Stat. Ann. § 2C:24–4(b)(5) (West 1981); Okla. Stat., Tit. 21, § 1021.2 (1981); Pa. Stat. Ann., Tit. 18, § 6312(c) (Purdon 1982–1983); R. I. Gen. Laws § 11–9–1.1 (1981); Tex. Penal Code Ann. § 43.25 (1982); Utah Code Ann. § 76–10–1206.5(3) (Supp. 1981); W. Va. Code § 61–8C–3 (Supp. 1981); Wis. Stat. § 940.203(4) (1979–1980).

Fifteen States prohibit the dissemination of such material only if it is obscene. Ala. Code §§ 13–7–231, 13–7–232 (Supp. 1981); Ark. Stat. Ann. § 41–4204 (Supp. 1981); Cal. Penal Code Ann. § 311.2(b) (West Supp. 1982) (general obscenity statute); Ill. Rev. Stat., ch. 38, ¶ 11–20a(b)(1) (1979); Ind. Code § 35–30–10.1–2 (1979); Me. Rev. Stat. Ann., Tit. 17, § 2923(1) (Supp. 1981–1982); Minn. Stat. §§ 617.246(3) and (4) (1980); Neb. Rev. Stat. § 28–1463(2) (1979); N. H. Rev. Stat. Ann. § 650:2(II) (Supp. 1981); N. D. Cent. Code § 12.1–27.1–01 (1976) (general obscenity statute); Ohio Rev. Code Ann. § 2907.321(A) (1982); Ore. Rev. Stat. § 163.485 (1981); S. D. Codified Laws §§ 22–22–24, 22–22–25 (1979); Tenn. Code Ann. § 39–1020 (Supp. 1981); Wash. Rev. Code § 9.68A.030 (1981). The federal statute also prohibits dissemination only if the material is obscene. 18 U. S. C. § 2252(a) (1976 ed., Supp. IV). Two States prohibit dissemination only if the material is obscene as to minors. Conn. Gen. Stat. § 53a–196b (1981); Va. Code § 18.2–374.1 (1982).

Twelve States prohibit only the use of minors in the production of the material. Alaska Stat. Ann. § 11.41.455 (1978); Ga. Code § 26–9943a(b) (1978); Idaho Code § 44–1306 (1977); Iowa Code § 728.12 (1981); Kan. Stat. Ann. § 21–3516 (1981); Md. Ann. Code, Art. 27, § 419A (Supp. 1981); Mo. Rev. Stat. § 568.060(1)(b) (1978); Nev. Rev. Stat. § 200.509 (1981); N. M. Stat. Ann. § 30–6–1 (Supp. 1982); N. C. Gen. Stat. § 14–190.6 (1981); S. C. Code § 16–15–380 (Supp. 1981); Wyo. Stat. § 14–3–102(a)(v)(E) (1978).

he consents to the participation by such child in a sexual performance."

A "[s]exual performance" is defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." § 263.00(1). "Sexual conduct" is in turn defined in § 263.00(3):

"'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

A performance is defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." § 263.00(4).

At issue in this case is § 263.15, defining a class D felony:[3]

"A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."

To "promote" is also defined:

"'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." § 263.00(5).

A companion provision bans only the knowing dissemination of obscene material. § 263.10.

This case arose when Paul Ferber, the proprietor of a Man-

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[3] Class D felonies carry a maximum punishment for up to seven years as to individuals, and as to corporations a fine of up to $10,000. N. Y. Penal Law §§ 70.00, 80.10 (McKinney 1975). Respondent Ferber was sentenced to 45 days in prison.

hattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of violating § 263.10 and two counts of violating § 263.15, the two New York laws controlling dissemination of child pornography.[4] After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court. 74 App. Div. 2d 558, 424 N. Y. S. 2d 967 (1980).

The New York Court of Appeals reversed, holding that § 263.15 violated the First Amendment. 52 N. Y. 2d 674, 422 N. E. 2d 523 (1981). The court began by noting that in light of § 263.10's explicit inclusion of an obscenity standard, § 263.15 could not be construed to include such a standard. Therefore, "the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment." 52 N. Y. 2d, at 678, 422 N. E. 2d, at 525. Although the court recognized the State's "legitimate interest in protecting the welfare of minors" and noted that this "interest may transcend First Amendment concerns," *id.*, at 679, 422 N. E. 2d, at 525–526, it nevertheless found two fatal defects in the New York statute. Section 263.15 was underinclusive because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity. It was also overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which

[4] A state judge rejected Ferber's First Amendment attack on the two sections in denying a motion to dismiss the indictment. 96 Misc. 2d 669, 409 N. Y. S. 2d 632 (1978).

"deal with adolescent sex in a realistic but nonobscene manner." 52 N. Y. 2d, at 681, 422 N. E. 2d, at 526. Two judges dissented. We granted the State's petition for certiorari, 454 U. S. 1052 (1981), presenting the single question:

> "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"

II

The Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in § 263.10, which follows the guidelines enunciated in *Miller* v. *California*, 413 U. S. 15 (1973),[5] constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography. It was on the premise that "nonobscene adolescent sex" could not be singled out for special treatment that the court found § 263.15 "strikingly underinclusive." Moreover, the assumption that the constitutionally permissible regulation of pornography could not be more extensive with respect to the distribution of material depicting children may also have led the court to conclude that a narrowing construction of § 263.15 was unavailable.

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

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[5] N. Y. Penal Law § 235.00(1) (McKinney 1980); *People* v. *Illardo*, 48 N. Y. 2d 408, 415, and n. 3, 399 N. E. 2d 59, 62–63, and n. 3 (1979).

A

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), the Court laid the foundation for the excision of obscenity from the realm of constitutionally protected expression:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572 (footnotes omitted).

Embracing this judgment, the Court squarely held in *Roth* v. *United States*, 354 U. S. 476 (1957), that "obscenity is not within the area of constitutionally protected speech or press." *Id.*, at 485. The Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment: The original States provided for the prosecution of libel, blasphemy, and profanity and the "universal judgment that obscenity should be restrained [is] reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956." *Id.*, at 484–485 (footnotes omitted).

Roth was followed by 15 years during which this Court struggled with "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (opinion of Harlan, J.). See, *e. g.*, *Redrup* v. *New York*, 386 U. S. 767 (1967). Despite considerable vacillation over the proper definition of obscenity, a majority of the Members of the Court remained firm in the position that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibil-

ities of unwilling recipients or of exposure to juveniles." *Miller* v. *California*, *supra*, at 18–19 (footnote omitted); *Stanley* v. *Georgia*, 394 U. S. 557, 567 (1969); *Ginsberg* v. *New York*, 390 U. S. 629, 637–643 (1968); *Interstate Circuit, Inc.* v. *Dallas*, *supra*, at 690; *Redrup* v. *New York*, *supra*, at 769; *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964).

Throughout this period, we recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller* v. *California*, *supra*, at 23. Consequently, our difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but also to devise substantive limits on what fell within the permissible scope of regulation. In *Miller* v. *California*, *supra*, a majority of the Court agreed that a "state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.*, at 24. Over the past decade, we have adhered to the guidelines expressed in *Miller*,[6] which subsequently has been followed in the regulatory schemes of most States.[7]

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[6] *Hamling* v. *United States*, 418 U. S. 87 (1974); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974); *Ward* v. *Illinois*, 431 U. S. 767 (1977); *Marks* v. *United States*, 430 U. S. 188 (1977); *Pinkus* v. *United States*, 436 U. S. 293 (1978).

[7] Thirty-seven States and the District of Columbia have either legislatively adopted or judicially incorporated the *Miller* test for obscenity. Ala. Code § 13A–12–150 (Supp. 1981); Ariz. Rev. Stat. Ann. § 13–3501(2) (1978); Ark. Stat. Ann. § 41–3502(6) (Supp. 1981); Colo. Rev. Stat. § 18–7–101(2) (Supp. 1981); Del. Code Ann., Tit. 11, § 1364 (1979); *Lakin* v. *United States*, 363 A. 2d 990 (D. C. 1976); Ga. Code § 26–2101(b) (1978); Haw. Rev. Stat. § 712–1210(6) (Supp. 1981); Idaho Code § 18–4101(A) (1979); Iowa Code § 728.4 (1981) (only child pornography covered); Ind. Code § 35–30–10.1–1(c) (1979); Kan. Stat. Ann. § 21–4301 (2)(a) (1981); Ky. Rev. Stat. § 531.010(3) (1975); La. Rev. Stat. Ann. §§ 14:106(A)(2) and (A)(3) (West Supp. 1982); *Ebert* v. *Maryland State Bd. of Censors*, 19 Md. App. 300, 313 A. 2d 536 (1973); Mass. Gen. Laws Ann., ch. 272, § 31 (West Supp. 1982–1983); *People* v. *Neumayer*, 405 Mich. 341, 275 N. W. 2d 230 (1979); *State* v. *Welke*, 298 Minn. 402, 216 N. W. 2d 641 (1974); Mo. Rev. Stat. § 573.010(1) (1978); Neb. Rev. Stat. § 28–807(9)

B

The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the "sensibilities of unwilling recipients" from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

First. It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychologi-

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(1979); Nev. Rev. Stat. § 201.235 (1981); N. H. Rev. Stat. Ann. § 650:1(IV) (Supp. 1981); N. J. Stat. Ann. § 2C:34-2 (West 1981); N. Y. Penal Law § 235.00(1) (McKinney 1980); N. C. Gen. Stat. § 14-190.1(b) (1981); N. D. Cent. Code § 12.1-27.1-01(4) (1976); *State* v. *Burgun*, 56 Ohio St. 2d 354, 384 N. E. 2d 255 (1978); *McCrary* v. *State*, 533 P. 2d 629 (Okla. Crim. App. 1974); Ore. Rev. Stat. § 167.087(2) (1981); Pa. Stat. Ann., Tit. 18, § 5903(b) (Purdon Supp. 1982-1983); R. I. Gen. Laws § 11-31-1 (1981); S. C. Code § 16-15-260(a) (Supp. 1981); S. D. Codified Laws § 22-24-27(10) (1979); Tenn. Code Ann. § 39-3001(1) (Supp. 1981); Tex. Penal Code Ann. § 43.21(a) (1982); Utah Code Ann. § 76-10-1203(1) (1978); Va. Code § 18.2-372 (1982); 1982 Wash. Laws., ch. 184, § 1(2).

Four States continue to follow the test approved in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). Cal. Penal Code Ann. § 311(a) (West Supp. 1982); Conn. Gen. Stat. § 53a-193 (1981); Fla. Stat. § 847.07 (1981); Ill. Rev. Stat., ch. 38, ¶ 11-20(b) (1979). Five States regulate only the distribution of pornographic material to minors. Me. Rev. Stat. Ann., Tit. 17, § 2911 (Supp. 1981-1982); Mont. Code Ann. § 45-8-201 (1981); N. M. Stat. Ann. § 30-37-2 (Supp. 1982); Vt. Stat. Ann., Tit. 13, § 2802 (1974); W. Va. Code § 61-8A-2 (1977). Three state obscenity laws do not fall into any of the above categories. Miss. Code Ann. § 97-29-33 (1973), declared invalid in *ABC Interstate Theatres, Inc.* v. *State*, 325 So. 2d 123 (Miss. 1976); Wis. Stat. § 944.21(1)(a) (1979-1980), declared invalid in *State* v. *Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 292 N. W. 2d 807 (1980); Wyo. Stat. § 6-5-303 (1977). Alaska has no current state obscenity law.

A number of States employ a different obscenity standard with respect to material distributed to children. See, *e. g.*, Fla. Stat. § 847.0125 (1981).

cal well-being of a minor" is "compelling." *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince* v. *Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg* v. *New York*, *supra*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

> "[T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances." 1977 N. Y. Laws, ch. 910, § 1.[8]

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[8] In addition, the legislature found:

"[T]he sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute . . . the peddlers . . . of this filth by vigorously applying the sanctions contained in this act." 1977 N. Y. Laws, ch. 910, § 1.

We shall not second-guess this legislative judgment. Respondent has not intimated that we do so. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.[9] That judgment, we think, easily passes muster under the First Amendment.

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[9] "[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole." S. Rep. No. 95-438, p. 5 (1977). It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. Schoettle, Child Exploitation: A Study of Child Pornography, 19 J. Am. Acad. Child Psychiatry 289, 296 (1980) (hereafter cited as Child Exploitation); Schoettle, Treatment of the Child Pornography Patient, 137 Am. J. Psychiatry 1109, 1110 (1980); Densen-Gerner, Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children, reprinted in U. S. Dept. of Health and Human Services, Sexual Abuse of Children: Selected Readings 77, 80 (1980) (hereafter cited as Commercial Exploitation) (sexually exploited children predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution). See generally Burgess & Holmstrom, Accessory-to-Sex: Pressure, Sex, and Secrecy, in A. Burgess, A. Groth, L. Holmstrom, & S. Sgroi, Sexual Assault of Children and Adolescents 85, 94 (1978); V. De Francis, Protecting the Child Victim of Sex Crimes Committed by Adults 169 (1969); Ellerstein & Canavan, Sexual Abuse of Boys, 134 Am. J. Diseases of Children 255, 256-257 (1980); Finch, Adult Seduction of the Child: Effects on the Child, Medical Aspects of Human Sexuality 170, 185 (Mar. 1973); Groth, Sexual Trauma in the Life Histories of Rapists and Child Molesters, 4 Victimology 10 (1979). Sexual molestation by adults is often involved in the production of child sexual performances. Sexual Exploitation of Children, A Report to the Illinois General Assembly by the Illinois Legislative Investigating Commission 30-31 (1980). When such performances are recorded and distributed, the child's privacy interests are also invaded. See n. 10, *infra*.

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.[10] Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if

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[10] As one authority has explained:

"[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981).

See also Child Exploitation 292 ("[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions"); Note, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Mich. J. Law Reform 295, 301 (1979) (hereafter cited as Use in Pornography) (interview with child psychiatrist) ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child").

Thus, distribution of the material violates "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U. S. 589, 599 (1977). Respondent cannot undermine the force of the privacy interests involved here by looking to *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), and *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979), cases protecting the right of newspapers to publish, respectively, the identity of a rape victim and a youth charged as a juvenile offender. Those cases only stand for the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." *Id.*, at 103.

384-537 O—82——9 : QL 9

not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.[11] Cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding federal restrictions on sale of goods manufactured in violation of Fair Labor Standards Act).

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not fol-

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[11] See Sexual Exploitation of Children, Hearings before the Subcommittee on Crime of the House Judiciary Committee, 95th Cong., 1st Sess., 34 (1977) (statement of Charles Rembar) ("It is an impossible prosecutorial job to try to get at the acts themselves"); *id.*, at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology) ("[W]e have to be very careful . . . that we don't take comfort in the existence of statutes that are on the books in the connection with the use of children in pornography . . . . There are usually no witnesses to these acts of producing pornography"); *id.*, at 69 (statement of Investigator Lloyd Martin, Los Angeles Police Department) (producers of child pornography use false names making difficult the tracing of material back from distributor). See also L. Tribe, American Constitutional Law 666, n. 62 (1978); Note, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U. Ill. Law Forum 711, 716, n. 29; Use in Pornography 315 ("passage of criminal laws aimed at producers without similar regulation of distributors will arguably shift the production process further underground").

low that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value." Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.[12]

Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.[13] "It rarely has been suggested that

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[12] In addition, legal obscenity under *Miller* is a function of "contemporary community standards." 413 U. S., at 24. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.*, at 32. It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation. Furthermore, a number of States rely on stricter obscenity tests, see n. 7, *supra*, under which successful prosecution for child pornography may be even more difficult.

[13] One state committee studying the problem declared: "The act of selling these materials is guaranteeing that there will be additional abuse of children." Texas House Select Committee on Child Pornography: Its Related

the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).[14] We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.[15]

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary per-

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Causes and Control 132 (1978). See also Commercial Exploitation 80 ("Printed materials cannot be isolated or removed from the process involved in developing them").

[14] In *Giboney*, a unanimous Court held that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973), the Court allowed an injunction against a newspaper's furtherance of illegal sex discrimination by placing of job advertisements in gender-designated columns. The Court stated:

"Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.*, at 389.

[15] In this connection we note that 18 U. S. C. § 2251 (1976 ed., Supp. IV), making it a federal offense for anyone to use children under the age of 16 in the production of pornographic materials, embraces all "sexually explicit conduct" without imposing an obscenity test. In addition, half of the state laws imposing criminal liability on the producer do not require the visual material to be legally obscene. Use in Pornography 307–308.

formance or scientific or educational work. As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.[16] Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66 (1976) (opinion of STEVENS, J., joined by BURGER, C. J., and WHITE and REHNQUIST, JJ.). See also *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 742–748 (1978) (opinion of STEVENS, J., joined by BURGER, C. J., and REHNQUIST, J.). "[I]t is the content of [an] utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'" *Young* v. *American Mini Theatres, Inc., supra*, at 66. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Leaving aside the special considerations when public officials are the target, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), a libelous publication is not protected by the Constitution. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952). Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs

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[16] 96 Misc. 2d, at 676, 409 N. Y. S. 2d, at 637. This is not merely a hypothetical possibility. See Brief for Petitioner 25 and examples cited therein.

the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

C

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.[17] The category of "sexual conduct" proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distri-

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[17] Sixteen States define a child as a person under age 18. Four States define a child as under 17 years old. The federal law and 16 States, including New York, define a child as under 16. Illinois and Nebraska define a child as a person under age 16 or who appears as a prepubescent. Ill. Rev. Stat., ch. 38, ¶ 11-20a(a)(1)(A) (1979); Neb. Rev. Stat. § 28-1463 (1979). Indiana defines a child as one who is or appears to be under 16. Ind. Code. §§ 35-30-10.1-2, 35-30-10.1-3 (1979). Kentucky provides for two age classifications (16 and 18) and varies punishment according to the victim's age. Ky. Rev. Stat. §§ 531.300-531.370 (Supp. 1980). See Use in Pornography 307, n. 71 (collecting statutes).

bution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith* v. *California*, 361 U. S. 147 (1959); *Hamling* v. *United States*, 418 U. S. 87 (1974).

D

Section 263.15's prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." § 263.00(3). The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation. 413 U. S., at 25. A performance is defined only to include live or visual depictions: "any play, motion picture, photograph or dance . . . [or] other visual representation exhibited before an audience." § 263.00(4). Section 263.15 expressly includes a scienter requirement.

We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally "underinclusive" about a statute that singles out this category of material for proscription.[18] It also follows that the State is not barred by

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[18] *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975), relied upon by the Court of Appeals, struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, *id.*, at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance im-

the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.[9]

III

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State. Respondent prevailed on that ground below, and it is to that issue that we now turn.

The New York Court of Appeals recognized that overbreadth scrutiny has been limited with respect to conduct-related regulation, *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), but it did not apply the test enunciated in *Broadrick* because the challenged statute, in its view, was directed at "pure speech." The court went on to find that § 263.15 was fatally overbroad: "[T]he statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts.

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permissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that.

[9] It is often impossible to determine where such material is produced. The Senate Report accompanying federal child pornography legislation stressed that "it is quite common for photographs or films made in the United States to be sent to foreign countries to be reproduced and then returned to this country in order to give the impression of foreign origin." S. Rep. No. 95-438, p. 6 (1977). In addition, States have not limited their distribution laws to material produced within their own borders because the maintenance of the market itself "leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured." 52 N. Y. 2d 674, 688, 422 N. E. 2d 523, 531 (1981) (Jasen, J., dissenting).

Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose." 52 N. Y. 2d, at 678, 422 N. E. 2d, at 525.

While the construction that a state court gives a state statute is not a matter subject to our review, *Wainwright* v. *Stone*, 414 U. S. 21, 22–23 (1973), *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972), this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state-court decisions giving the Constitution too little shrift. A state court is not free to avoid a proper facial attack on federal constitutional grounds. *Bigelow* v. *Virginia*, 421 U. S. 809, 817 (1975). By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution.

A

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. *Broadrick* v. *Oklahoma*, *supra*, at 610; *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220 (1912). In *Broadrick*, we recognized that this rule reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, *McGowan* v. *Maryland*, 366 U. S. 420, 429 (1961), and prudential limitations on constitutional adjudication.[20] In *United States* v. *Raines*, *supra*, at 21, we

[20] In addition to prudential restraints, the traditional rule is grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies.

"This Court, as is the case with all federal courts, 'has no jurisdiction to

noted the "incontrovertible proposition" that it "'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation,'" (quoting *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953)). By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule,[21] we face "flesh-and-blood"[22] legal problems with data "relevant and adequate to an informed judgment."[23] This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervailing policies." *United States* v. *Raines*, *supra*, at 22–23. The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Village of Schaumburg* v.

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pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

[21] Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face. See, *e. g.*, *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5 (1949). See generally Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10–14.

[22] A. Bickel, The Least Dangerous Branch 115–116 (1962).

[23] Frankfurter & Hart, The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 95–96 (1935).

Citizens for a Better Environment, 444 U. S. 620, 634 (1980); *Gooding* v. *Wilson*, *supra*, at 521. It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity. *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940); *United States* v. *Raines*, *supra*, at 21–22; *Gooding* v. *Wilson*, *supra*, at 521.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." *Broadrick*, 413 U. S., at 613. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.[24]

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[24] When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g.*, *Haynes* v. *United States*, 390 U. S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U. S. 17, 27 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated. *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971).

A state court is also free to deal with a state statute in the same way. If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct. Here, of course, we are dealing with a state statute on direct review of a state-court decision that has construed the statute. Such a construction is binding on us.

In *Broadrick*, we explained the basis for this requirement:

> "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969)." *Id.*, at 615.

We accordingly held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ibid.*[25]

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[25] *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973)"). See Bogen, First Amendment Ancillary Doctrines, 37 Md. L. Rev. 679, 712–714 (1978); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 860–861 (1970).

Broadrick examined a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.

The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.[26]

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[26] In *Gooding* v. *Wilson*, 405 U. S. 518, 519, 527 (1972), the Court's invalidation of a Georgia statute making it a misdemeanor to use "'opprobrious words or abusive language, tending to cause a breach of the peace'" followed from state judicial decisions indicating that "merely to speak words offensive to some who hear them" could constitute a "breach of the peace." Cases invalidating laws requiring members of a "subversive organization" to take a loyalty oath, *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), or register with the government, *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), can be explained on the basis that the laws involved, unlike § 263.15, defined no central core of constitutionally regulable conduct; the entire scope of the laws was subject to the uncertainties and vagaries of prosecutorial discretion. See also *Bigelow* v. *Virginia*, 421 U. S. 809, 817 (1975) ("the facts of this case well illustrate 'the statute's potential for sweeping and improper applications'") (citation omitted); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963) ("We read the decree of the Virginia Supreme Court of Appeals . . . as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys"); *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940) (the statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press").

Indeed, JUSTICE BRENNAN observed in his dissenting opinion in *Broadrick:*

> "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." *Id.*, at 630.

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.[27] This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach of New York's child pornography law and the situation faced by the Oklahoma state employees with respect to that State's restriction on partisan political activity. Indeed, it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381 (1977) (overbreadth analysis inapplicable to commercial speech).

This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense

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[27] "A substantial overbreadth rule is implicit in the chilling effect rationale. . . . [T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "[w]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Note, 83 Harv. L. Rev., *supra* n. 25, at 859, and n. 61.

of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment. Cf. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1973). We recognize, however, that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial. We simply hold that the fact that a criminal prohibition is involved does not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth.

B

Applying these principles, we hold that § 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in § 263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially overbroad and . . . whatever overbreadth may exist

should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, 413 U. S., at 615–616.

IV

Because § 263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth.[*] The decision of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BLACKMUN concurs in the result.

JUSTICE O'CONNOR, concurring.

Although I join the Court's opinion, I write separately to stress that the Court does not hold that New York must except "material with serious literary, scientific, or educational value," *ante*, at 766, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion, see *ante*, at 756–764, suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while

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[*] There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here "does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964).

masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment. As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or photographing children." *Ante*, at 763. Thus, the statute attempts to protect minors from abuse without attempting to restrict the expression of ideas by those who might use children as live models.

On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous "kiddie porn" market that New York and other States have attempted to regulate. Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of National Geographic, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York's statute.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in

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Ginsburg v. *New York*, 390 U. S. 629 (1968), the State has a special interest in protecting the well-being of its youth. *Id.*, at 638–641. See also *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 607 (1982). This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material. *Ginsburg* v. *New York*, *supra*, at 637, 638, n. 6, 642–643, n. 10. See also *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.). I also agree with the Court that the "tiny fraction," *ante*, at 773, of material of serious artistic, scientific, or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 630 (1973) (BRENNAN, J., dissenting).

But in my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment. As the Court recognizes, the limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly "slight social value," and the State has a compelling interest in their regulation. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942). The First Amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not "*de minimis*." See *ante*, at 761. At the same time, the State's interest in suppression of such materials is likely to be far less compelling. For the Court's assumption of harm to the child resulting from the "permanent record" and "circulation" of the child's "participation," *ante*, at 759, lacks much of its force where the depiction is a serious contribution to art or science. The production of materials of serious value is not the "low-

profile, clandestine industry" that according to the Court produces purely pornographic materials. See *ante*, at 760. In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed "material outside the protection of the First Amendment." See *ante*, at 763.

I, of course, adhere to my view that, in the absence of exposure, or particular harm, to juveniles or unconsenting adults the State lacks power to suppress sexually oriented materials. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting). With this understanding, I concur in the Court's judgment in this case.

JUSTICE STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

Before addressing that issue, I shall explain why respondent's conviction does not violate the Constitution. The two films that respondent sold contained nothing more than lewd exhibition; there is no claim that the films included any material that had literary, artistic, scientific, or educational value.[1] Respondent was a willing participant in a commercial market that the State of New York has a legitimate interest in suppressing. The character of the State's interest in protecting children from sexual abuse justifies the imposition

[1] Respondent's counsel conceded at oral argument that a finding that the films are obscene would have been consistent with the *Miller* definition. Tr. of Oral Arg. 41.

of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films. In this respect my evaluation of this case is different from the opinion I have expressed concerning the imposition of criminal sanctions for the promotion of obscenity in other contexts.[2]

A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection. The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.

The Court's holding that this respondent may not challenge New York's statute as overbroad follows its discussion of the contours of the category of nonobscene child pornography that New York may legitimately prohibit. Having defined that category in an abstract setting,[3] the Court makes the

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[2] See *Burch* v. *Louisiana*, 441 U. S. 130, 139 (STEVENS, J., concurring); *Pinkus* v. *United States*, 436 U. S. 293, 305 (STEVENS, J., concurring); *Ballew* v. *Georgia*, 435 U. S. 223, 245 (STEVENS, J., concurring); *Smith* v. *United States*, 431 U. S. 291, 311–321 (STEVENS, J., dissenting); *Marks* v. *United States*, 430 U. S. 188, 198 (STEVENS, J., concurring in part and dissenting in part); see also *Schad* v. *Borough of Mount Ephraim*, 452 U. S. 61, 84 (STEVENS, J., concurring in judgment); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 750 (opinion of STEVENS, J.).

[3] "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the aver-

empirical judgment that the arguably impermissible application of the New York statute amounts to only a "tiny fraction of the materials within the statute's reach." *Ante*, at 773. Even assuming that the Court's empirical analysis is sound,[4] I believe a more conservative approach to the issue would adequately vindicate the State's interest in protecting its children and cause less harm to the federal interest in free expression.

A hypothetical example will illustrate my concern. Assume that the operator of a New York motion picture theater specializing in the exhibition of foreign feature films is offered a full-length movie containing one scene that is plainly lewd if viewed in isolation but that nevertheless is part of a serious work of art. If the child actor resided abroad, New York's interest in protecting its young from sexual exploitation would be far less compelling than in the case before us. The federal interest in free expression would, however, be just as strong as if an adult actor had been used. There are at least three different ways to deal with the statute's potential application to that sort of case.

First, at one extreme and as the Court appears to hold, the First Amendment inquiry might be limited to determining

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age person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ante*, at 764.

[4] The Court's analysis is directed entirely at the permissibility of the statute's coverage of nonobscene material. Its empirical evidence, however, is drawn substantially from congressional Committee Reports that ultimately reached the conclusion that a prohibition against *obscene* child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem. The Senate Committee on the Judiciary concluded that "virtually all of the materials that are normally considered child pornography are obscene under the current standards," and that "[i]n comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential." S. Rep. No. 95-438, p. 13 (1977); see also H. R. Rep. No. 95-696, pp. 7-8 (1977). The coverage of the federal statute is limited to obscene material. See 18 U. S. C. § 2252(a) (1976 ed., Supp. IV).

whether the offensive scene, viewed in isolation, is lewd. When the constitutional protection is narrowed in this drastic fashion, the Court is probably safe in concluding that only a tiny fraction of the materials covered by the New York statute is protected. And with respect to my hypothetical exhibitor of foreign films, he need have no uncertainty about the permissible application of the statute; for the one lewd scene would deprive the entire film of any constitutional protection.

Second, at the other extreme and as the New York Court of Appeals correctly perceived, the application of this Court's cases requiring that an obscenity determination be based on the artistic value of a production taken as a whole would afford the exhibitor constitutional protection and result in a holding that the statute is invalid because of its overbreadth. Under that approach, the rationale for invalidating the entire statute is premised on the concern that the exhibitor's understanding about its potential reach could cause him to engage in self-censorship. This Court's approach today substitutes broad, unambiguous, state-imposed censorship for the self-censorship that an overbroad statute might produce.

Third, as an intermediate position, I would refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit. Specifically, I would postpone decision of my hypothetical case until it actually arises. Advocates of a liberal use of overbreadth analysis could object to such postponement on the ground that it creates the risk that the exhibitor's uncertainty may produce self-censorship. But that risk obviously interferes less with the interest in free expression than does an abstract, advance ruling that the film is simply unprotected whenever it contains a lewd scene, no matter how brief.

My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our

traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

Moreover, it is probably safe to assume that the category of speech that is covered by the New York statute generally is of a lower quality than most other types of communication. On a number of occasions, I have expressed the view that the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech.[5] Today the Court accepts this view, putting the category of speech described in the New York statute in its rightful place near the bottom of this hierarchy. *Ante*, at 761–763. Although I disagree with the Court's position that such speech is totally without First Amendment protection, I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine.[6]

Because I have no difficulty with the statute's application in this case, I concur in the Court's judgment.

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[5] See, *e. g.*, *Schad* v. *Borough of Mount Ephraim*, 452 U. S., at 80, 83 (STEVENS, J., concurring in judgment); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 544–548 (STEVENS, J., concurring in judgment); *FCC* v. *Pacifica Foundation*, 438 U. S., at 744–748 (opinion of STEVENS, J.); *Carey* v. *Population Services International*, 431 U. S. 678, 716–717 (STEVENS, J., concurring in part and concurring in judgment); *Smith* v. *United States*, 431 U. S., at 317–319 (STEVENS, J., dissenting); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66–71 (opinion of STEVENS, J.).

[6] See *FCC* v. *Pacifica Foundation*, *supra*, at 742–743 (opinion of STEVENS, J.); *Young* v. *American Mini Theatres, Inc.*, *supra*, at 59–61; see also *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 544–548 (STEVENS, J., dissenting in part); *Schad* v. *Borough of Mount Ephraim*, *supra*, at 85 (STEVENS, J., concurring in judgment).

ENMUND *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81-5321. Argued March 23, 1982—Decided July 2, 1982

Petitioner and a codefendant, at a jury trial in a Florida court, were convicted of first-degree murder and robbery of two elderly persons at their farmhouse, and were sentenced to death. The Florida Supreme Court affirmed. The court held that, although the record supported no more than the inference that petitioner was the person in a car parked by the side of the road near the farmhouse at the time of the killings waiting to help the robbers and killers (the codefendant and another) escape, this was enough under Florida law to make petitioner a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to petitioner's challenge to the death sentence that he did not himself kill and was not present at the killings, or whether he intended that the victims be killed or anticipated that lethal force might be used to effectuate the robbery or escape.

Held: The imposition of the death penalty upon petitioner is inconsistent with the Eighth and Fourteenth Amendments. Pp. 788–801.

(a) The current judgments of legislatures, juries, and prosecutors weigh heavily on the side of rejecting capital punishment for the crime at issue. Only a small minority of States—eight—allow the death penalty to be imposed solely because the defendant somehow participated in the robbery in the course of which a murder was committed, but did not take or attempt or intend to take life, or intend that lethal force be employed. And the evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's, the statistics demonstrating that juries—and perhaps prosecutors—consider death a disproportionate penalty for those who fall within petitioner's category. Pp. 788–796.

(b) While robbery is a serious crime deserving serious punishment, it is not a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* v. *Georgia*, 428 U. S. 153, 184. The death penalty, which is "unique in its severity and irrevocability," *id.*, at 187, is an excessive penalty for the robber, who, as such, does not take human life. Here, the focus must be on petitioner's culpability, not on those who committed the robbery and killings. He did not kill or intend to kill and thus his culpability is different from that of the robbers who killed, and it is impermissible for the State

to treat them alike and attribute to petitioner the culpability of those who killed the victims. Pp. 797–798.

(c) Neither deterrence of capital crimes nor retribution is a sufficient justification for executing petitioner. It is unlikely that the threat of the death penalty for murder will measurably deter one such as petitioner who does not kill or intend to kill. As to retribution, this depends on the degree of petitioner's culpability, which must be limited to his participation in the robbery. Putting him to death to avenge two killings that he did not commit or intend to commit or cause would not measurably contribute to the retribution end of ensuring that the criminal gets his just deserts. Pp. 798–801.

399 So. 2d 1362, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 801. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 801.

James S. Liebman argued the cause *pro hac vice* for petitioner. With him on the briefs were *William C. McLain*, *Jack Greenberg*, *James M. Nabrit III*, *Joel Berger*, *John Charles Boger*, *Deborah Fins*, and *Anthony G. Amsterdam*.

Lawrence A. Kaden, Assistant Attorney General of Florida, argued the cause *pro hac vice* for respondent. With him on the brief were *Jim Smith*, Attorney General, and *George R. Georgieff* and *Raymond L. Marky*, Assistant Attorneys General.*

JUSTICE WHITE delivered the opinion of the Court.

I

The facts of this case, taken principally from the opinion of the Florida Supreme Court, are as follows. On April 1,

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**Daniel J. Popeo*, *Paul D. Kamenar*, and *Nicholas E. Calio* filed a brief for the Washington Legal Foundation as *amicus curiae* urging affirmance.

Robert K. Corbin, Attorney General of Arizona, *William J. Schaffer III*, and *Bruce Ferg*, Assistant Attorneys General, filed a brief for the States of Arizona et al. as *amici curiae*.

1975, at approximately 7:45 a. m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, and took their money and fled.

Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a. m. and saw a large cream- or yellow-colored car parked beside the road about 200 yards from the house and that a man was sitting in the car. Another witness testified that at approximately 6:45 a. m. he saw Ida Jean Shaw, petitioner's common-law wife and Jeanette Armstrong's mother, driving a yellow Buick with a vinyl top which belonged to her and petitioner Earl Enmund. Enmund was a passenger in the car along with an unidentified woman. At about 8 a. m. the same witness saw the car return at a high rate of speed. Enmund was driving, Ida Jean Shaw was in the front seat, and one of the other two people in the car was lying down across the back seat.

Enmund, Sampson Armstrong, and Jeanette Armstrong were indicted for the first-degree murder and robbery of the Kerseys. Enmund and Sampson Armstrong were tried together.[1] The prosecutor maintained in his closing argument that "Sampson Armstrong killed the old people." Record 1577. The judge instructed the jury that "[t]he killing of a

[1] Jeanette Armstrong's trial was severed and she was convicted of two counts of second-degree murder and one count of robbery and sentenced to three consecutive life sentences. 399 So. 2d 1362, 1371 (Fla. 1981).

human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." App. 6. He went on to instruct them that

> "[i]n order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery." *Id.*, at 9.

The jury found both Enmund and Sampson Armstrong guilty of two counts of first-degree murder and one count of robbery. A separate sentencing hearing was held and the jury recommended the death penalty for both defendants under the Florida procedure whereby the jury advises the trial judge whether to impose the death penalty. See Fla. Stat. § 921.141(2) (1981). The trial judge then sentenced Enmund to death on the two counts of first-degree murder. Enmund appealed, and the Florida Supreme Court remanded for written findings as required by Fla. Stat. § 921.141(3) (1981). The trial judge found four statutory aggravating circumstances: the capital felony was committed while Enmund was engaged in or was an accomplice in the commission of an armed robbery, Fla. Stat. § 921.141(5)(d) (1981); the capital felony was committed for pecuniary gain, § 921.141(5)(f); it was especially heinous, atrocious, or cruel, § 921.141(5)(h); and Enmund was previously convicted of a felony involving the use or threat of violence, § 921.141(5)(b). 399 So. 2d 1362, 1371–1372 (Fla. 1981). The court found that "*none* of the statutory mitigating circumstances applied" to Enmund and that the aggravating circumstances outweighed the mitigating circumstances. *Id.*, at 1372. Enmund was therefore sentenced to death on each of the murder counts.

The Florida Supreme Court affirmed Enmund's conviction and sentences. It found that "[t]here was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." *Id.*, at 1370. However, it rejected petitioner's argument that at most he could be found guilty of second-degree murder under Florida's felony-murder rule. The court explained that the interaction of the "'felony murder rule and the law of principals combine 'to make a felon generally responsible for the lethal acts of his co-felon.'" *Id.*, at 1369, quoting *Adams* v. *State*, 341 So. 2d 765, 768–769 (Fla. 1976), cert. denied, 434 U. S. 878 (1977). Although petitioner could be convicted of second-degree murder only if he were an accessory before the fact rather than a principal, the Florida Supreme Court reasoned:

> "[T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a)." 399 So. 2d, at 1370.[8]

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[8] The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. 399 So. 2d, at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund

The State Supreme Court rejected two of the four statutory aggravating circumstances found by the trial court. It held that the findings that the murders were committed in the course of a robbery and that they were committed for pecuniary gain referred to the same aspect of petitioner's crime and must be treated as only one aggravating circumstance. *Id.*, at 1373. In addition, the court held that "[t]he recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved." *Ibid.*, citing *Armstrong* v. *State*, 399 So. 2d 953 (Fla. 1981).[3] However, because there were two aggravating circumstances and no mitigating circumstances, the death sentence was affirmed. In so doing, the court expressly rejected Enmund's submission that because the evidence did not establish that he intended to take life, the death penalty was barred by the Eighth Amendment of the United States Constitution. 399 So. 2d, at 1371.

We granted Enmund's petition for certiorari, 454 U. S. 939 (1981), presenting the question whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life.[4]

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was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. *Post*, at 809. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used.

[3] In *Armstrong* the Florida Supreme Court rejected the trial court's conclusion that the Kerseys had been killed in order to eliminate them as witnesses, and stated that according to the only direct account of the events, "the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Kersey." 399 So. 2d, at 963.

[4] The petitioner argues a second question: whether the degree of Enmund's participation in the killings was given the consideration required by the Eighth and Fourteenth Amendments. We need not deal with this question.

II

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.

A

The Cruel and Unusual Punishments Clause of the Eighth Amendment is directed, in part, "'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Weems* v. *United States*, 217 U. S. 349, 371 (1910), quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting). This Court most recently held a punishment excessive in relation to the crime charged in *Coker* v. *Georgia*, 433 U. S. 584 (1977). There the plurality opinion concluded that the imposition of the death penalty for the rape of an adult woman "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.*, at 592. In reaching this conclusion, it was stressed that our judgment "should be informed by objective factors to the maximum possible extent." *Ibid.* Accordingly, the Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its

own judgment to bear on the matter. We proceed to analyze the punishment at issue in this case in a similar manner.

B

The *Coker* plurality observed that "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape." *Id.*, at 593. More importantly, in reenacting death penalty laws in order to satisfy the criteria established in *Furman* v. *Georgia*, 408 U. S. 238 (1972), only three States provided the death penalty for the rape of an adult woman in their revised statutes. 433 U. S., at 594. The plurality therefore concluded that "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.*, at 596 (footnote omitted).

Thirty-six state and federal jurisdictions presently authorize the death penalty. Of these, only eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.[5] Of the remaining 28 jurisdictions, in 4 felony murder is not a capital crime.[6] Eleven States require some culpable mental state

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[5] Cal. Penal Code Ann. §§ 189, 190.2(a)(17) (West Supp. 1982); Fla. Stat. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1981); Ga. Code §§ 26-1101(b), (c), 27-2534.1(b)(2) (1978); Miss. Code Ann. §§ 97-3-19(2)(e), 99-19-101(5)(d) (Supp. 1981); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4) (1981); S. C. Code §§ 16-3-10, 16-3-20(C)(a)(1) (1976 and Supp. 1981); Tenn. Code Ann. §§ 39-2402(a), 39-2404(i)(7) (Supp. 1981); Wyo. Stat. §§ 6-4-101, 6-4-102(h)(iv) (1977).

[6] Mo. Rev. Stat. §§ 565.001, 565.003, 565.008(2) (1978) (death penalty may be imposed only for capital murder; felony murder is first-degree murder); N. H. Rev. Stat. Ann. §§ 630:1, 630:1(III), 630:1-a(I)(b)(2) (1974 and Supp. 1981) (capital murder includes only killing a law enforcement officer, killing during a kidnaping, and murder for hire); 18 Pa. Cons. Stat. §§ 2502(a), (b), 1102 (1980) (death penalty may be imposed only for first-degree murder; felony murder is second-degree murder). Wash. Rev. Code §§ 9A.32.030, 10.95.020 (1981) (death penalty may be imposed only for premeditated killing).

with respect to the homicide as a prerequisite to conviction of a crime for which the death penalty is authorized. Of these 11 States, 8 make knowing, intentional, purposeful, or premeditated killing an element of capital murder.[1] Three other States require proof of a culpable mental state short of intent, such as recklessness or extreme indifference to human life, before the death penalty may be imposed.[2] In these 11 States, therefore, the actors in a felony murder are not subject to the death penalty without proof of their mental state, proof which was not required with respect to Enmund

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[1] Ala. Code §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 and Supp. 1982) (to be found guilty of capital murder, accomplice must have had "intent to promote or assist the commission of the offense" and murder must be intentional); Ill. Rev. Stat., ch. 38, ¶¶ 9-1(a)(3), 9-1(b)(6) (1979) (capital crime only if defendant killed intentionally or with knowledge that his actions "created a strong probability of death or great bodily harm"); La. Rev. Stat. Ann. § 14:30(1) (West Supp. 1982) ("specific intent to kill"); N. M. Stat. Ann. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981) (felony murder is a capital crime but death penalty may not be imposed absent intent to kill unless victim was a peace officer); Ohio Rev. Code Ann. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (1982) (accomplice not guilty of capital murder unless he intended to kill); Tex. Penal Code Ann. §§ 19.02(a), 19.03(a)(2) (1974) ("intentionally commits the murder in the course of [a felony]"); Utah Code Ann. § 76-5-202(1) (1978) ("intentionally or knowingly causes the death of another"); Va. Code § 18.2-31(d) (1982) ("willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon").

[2] Ark. Stat. Ann. § 41-1501(1)(a) (1977) ("extreme indifference to . . . life"); see also § 41-1501, Commentary ("an inadvertent killing in the course of a felony will not . . . support . . . a conviction entailing punishment by death"); Del. Code Ann., Tit. 11, §§ 636(a)(2), (6) (1979) ("recklessly" or "with criminal negligence" causes death during the commission of a felony); Ky. Rev. Stat. § 507.020(1)(b) (Supp. 1980) (defendant must manifest "extreme indifference to human life" and "wantonly engag[e] in conduct which creates a grave risk of death . . . and thereby causes . . . death"); see also Commentary following Criminal Law of Kentucky Annotated, Penal Code § 507.020, p. 677 (1978) (each accomplice's "participation in [the] felony" must "constitut[e] wantonness manifesting extreme indifference to human life").

either under the trial court's instructions or under the law announced by the Florida Supreme Court.

Four additional jurisdictions do not permit a defendant such as Enmund to be put to death. Of these, one State flatly prohibits capital punishment in cases where the defendant did not actually commit murder.[9] Two jurisdictions preclude the death penalty in cases such as this one where the defendant "was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution."[10] One other State limits the death penalty in felony murders to narrow circumstances not involved here.[11]

Nine of the remaining States deal with the imposition of the death penalty for a vicarious felony murder in their capital sentencing statutes. In each of these States, a defendant may not be executed *solely* for participating in a felony in which a person was killed if the defendant did not actually cause the victim's death. For a defendant to be executed in these States, typically the statutory aggravating circumstances which are present must outweigh mitigating factors. To be sure, a vicarious felony murderer may be sentenced to death in these jurisdictions absent an intent to kill if sufficient aggravating circumstances are present. However, six

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[9] Md. Code Ann., Art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty). In addition, two jurisdictions already accounted for in n. 7, *supra*, also preclude the death penalty where the defendant did not commit the murder. Ill. Rev. Stat., ch. 38, ¶¶ 9–1(a)(3), 9–1(b)(6) (1979) (defendant must actually kill victim); Va. Code §§ 18.2–31(d), 18.2–10(a), 18.2–18 (1982) (except in cases of murder for hire, only principal in the first degree may be tried for capital murder).

[10] Colo. Rev. Stat. § 16–11–103(5)(d) (1978); 49 U. S. C. § 1473(c)(6)(D) (same).

[11] Vt. Stat. Ann., Tit. 13, §§ 2303(b), (c) (Supp. 1981) (capital murder reserved for offenders who commit a second unrelated murder or murder of a correctional officer).

384-537 O—82——5: QL 3

of these nine States make it a statutory *mitigating* circumstance that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor.[12] By making minimal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduce the likelihood that a person will be executed for vicarious felony murder. The remaining three jurisdictions exclude felony murder from their lists of aggravating circumstances that will support a death sentence.[13] In each of these nine States, a nontriggerman guilty of felony murder cannot be sentenced to death for the felony murder absent aggravating circumstances above and beyond the felony murder itself.

Thus only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. Even if the nine States are included where such a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances—which often include the defendant's minimal participation in the murder—only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die. Moreover, of the eight States which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances.[14] While the current legislative judg-

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[12] Ariz. Rev. Stat. Ann. § 13-703(G)(3) (Supp. 1981-1982) ("relatively minor" participation); Conn. Gen. Stat. § 53a-46a(f)(4) (Supp. 1982) (same); Ind. Code § 35-50-2-9(c)(4) (Supp. 1981) (same); Mont. Code Ann. § 46-18-304(6) (1981) (same); Neb. Rev. Stat. § 29-2523(2)(e) (1979) (same); N. C. Gen. Stat. § 15A-2000(f)(4) (Supp. 1981) (same).

[13] Idaho Code § 19-2515(f) (1979); Okla. Stat., Tit. 21, § 701.12 (1981); S. D. Comp. Laws Ann. § 23A-27A-1 (Supp. 1981).

[14] See the Ala., Colo., Conn., Md., Ohio, Pa., S. D., and Wash. statutes cited in nn. 5-7, 9, 10, 12, and 13, *supra*.

ment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," *Coker* v. *Georgia*, 433 U. S., at 596, nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.[15]

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[15] The dissent characterizes the state statutes somewhat differently. It begins by noting that 31 States "authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery." *Post*, at 819. That is not relevant to this case, however. Rather, at issue is the number of States which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill. The dissent divides the statutes into three categories. Its first category of 20 statutes include 8 about which there is no disagreement—Cal., Fla., Ga., Miss., Nev., S. C., Tenn., and Wyo. In 11 other States listed by the dissent—Ariz., Colo., Conn., Idaho, Ind., Mont., Neb., N. M., N. C., Okla., and S. D.—the dissent looks solely at the provisions defining the *crime* of capital murder. Colorado's capital sentencing statute makes a defendant's minimal participation in a murder an absolute defense to imposition of the death penalty. See n. 10, *supra*. Contrary to the dissent's claim that this provision would have been of no help to petitioner, see *post*, at 820, n. 36, if the case is judged on the basis of the Florida Supreme Court's findings, see n. 2, *supra*, Colorado law may well have barred imposition of the death penalty in this case. Similarly, the Ariz., Conn., Ind., Mont., Neb., and N. C. capital sentencing statutes do not permit capital punishment solely for vicarious felony murder and reduce the likelihood that the death penalty will be imposed on a vicarious felony murderer, even where aggravating circumstances are present, by making a defendant's minimal participation in the homicide a mitigating circumstance. See n. 12, *supra*. Three other States—Idaho, Okla., and S. D.—allow a defendant who does not kill or actually kill to be executed only where other aggravating circumstances are present, and in those States the felony murder itself cannot serve as an aggravating circumstance. See n. 13, *supra*. New Mexico's capital sentencing statute requires the jury to find at least one statutory aggravating circumstance before the death penalty may be imposed, and in addition aggravating circumstances must outweigh mitigating circumstances. N. M. Stat. Ann. §§ 31-20A-4(C)(1) and (2) (Supp. 1981). The statute lists seven statutory aggravating circumstances, six of which require an intent to kill. §§ 31-20A-5(B)-(G). The only aggravating circumstance which does not

C

Society's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, "'[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.'" *Coker* v. *Georgia*, *supra*, at 596, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 181 (1976). The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's. First, according to the petitioner, a search of all reported appellate court decisions since 1954 in cases where a defendant was executed for homicide shows that of the 362 executions, in 339 the person executed personally committed a homicidal assault.[16] In 2 cases the person executed had another person commit the homicide for him, and in 16 cases the facts were not reported in sufficient detail to determine whether the person executed committed the homicide.[17] The survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed. All six executions took place in

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include an intent element is not applicable here, for it requires that the victim must be "a peace officer who was acting in the lawful discharge of an official duty when he was murdered." § 31-20A-5(A). The remaining State, Vermont, limits the death penalty to narrow circumstances not present here. See n. 11, *supra*.

There is no disagreement that three States require a culpable mental state short of intent before a nontriggerman may be put to death, compare n. 8, *supra*, with *post*, at 821, n. 37, a mental state which Enmund was not proved to possess. Similarly, the dissent's second category of seven States which authorize the death penalty only if the defendant had specific intent to kill the victim differs from our group of specific-intent States only because we include New Mexico in that group. Compare n. 7, *supra*, with *post*, at 821–822, n. 38. Finally, there is no disagreement that three States restrict application of the death penalty to felony murderers who actually kill. Compare n. 9, *supra*, with *post*, at 822, n. 39.

[16] See App. D to Brief for Petitioner.

[17] There is no reason to believe that this group of 16 contains a higher proportion of nontriggermen than does the rest of the defendants studied.

1955. By contrast, there were 72 executions for rape in this country between 1955 and this Court's decision in *Coker* v. *Georgia* in 1977.[18]

That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population.[19] As of October 1, 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar.[20] Forty-five felony murderers are currently on death row. The Florida Supreme Court either found or affirmed a trial court or jury finding that the defendant intended life to be taken in 36 cases. In eight cases the courts made no finding with respect to intent, but the defendant was the triggerman in each case. In only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the triggerman.[21]

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[18] See NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. 1, n. * (Oct. 20, 1981).

[19] See App. E to Brief for Petitioner; NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. (Oct. 20, 1981).

[20] See App. to Reply Brief for Petitioner A-1—A-7.

[21] These statistics concerning the number of vicarious felony murderers who have been executed and the number of them on death row are consistent with the findings of a study of 111 cases in which the defendant was found guilty of a capital crime and hence could have received the death penalty. Kalven & Zeisel, The American Jury and the Death Penalty, 33 U. Chi. L. Rev. 769 (1966). The authors found that juries rebel "at imposing the death penalty for the vicarious criminal responsibility of the defend-

The State does not challenge this analysis of the Florida cases.

The dissent criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the percentage of cases where the State sought the death penalty for an accomplice guilty of felony murder. *Post*, at 818–819. We doubt whether it is possible to gather such information; and at any rate, it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder. The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die. Nor can these figures be discounted by attributing to petitioner the argument that "death is an unconstitutional penalty absent an intent to kill," *post*, at 819, and observing that the statistics are incomplete with respect to intent. Petitioner's argument is that because he did not kill, attempt to kill, *and* he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within his category.[22]

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ant," *id.*, at 776, to the extent that felony murder and accomplice factors accounted for more jury decisions not to impose the death penalty when the trial judge decided to impose the death penalty than any other factor. *Id.*, at 777. The authors had anticipated that "because of the rigidity of the felony murder rule, the jury's sense of equity would produce a broad area of disagreement." *Id.*, at 776, n. 10. However, they found that "disagreement over the rule emerges only at the level of the death penalty." *Ibid.*

[22] "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker* v. *Georgia*, 433 U. S. 584, 596, n. 10 (1977). It is thus

III

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

We have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* v. *Georgia*, 428 U. S., at 184 (footnote omitted). "[I]t does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim, life . . . is not over and normally is not beyond repair." *Coker* v. *Georgia*, 433 U. S., at 598 (footnote omitted). As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty, which is "unique in its severity and irrevocability," *Gregg* v. *Georgia*, *supra*, at 187, is an excessive penalty for the robber who, as such, does not take human life.

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worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe. ALI, Model Penal Code § 210.2, pp. 39–40 (Off. Draft and Revised Comments 1980) (hereafter Model Penal Code). It is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act. See Wolfgang, Kelly, & Nolde, Comparison of the Executed and Commuted Among Admissions to Death Row, 53 J. Crim. L. C. & P. S. 301, 310 (1962).

spondents "did not establish their case" with respect to 38 of the defendants.[17] The court found that MAP was a victim, rather than a willing participant, in the conspiracy and dismissed—without further explanation—37 individual defendants for lack of proof. Finally, the court ruled that certain damages had been improperly awarded and that other damages had been inadequately proved. The court remanded for further proceedings on the computation of damages.[18]

We granted a petition for certiorari. 454 U. S. 1030. At oral argument, a question arose concerning the factual basis for the judgment of the Mississippi Supreme Court. As noted, that court affirmed petitioners' liability for damages on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats. Such a finding was not necessary to the trial court's imposition of liability and neither state court had identified the evidence actually linking the petitioners to such an agreement. In response to a request from this Court, respondents filed a supplemental brief "specifying the acts committed by each of the petitioners giving rise to liability for damages." Supplemental Brief for Respondents 1. That brief helpfully places the petitioners in different categories; we accept respondents' framework for analysis and identify these classes as a preface to our review of the relevant incidents that occurred during the 7-year period for which damages were assessed.[19]

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[17] 393 So. 2d, at 1302.

[18] Concerning the permanent injunction entered by the chancellor, the court stated: "Although the granting of injunction has been assigned as error, the error has not been argued, and NAACP, et al. say, at the conclusion of their brief '. . . the injunctive aspects of the case are now moot. . . .'" *Id.*, at 1293. Despite this finding, the court did not vacate the injunction.

[19] Respondents acknowledge that "[t]he basis on which the Mississippi Supreme Court held that petitioners were liable for damages was 'the agreed use of illegal force, violence and threats.'" Supplemental Brief for Respondents 1–2.

First, respondents contend that liability is justified by evidence of participation in the "management" of the boycott.[20] Respondents identify two groups of persons who may be found liable as "managers": 79 individuals who regularly attended Tuesday night meetings of the NAACP at the First Baptist Church; and 11 persons who took "leadership roles" at those meetings.[21]

Second, respondents contend that liability is justified by evidence that an individual acted as a boycott "enforcer."[22] In this category, respondents identify 22 persons as members of the "Black Hats"—a special group organized during the boycott—and 19 individuals who were simply "store watchers."

Third, respondents argue that those petitioners "who themselves engaged in violent acts or who threatened violence have provided the best possible evidence that they wanted the boycott to succeed by coercion whenever it could not succeed by persuasion." *Id.*, at 10. They identify 16 in-

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[20] Respondents argue that anyone "who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics . . . ." *Id.*, at 2. Respondents thus would impose liability for the managers' *failure* to act; respondents argue that, despite evidence that boycott "enforcers" caused fear of injury to persons and property, "they were not taken from their posts and replaced by a system of voluntary compliance; there is no evidence that any of the petitioners even admonished them for their enforcement methods; the successful system of paramilitary enforcers on the streets and 'rhetorical' threats of violence by boycott leaders was left in place for the duration." *Id.*, at 5.

[21] These groups are not meant to be exclusive.

[22] "Once the pattern had been established—warnings to prospective customers, destruction of goods purchased at boycotted stores, public displays of weapons and of military discipline, denunciation of names gathered by the store-watchers, and subsequent violence against the persons and property of boycott breakers—store-watching in Port Gibson became the sort of activity from which a court could reasonably infer an intention to frighten people away from the stores." *Id.*, at 8.

dividuals for whom there is direct evidence of participation in what respondents characterize as violent acts or threats of violence.

Fourth, respondents contend that Charles Evers may be held liable because he "threatened violence on a number of occasions against boycott breakers." *Id.*, at 13. Like the chancellor, respondents would impose liability on the national NAACP because Evers "was acting in his capacity as Field Secretary of the NAACP when he committed these tortious and constitutionally unprotected acts." *Ibid.*

Finally, respondents state that they are "unable to determine on what record evidence the state courts relied in finding liability on the part of seven of the petitioners." *Id.*, at 16. With these allegations of wrongdoing in mind, we turn to consider the factual events that gave rise to this controversy.

B

The chancellor held petitioners liable for all of respondents' lost earnings during a 7-year period from 1966 to December 31, 1972. We first review chronologically the principal events that occurred during that period, describe some features of the boycott that are not in dispute, and then identify the most significant evidence of violent activity.

In late 1965 or early 1966, Charles Evers, the Field Secretary of the NAACP, helped organize the Claiborne County Branch of the NAACP. The pastor of the First Baptist Church, James Dorsey, was elected president of the Branch; regular meetings were conducted each Tuesday evening at the church. At about the same time, a group of black citizens formed a Human Relations Committee and presented a petition for redress of grievances to civic and business leaders of the white community. In response, a biracial committee—including five of the petitioners and several of the respondents—was organized and held a series of unproductive meetings.

The black members of the committee then prepared a further petition entitled "Demands for Racial Justice." This pe-

tition was presented for approval at the local NAACP meeting conducted on the first Tuesday evening in March. As described by the chancellor, "the approximately 500 people present voted their approval unanimously."[23] On March 14, 1966, the petition was presented to public officials of Port Gibson and Claiborne County.

The petition included 19 specific demands. It called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens."[24] As described by the chancellor, the purpose of the demands "was to gain equal rights and opportunities for Negro citizens."[25] The petition further provided that black leaders hoped it would not be necessary to resort to the "selective buying campaigns" that had been used in other communities.[26] On March 23, two demands that had been omitted

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[23] App. to Pet. for Cert. 15b.

[24] *Id.*, at 10b.

[25] *Id.*, at 12b.

[26] The petition stated:

"We hope it will not be necessary to resort to the kind of peaceful demonstrations and selective buying campaigns which have had to be used in other communities. It takes manpower, time and energy which could be better directed at solving these problems which exist in Port Gibson and Claiborne County by mutual cooperation and efforts at tolerant understanding.

"No one likes to have to resort to picketing and other kinds of demonstration—just as no one likes to be the target of this kind of demonstration. But this sort of thing is inevitable unless there can be real progress toward giving all citizens their equal rights. There seems sometimes to be no other alternative.

"Objectives of Negro citizens of Port Gibson and Claiborne County are, simply put, to have equality of opportunity, in every aspect of life, and to end the white supremacy which has pervaded community life. This im-

from the original petition were added, one of which provided: "All stores must employ Negro clerks and cashiers."[27] This supplemental petition stated that a response was expected by April 1.

A favorable response was not received. On April 1, 1966, the Claiborne County NAACP conducted another meeting at the First Baptist Church. As described by the chancellor:

> "Several hundred black people attended the meeting, and the purpose was to decide what action should be taken relative to the twenty-one demands. Speeches were made by Evers and others, and a vote was taken. It was the unanimous vote of those present, without dissent, to place a boycott on the white merchants of Port Gibson and Claiborne County." App. to Pet. for Cert. 15b.

The boycott was underway.[28]

In September 1966, Mississippi Action for Progress, Inc. (MAP), was organized to develop community action programs in 20 counties of Mississippi. One of MAP's programs—known as Head Start—involved the use of federal funds to provide food for young children. Originally, food purchases in Claiborne County were made alternately from white-owned and black-owned stores, but in February 1967 the di-

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plies many long-range objectives such as participation in decision-making at every level of community, civic, business and political affairs." *Id.*, at 9b.

[27] *Id.*, at 13b.

[28] Although Evers' speech on April 1, 1966, was not recorded, the chancellor found: "Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him.* According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP." *Id.*, at 17b–18b (footnote omitted).

rectors of MAP authorized their Claiborne County representatives to purchase food only from black-owned stores. Since MAP bought substantial quantities of food, the consequences of this decision were significant. A large portion of the trial was devoted to the question whether MAP participated in the boycott voluntarily and—under the chancellor's theories of liability—could be held liable for the resulting damages. The chancellor found MAP a willing participant, noting that "during the course of the trial, the only Head Start cooks called to the witness stand testified that they refused to go into white-owned stores to purchase groceries for the children in the program *for the reason that they were in favor of the boycott and wanted to honor it.*"[29]

Several events occurred during the boycott that had a strong effect on boycott activity. On February 1, 1967, Port Gibson employed its first black policeman. During that month, the boycott was lifted on a number of merchants. On April 4, 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis. The chancellor found that this tragic event had a depressing effect on the black community and, as a result, the boycott "tightened."[30]

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[29] *Id.*, at 22b (emphasis in original). The chancellor also noted that MAP's Board of Directors "did not seek help from local law-enforcement officers, nor did they complain to United States authorities for protection of their cooks from possible reprisals arising from trade with the white merchants"; and that "MAP employees in Claiborne County continued to take an active part in the NAACP activities and to support the boycott by picketing and marching." *Id.*, at 23b. The Mississippi Supreme Court rejected the chancellor's findings and concluded that MAP was not a willing participant in the boycott, thus absolving it from liability.

[30] *Id.*, at 25b. One of the respondents awarded the most in damages, Barbara Ellis—a partner in Ellis Variety Store—testified that the store was boycotted from April 1, 1966, until January 27, 1967. On the latter date, the store agreed—apparently at the urging of a biracial committee—to hire a black cashier. Record 1183. The boycott was reimposed on April 17, 1968, after the death of Martin Luther King, Jr., but again was lifted on May 1, 1968. *Id.*, at 1184. The boycott finally was reimposed on April 19, 1969, the day following the shooting of Roosevelt Jackson. *Ibid.*

One event that occurred during the boycott is of particular significance. On April 18, 1969, a young black man named Roosevelt Jackson was shot and killed during an encounter with two Port Gibson police officers.[31] Large crowds immediately gathered, first at the hospital and later at the church. Tension in the community neared a breaking point. The local police requested reinforcements from the State Highway Patrol and sporadic acts of violence ensued. The Mayor and Board of Aldermen placed a dawn-to-dusk curfew into effect.

On April 19, Charles Evers spoke to a group assembled at the First Baptist Church and led a march to the courthouse where he demanded the discharge of the entire Port Gibson Police Force. When this demand was refused, the boycott was reimposed on all white merchants. One of Evers' speeches on this date was recorded by the police. In that speech—significant portions of which are reproduced in an Appendix to this opinion—Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night.

On April 20, Aaron Henry came to Port Gibson, spoke to a large gathering, urged moderation, and joined local leaders in a protest march and a telegram sent to the Attorney General of the United States. On April 21, Evers gave another speech to several hundred people, in which he again called for a discharge of the police force and for a total boycott of all white-owned businesses in Claiborne County. Although this speech was not recorded, the chancellor found that Evers stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[32]

As noted, this lawsuit was filed in October 1969. No significant events concerning the boycott occurred after that

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[31] The officers had gone to Jackson's home to arrest him. A scuffle ensued and Jackson was shot by a white officer allegedly while being held by a black officer.

[32] App. to Pet. for Cert. 27b.

time. The chancellor identified no incident of violence that occurred after the suit was brought. He did identify, however, several significant incidents of boycott-related violence that occurred some years earlier.

Before describing that evidence, it is appropriate to note that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children. The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott. Such activity was fairly irregular, occurred primarily on weekends, and apparently was largely discontinued around the time the lawsuit was filed.[33]

One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons."[34] The names of persons who vio-

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[33] Record 1146. The Sheriff of Claiborne County testified: "There were pickets off and on from April, 1966 to 1970." *Id.*, at 1060. When asked to describe "how they conducted themselves, what they did, what they went about doing," he stated: "Most of them carried or either had signs on their shoulders and they walked up and down the streets in front of the stores. They wouldn't always picket the same stores at the same time. At different times they might picket M&M then they would move up and picket Claiborne Hardware down Market Street to other businesses. Most of the time it was teenagers and at the last it was little bitty fellows, as young as about six years old. That was '69 and '70." *Ibid.* The Sheriff also testified that the boycott was "tight" in April 1966, April 1968, and April 1969. *Id.*, at 1152.

[34] Evidence concerning the aims and practices of the "Black Hats" is contradictory. Respondents describe them as a "paramilitary organization." Petitioner Elmo Scott, a member of the group, testified concerning instructions that were given to him: "It was given to the Deacons to give respect to the people that was on the street and, regardless of what they say back to you, for you not to use bad language to them or not to curse

384-537 O - 83 - 12

lated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."[35]

The chancellor also concluded that a quite different form of discipline had been used against certain violators of the boycott. He specifically identified 10 incidents that "strikingly" revealed the "atmosphere of fear that prevailed among blacks from 1966 until 1970."[36] The testimony concerning four incidents convincingly demonstrates that they occurred because the victims were ignoring the boycott. In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged. None of these four victims, however, ceased trading with white merchants.[37]

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them or no kind of way, just talk to them in the right manner of way." *Id.*, at 2985. It is undisputed that the "Black Hats" were formed during the boycott, that members of the organization engaged in "store watching" and other "enforcement" activities, and that some individuals who belonged to the group committed acts of violence.

[35] App. to Pet. for Cert. 19b.

[36] *Id.*, at 35b.

[37] On August 22, 1966, birdshot was fired into the home of James Gilmore, a black man who ignored the boycott. He immediately grabbed a shotgun, leapt into his car, pursued the vehicle from which he believed the shots had come, forced it to the side of the road, and apprehended three young black men who were active supporters of the boycott. They were indicted, tried, and convicted, but the convictions were set aside on appeal. *Whitney* v. *State*, 205 So. 2d 284 (Miss. 1967). Gilmore continued to patronize white merchants after the incident.

In June 1966, while Murriel Cullens was having a beer in Wolf's Store, a brick was thrown through the windshield of his parked car. He had been patronizing white merchants and continued to do so thereafter. Record 14049. In November 1966, shotgun pellets were fired into the wall of his mother's home. She had received a number of threatening telephone calls criticizing her for patronizing white stores. She continued to do so after the incident. *Id.*, at 14003. At trial, Laura Cullens testified, in response

The evidence concerning four other incidents is less clear, but again it indicates that an unlawful form of discipline was applied to certain boycott violators. In April 1966, a black couple named Cox asked for a police escort to go into a white-owned dry cleaner and, a week later, shots were fired into their home. In another incident, an NAACP member took a bottle of whiskey from a black man who had purchased it in a white-owned store. The third incident involved a fight between a commercial fisherman who did not observe the boycott and four men who "grabbed me and beat me up and took a gun off me."[38] In a fourth incident, described only in hearsay testimony, a group of young blacks apparently pulled down the overalls of an elderly brick mason known as "Preacher White" and spanked him for not observing the boycott.[39]

Two other incidents discussed by the chancellor are of less certain significance. Jasper Coleman testified that he par-

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to a auestion whether she had been scared: "No indeed. I haven't had a bone in me scared in my life from nobody. And I have always told them, they say, 'You're just an uncle tom.' And I say, 'Well, uncle tom can be blue, black, green or purple or white. If I feel I am in the right, I stand in that right and nobody tells me what to do.'" *Id.*, at 14017.

James Bailey, who was a teenager at the time of the incident, testified that he had noticed that an elderly black lady named Willie Butler traded with a white merchant and had groceries delivered to her home. He testified that he destroyed flowers in her garden to punish her for violating the boycott. *Id.*, at 3656. He stated that he acted on his own initiative and that Mrs. Butler continued to trade with the merchant. *Id.*, at 3660, 3741.

[38] *Id.*, at 13868. One of his assailants testified that the incident resulted from an automobile accident, rather than the boycott. *Id.*, at 3656.

[39] "Preacher White" had died by the time of trial. No witness admitted being present at what respondents' counsel characterized as "the spanking of Preacher White." *Id.*, at 3696. The Port Gibson Chief of Police testified, however, that White had come in and complained that a group of young blacks had pulled his overalls down and whipped him. *Id.*, at 2176. In describing this incident, the chancellor stated that Preacher White "was stripped of his clothing and whipped by a group of young blacks because he refused to honor the boycott." App. to Pet. for Cert. 37b.

ticipated in an all-night poker game at a friend's house on Christmas Eve 1966. The following morning he discovered that all four tires of his pickup truck had been slashed with a knife. Coleman testified that he did not participate in the boycott but was never threatened for refusing to do so. Record 13791. Finally, Willie Myles testified that he and his wife received a threatening phone call and that a boy on a barge told him that he would be whipped for buying his gas at the wrong place.

Five of these incidents occurred in 1966. The other five are not dated. The chancellor thus did not find that any act of violence occurred after 1966.[40] In particular, he made no reference to any act of violence or threat of violence—with the exception, of course, of Charles Evers' speeches—after the shootings of Martin Luther King, Jr., in 1968 or Roosevelt Jackson in 1969. The chancellor did not find that any of the incidents of violence was discussed at the Tuesday evening meetings of the NAACP.[41]

II

This Court's jurisdiction to review the judgment of the Mississippi Supreme Court is, of course, limited to the fed-

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[40] In describing the "atmosphere of fear" existing during the boycott, the chancellor emphasized the participation of petitioner Rudy Shields. He stated:

"Defendant Rudolph J. (Rudy) Shields, formerly of Chicago, was the principal figure in several altercations. He boasted that he was 'the most jailed person in the Claiborne County boycott.' This man was the acknowledged leader of the 'Deacons.'" *Id.*, at 35b.

See also Supplemental Brief for Respondents 10–13. The record indicates that Shields was in Port Gibson for approximately eight months during 1966. Record 4993.

[41] The chancellor did find—and apparently believed this fact to be significant—that the NAACP provided attorneys to black persons arrested in connection with acts arising from the boycott. App. to Pet. for Cert. 38b. The NAACP provided legal representation to the three black persons arrested in August 1966 following the Gilmore shooting.

eral questions necessarily decided by that court.[42] We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.

A

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.[43] The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 294, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint

[42] Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480.

[43] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1. First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Edwards* v. *South Carolina*, 372 U. S. 229, 235.

or lost." *Ibid.* In emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *id.*, at 295, we noted the words of Justice Harlan, writing for the Court in *NAACP* v. *Alabama*, 357 U. S. 449, 460:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

THE CHIEF JUSTICE stated for the Court in *Citizens Against Rent Control:* "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." 454 U. S., at 296.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. In *De Jonge* v. *Oregon*, 299 U. S. 353, the Court unanimously held that an individual could not be penalized simply for assisting in the conduct of an otherwise lawful meeting held under the auspices of the Communist Party, an organization that advocated "criminal syndicalism." After reviewing the rights of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," *id.*, at 364, Chief Justice Hughes, writing for the Court, stated:

> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices

under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*, at 365.

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In *Thornhill* v. *Alabama*, 310 U. S. 88, the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 99. Cf. *Chauffeurs* v. *Newell*, 356 U. S. 341. In *Edwards* v. *South Carolina*, 372 U. S. 229, we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott

through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

> "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, 323 U. S. 516, 537.

In *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, the Court considered the validity of a prior restraint on speech that invaded the "privacy" of the respondent. Petitioner, a racially integrated community organization, charged that respondent, a real estate broker, had engaged in tactics known as "blockbusting" or "panic peddling."[44] Petitioner asked respondent to sign an agreement that he would not solicit property in their community. When he refused, petitioner distributed leaflets near respondent's home that were critical of his business practices.[45] A state court enjoined petitioner from distributing the leaflets; an appellate court affirmed on the ground that the alleged activities were coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. *Id.*, at 418. This Court reversed. THE CHIEF JUSTICE explained:

> "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication pro-

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[44] Specifically, petitioner contended that respondent "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes." 402 U. S., at 416.

[45] One of petitioner's officers testified at trial that he had hoped that respondent would be induced to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us." *Id.*, at 417.

tected by the First Amendment. *E. g., Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State, supra; Thornhill* v. *Alabama*, 310 U. S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.*, at 419.

In dissolving the prior restraint, the Court recognized that "offensive" and "coercive" speech was nevertheless protected by the First Amendment.[46]

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." *Thomas* v. *Collins, supra*, at 530. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change.

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[46] See *Watts* v. *United States*, 394 U. S. 705, 708 ("The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America*, 383 U. S. 53, 58 (1966), is often vituperative, abusive, and inexact"). See also *Cohen* v. *California*, 403 U. S. 15; Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372 (1979).

Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.

The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States* v. *O'Brien*, 391 U. S. 367.[47] A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *NLRB* v. *Retail Store Employees*, 447 U. S. 607. The right of business entities to "associate" to suppress competition may be curtailed. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB* v. *Retail Store Employees*, *supra*, at 617–618 (BLACKMUN, J., concurring in part). See *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212, 222–223, and n. 20.

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[47] "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376–377 (footnotes omitted).

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U. S. 455, 467. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, the Court considered whether the Sherman Act prohibited a publicity campaign waged by railroads against the trucking industry that was designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers. Noting that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms," the Court held that the Sherman Act did not proscribe the publicity campaign. *Id.*, at 137–138. The Court stated that it could not see how an intent to influence legislation to destroy the truckers as competitors "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.*, at 138–139. Noting that the right of the people to petition their representatives in government "cannot properly be made to depend on their intent in doing so," the Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.*, at 139–140. This conclusion was not changed by the fact that the railroads' anticompetitive *purpose* produced an anti-

competitive *effect;* the Court rejected the truckers' Sherman Act claim despite the fact that "the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action." *Id.*, at 143.

It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[48]

In upholding an injunction against the state supersedeas bonding requirement in this case, Judge Ainsworth of the Court of Appeals for the Fifth Circuit cogently stated:

> "At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This

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[48] In *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, the Court unanimously rejected Alabama's effort to oust the NAACP from that State. The State claimed, in part, that the NAACP was "'engaged in organizing, supporting and financing an illegal boycott'" of Montgomery's bus system. *Id.*, at 302. Writing for the Court, Justice Harlan described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law." *Id.*, at 307. In *Missouri* v. *National Organization for Women, Inc.*, 620 F. 2d 1301, 1317 (CA8 1980), cert. denied, 449 U. S. 842, Judge Stephenson stated that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott."

view accords insufficient weight to the First Amendment's protection of political speech and association. There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." *Henry* v. *First National Bank of Clarksdale*, 595 F. 2d 291, 303 (1979) (footnote omitted).

We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.[49]

B

The Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott. The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed.[50] In particular, we

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[49] We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law. See *Hughes* v. *Superior Court*, 339 U. S. 460.

[50] "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may

consider here the effect of our holding that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected.[51]

The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *Samuels* v. *Mackell*, 401 U. S. 66, 75 (Douglas, J., concurring). Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. *NAACP* v. *Button*, 371 U. S. 415, 438.[52] Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to

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legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U. S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285.

[51] Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. *New York Times Co.* v. *Sullivan*, *supra*, at 265.

[52] See also *Carroll* v. *Princess Anne*, 393 U. S. 175, 184; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 604.

damages liability and on the persons who may be held accountable for those damages.

In *Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court considered a case in many respects similar to the one before us. The case grew out of the rivalry between the United Mine Workers (UMW) and the Southern Labor Union (SLU) over representation of workers in the southern Appalachian coal fields. A coal company laid off 100 miners of UMW's Local 5881 when it closed one of its mines. That same year, a subsidiary of the coal company hired Gibbs as mine superintendent to attempt to open a new mine on nearby property through use of members of the SLU. Gibbs also received a contract to haul the mine's coal to the nearest railroad loading point. When he attempted to open the mine, however, he was met by armed members of Local 5881 who threatened Gibbs and beat an SLU organizer. These incidents occurred on August 15 and 16. Thereafter, there was no further violence at the mine site and UMW members maintained a peaceful picket line for nine months. No attempts to open the mine were made during that period.

Gibbs lost his job as superintendent and never began performance of the haulage contract. Claiming to have suffered losses as a result of the union's concerted plan against him, Gibbs filed suit in federal court against the international UMW. He alleged an unlawful secondary boycott under the federal labor laws and, as a pendent state-law claim, "an unlawful conspiracy and an unlawful boycott aimed at him . . . to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." *Id.*, at 720. The federal claim was dismissed on the ground that the dispute was "primary" and therefore not cognizable under the federal prohibition of secondary labor boycotts. Damages were awarded against the UMW, however, on the state claim of interference with an employment relationship.

This Court reversed. The Court found that the pleadings, arguments of counsel, and jury instructions had not ade-

quately defined the compass within which damages could be awarded under state law. The Court noted that it had "consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes" and had sustained "a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation." *Id.*, at 729. To accommodate federal labor policy, however, the Court in *Gibbs* held: "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Ibid.* The Court noted that in *Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, damages were restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants. "'Thus there [was] nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.'" 383 U. S., at 730 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 249, n. 6).

The careful limitation on damages liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. That limitation is no less applicable, however, to the important First Amendment interests at issue in this case. Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his

association with another. In *Scales* v. *United States*, 367 U. S. 203, 229, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." The Court suggested that to punish association with such a group, there must be "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" *Ibid.* (quoting *Noto* v. *United States*, 367 U. S. 290, 299).[53] Moreover, in *Noto* v. *United States* the Court emphasized that this intent must be judged "according to the strictest law,"[54] for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Id.*, at 299–300.

In *Healy* v. *James*, 408 U. S. 169, the Court applied these principles in a noncriminal context. In that case the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a national organization associated with disruptive and violent campus activity. It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.*, at 185–186. The Court stated that "it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.*, at 186 (quoting *United States* v. *Robel*, 389 U. S. 258, 265). "The government has the bur-

[53] See *United States* v. *Robel*, 389 U. S. 258; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500.

[54] "*Strictissimi juris.*" 367 U. S., at 299.

384-537 O - 83 - 13

den of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U. S., at 186 (footnote omitted).[55]

The principles announced in *Scales*, *Noto*, and *Healy* are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[56] "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960)." *Carroll* v. *Princess Anne*, 393 U. S. 175, 183–184.

III

The chancellor awarded respondents damages for all business losses that were sustained during a 7-year period beginning in 1966 and ending December 31, 1972.[57] With the ex-

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[55] In *Rizzo* v. *Goode*, 423 U. S. 362, the Court vacated an injunction, directed against an entire police department, that had resulted from 20 specific incidents of police misconduct. The Court held that such collective responsibility should be limited to instances in which a concerted design existed to accomplish a wrongful objective. *Id.*, at 373–376.

[56] Of course, the question whether an individual may be held liable for damages merely by reason of his association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited. See *infra*, at 925–926.

[57] It is noteworthy that the portion of the chancellor's opinion discussing damages begins by referring expressly to the two theories of liability that the Mississippi Supreme Court rejected:

"The complainants proved, in this record, that they suffered injury to their respective businesses as the direct and proximate result of the unlawful secondary boycott and the defendants' actions in restraining trade, all of

ception of Aaron Henry, all defendants were held jointly and severally liable for these losses. The chancellor's findings were consistent with his view that voluntary participation in the boycott was a sufficient basis on which to impose liability. The Mississippi Supreme Court properly rejected that theory; it nevertheless held that petitioners were liable for all damages "resulting from the boycott."[58] In light of the principles set forth above, it is evident that such a damages award may not be sustained in this case.

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that "coercion, intimidation, and threats" formed "*part* of the boycott activity" and "*contributed* to its almost complete success."[59] The court broadly asserted—without differentiation—that "'[i]ntimidation, threats, social ostracism, vilification, and traduction'" were devices used by the defendants to effectuate the boycott.[60] The court repeated the chancellor's finding that "the volition of *many* black persons was overcome out of sheer fear."[61] These findings are inconsistent with the court's imposition of all damages "resulting from the boycott." To the extent that the court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the "precision of regulation" demanded by that constitutional provision.

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which was accomplished by defendants through a conspiracy." App. to Pet. for Cert. 57b (footnote omitted).

In a footnote, the chancellor added that "any kind of boycott is unlawful if executed with force or violence or threats." *Id.*, at 57b, n. 21.

[58] 393 So. 2d, at 1307.

[59] *Id.*, at 1302 (emphasis added).

[60] *Id.*, at 1300 (quoting trial court; see App. to Pet. for Cert. 39b).

[61] 393 So. 2d, at 1300 (emphasis added).

The record in this case demonstrates that all of respondents' losses were not proximately caused by violence or threats of violence. As respondents themselves stated at page 12 of their brief in the Mississippi Supreme Court:

> "Most of the witnesses testified that they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott."

This assessment is amply supported by the record.[62] It is indeed inconceivable that a boycott launched by the unanimous vote of several hundred persons succeeded solely through fear and intimidation. Moreover, the fact that the boycott "intensified" following the shootings of Martin Luther King, Jr., and Roosevelt Jackson demonstrates that factors other than force and violence (by the petitioners) figured

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[62] The testimony of Julia Johnson—although itself only a small portion of a massive record—perhaps best illustrates this point:

"Q. How did you observe the boycott?

"A. I just stayed out of the stores, because I had my own personal reasons to stay out of the stores. There were some things I really wanted, and the things I wanted were the right to vote, the right to have a title—Mrs. or Mr. or whatever I am, and not uncle or aunt, boy or girl. So that's what I wanted. And if I wanted a job—a qualified job, I wanted to have the opportunity to be hired. Not hired because I'm black or white, but just hired.

"Q. And this was your reason for observing the boycott?

"A. Yes, it was.

"Q. And you were in favor of the boycott?

"A. Yes, I was in favor of the boycott.

"Q. And it wasn't because somebody threatened you?

"A. No, it wasn't because nobody threatened me.

"Q. You weren't afraid?

"A. Was I afraid?

"Q. Yes.

"A. No, I was not afraid." Record 15476.

It is clear that losses were sustained because persons like Julia Johnson "wanted justice and equal opportunity." *Id.*, at 6864 (testimony of Margaret Liggins). See *id.*, at 6737, 12419, 13543–13544.

prominently in the boycott's success. The chancellor made no finding that any act of violence occurred after 1966. While the timing of the acts of violence was not important to the chancellor's imposition of liability, it is a critical factor under the narrower rationale of the Mississippi Supreme Court. That court has completely failed to demonstrate that business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966.[63] It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

This case is not like *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity.[64] The violent conduct present in that case was pervasive.[65] The Court in *Meadowmoor* stated that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.*, at 293. The Court emphasized, however:

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[63] It is also noteworthy that virtually every victim of the acts of violence found by the chancellor testified that he or she continued to patronize the white merchants. See *supra*, at 904, and n. 37.

[64] In *Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court stated that if "special facts" such as those presented in *Meadowmoor* "appeared in an action for damages after picketing marred by violence had occurred," they might "support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." 383 U. S., at 731–732.

[65] As described by the Court: "Witnesses testified to more than fifty instances of windowsmashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the ven-

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *Ibid.*

Such "insubstantial findings" were not present in *Meadowmoor*. But in this case, the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of *all* business losses sustained over a 7-year span. No losses are attributed to the voluntary participation of individuals determined to secure "justice and equal opportunity."[66] The court's judgment "screens reality" and cannot stand.[67]

Respondents' supplemental brief also demonstrates that on the present record no judgment may be sustained against most of the petitioners. Regular attendance and participation at the Tuesday meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability. The chancellor's findings do not suggest that any illegal conduct was authorized, ratified, or even discussed at any of the meetings. The Sheriff testified that he was kept

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dor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver." 312 U. S., at 291–292.

[66] See n. 62, *supra*.

[67] For the same reasons, the permanent injunction entered by the chancellor must be dissolved. Since the boycott apparently has ended, the Mississippi Supreme Court may wish to vacate the entire injunction on the ground that it is no longer necessary; alternatively, the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character.

informed of what transpired at the meetings; he made no reference to any discussion of unlawful activity.[68] To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute "guilt by association," since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a "guilt *for* association" theory. Neither is permissible under the First Amendment.[69]

Respondents also argue that liability may be imposed on individuals who were either "store watchers" or members of the "Black Hats." There is nothing unlawful in standing outside of a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others. As established above, mere association with either group—absent a specific intent to further an unlawful aim embraced by that group—is

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[68] See Record 1172. The strongest evidence of wrongdoing at the meetings was presented by petitioner Marjorie Brandon, who served at times as the local NAACP secretary. She testified that "in the meetings there were statements saying that you would be dealt with" if found trading in boycotted stores. *Id.*, at 5637. She stated that she understood "dealt with" to mean "they would take care of you, do something to you, if you were caught going in." *Ibid.* Her testimony does not disclose who made the statements, how often they were made, or that they were in any way endorsed by others at the meetings. A massive damages judgment may not be sustained on the basis of this testimony; the fact that certain anonymous persons made such statements at some point during a 7-year period is insufficient to establish that the Association itself possessed unlawful aims or that any petitioner specifically intended to further an unlawful goal.

[69] A legal duty to "repudiate"—to disassociate oneself from the acts of another—cannot arise unless, absent the repudiation, an individual could be found liable for those acts. As our decisions in *Scales*, *Noto*, and *Healy* make clear, see *supra*, at 920, civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those acts of violence were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals. Cf. *General Building Contractors Assn.* v. *Pennsylvania*, *ante*, at 391–395.

an insufficient predicate for liability. At the same time, the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.

Respondents have sought separately to justify the judgment entered against Charles Evers and the national NAACP. As set forth by the chancellor, Evers was specially connected with the boycott in four respects. First, Evers signed the March 23 supplemental demand letter and unquestionably played the primary leadership role in the organization of the boycott. Second, Evers participated in negotiations with MAP and successfully convinced MAP to abandon its practice of purchasing food alternately from white-owned and black-owned stores. Third, he apparently presided at the April 1, 1966, meeting at which the vote to begin the boycott was taken; he delivered a speech to the large audience that was gathered on that occasion. See n. 28, *supra*. Fourth, Evers delivered the speeches on April 19 and 21, 1969, which we have discussed previously. See *supra*, at 902; Appendix to this opinion.

For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings or his active participation in the boycott itself. To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award. Respondents point to Evers' speeches, however, as justification for the chancellor's damages award. Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric

lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

It is clear that "fighting words"—those that provoke immediate violence—are not protected by the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Similarly, words that create an immediate panic are not entitled to constitutional protection. *Schenck* v. *United States*, 249 U. S. 47.[70] This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment. In *Brandenburg* v. *Ohio*, 395 U. S. 444, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on

[70] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U. S., at 52.

"the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. See *Noto* v. *United States*, 367 U. S., at 297–298 ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). See also *Whitney* v. *California*, 274 U. S. 357, 372 (Brandeis, J., concurring).

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of the Cox incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.[71]

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[71] In *Watts* v. *United States*, 394 U. S. 705, the petitioner was convicted of willfully making a threat to take the life of the President. During a pub-

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.[72] The chancellor's findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred.[73] The findings are constitutionally inadequate to support the damages judgment against him.

The liability of the NAACP derived solely from the liability of Charles Evers.[74] The chancellor found:

> "The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b–43b.

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lic rally at the Washington Monument, petitioner stated in a small discussion group:

"'They always holler at us to get an education. And now I have already received my draft classification as 1–A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.'" *Id.*, at 706.

This Court summarily reversed. The Court agreed with the petitioner that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President." *Id.*, at 708.

[72] There is evidence that Evers occasionally served as a "store watcher," but there is no suggestion that anything improper occurred on those occasions.

[73] See n. 69, *supra*.

[74] Indeed it is noteworthy that Aaron Henry—who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP—was the only defendant dismissed by the chancellor on the merits.

Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. On the present record, however, the judgment against the NAACP could not stand in any event.

The associational rights of the NAACP and its members have been recognized repeatedly by this Court.[75] The NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority.[76] Cf. *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.

The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, president of the Mississippi State Branch of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. Record 4930.[77] Similarly, there is no evidence that the NAACP rati-

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[75] Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539; *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288.

[76] There is no question that Charles Evers—as its only paid representative in Mississippi—was an agent of the NAACP.

[77] In a footnote to his discussion of the NAACP's liability, the chancellor wrote:

"Aaron E. Henry, a prominent black leader in the State of Mississippi, who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP, testified that the NAACP 'absolutely did not approve of the way the boycott was being conducted in Port Gibson.' There is also evidence in the record tending to show that

fied—or even had specific knowledge of—any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking, any official action with respect to the boycott. *Id.*, at 4896. The NAACP supplied no financial aid to the boycott. *Id.*, at 4940. The chancellor made no finding that the national organization was involved in any way in the boycott.[78]

To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment. As Justice Douglas noted in *NAACP* v. *Overstreet*, 384 U. S. 118, dissenting from a dismissal of a writ of certiorari found to have been improvidently granted:

> "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the

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Evers was called to account by the national NAACP because of the manner in which the boycott was conducted. However, the NAACP took no action whatever to curb Evers' activities in this connection." App. to Pet. for Cert. 42b, n. 9.

Henry's testimony concerning Evers' having been "called to account by the National NAACP" concerned Evers' failure to make proper reports and Henry's understanding that there was a personality clash between Evers and an executive of the NAACP. Record 4905, 4907. We have found no evidence in the record that any representative of the national NAACP was advised of any facts concerning the manner in which the Port Gibson boycott was conducted.

[78] The chancellor did find that the NAACP had posted bond and provided legal representation for arrested boycott violators. Since the NAACP regularly provides such assistance to indigent black persons throughout the country, this finding cannot support a determination that the national organization was aware of, and ratified, unauthorized violent conduct. Counsel for respondents does not contend otherwise.

additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled. See *Bates* v. *Little Rock*, 361 U. S. 516, 523. Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy. *E. g.*, *DeGregory* v. *New Hampshire*, 383 U. S. 825; *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 543–546; *Shelton* v. *Tucker*, 364 U. S. 479; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462–463. Recognizing that guilt by association is a philosophy alien to the traditions of a free society (see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 245–246, and the First Amendment itself, we have held that civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes (*Wieman* v. *Updegraff*, 344 U. S. 183) and with the specific intention to further those purposes. See *Elfbrandt* v. *Russell*, [384 U. S., at] 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Id.*, at 122.

The chancellor's findings are not adequate to support the judgment against the NAACP.

IV

In litigation of this kind the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity.[79] And

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[79] In discussing the doctrine of criminal conspiracy, Justice Jackson noted:

"The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state

yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.[80]

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully

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itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'etat*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history." *Krulewitch* v. *United States*, 336 U. S., at 448 (concurring opinion).

[80] "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the chancellor, framed largely in the light of two legal theories rejected by the Mississippi Supreme Court, are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott.

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST concurs in the result.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Portions of speech delivered by Charles Evers on April 19, 1969 (Record 1092–1108):

"Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brethren know that guns and bullets ain't gonna stop us. (No) (No) We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.), that we are going to have our share. (Yeah, we are.)

. . . . .

"We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

"Then we are going to do more than that. The white merchants of this town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

"Oh, no, white folks, we ain't going to shoot you with no bullet. (That's right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That's right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You're guilty. You're guilty because you don't care a thing about anybody. (Yes.) And when you go and let a big, black burly nigger like you get on the police force (Yea) go down and grab another black brother's arm and hold it while a white racist stole him from us, and he's a liar if he says he didn't hold him.

. . . . .

"We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

"We don't want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain't hired nobody yet. (That's right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That's right) (Applause) He haven't hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They're out here on the highway and they haven't hired none of us yet.

"Do you know Ellis who had a part-time boy all his life? He ain't hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain't gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain't a'scar'd of white folks (Applause) (Me) and we want you that's willing to follow the rules now to go down by Brother Stampley's and serve notice on him with our placards that we ain't coming no more.

"Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

"All right, Brother Wolf, you're next. (Applause) We got a couple of 'em to come down by Brother Wolf's. We mean business, white folks. We ain't gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, 'What's wrong with you niggers?' I'll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to

deny us the right to even exist. (Tell 'em about it.) And we ain't coming back, white folks. (We ain't.)

"You all put a curfew on us at eight o'clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain't coming back, white folks.

. . . . .

"We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend. He say, 'Naw, brother, we ain't coming.' 'Have you got rid of all those bigots you got on your police force?' 'No.' 'Have you hired Negroes in all them stores?' 'No.' 'Well, we ain't coming back.' (Right) That's all we gonna do. You know, what they don't realize is you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don't back upon your agreement. (Yea) I don't care how many Negroes working on it, that's too bad. We are going only to Negro-owned service stations. And we are going only—the only time you will see us around on this street, now listen good, you are going to Lee's Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

"We don't want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can't beat this. (No) It won't cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause) Now, you know, we have got a little song that says, 'This is your thing, do what you want to do.' (Applause) This is our thing, let's do what we want to do with it. Let's make sure now—if you be dis-

obedient now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying, 'You know what, Evers is down there with his goon squad, . . .' Now, we know Claiborne County,—'with his goon squad harassing poor ole niggers.'

"Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that's our business. (That's right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain't gonna never control us no more. (Applause)

. . . . .

"Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don't let me down, and don't let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don't demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)

"None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

"Now, let's get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer

to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

. . . . .

"Let's go to the funeral of our young son whenever the funeral is. I don't want you to come with hate because that is not going to solve our problems. (No hate.) We don't want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain't going to ever stop hating them for that. But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. (No) That's not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

"Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell 'em about it.)

. . . . .

"I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain't

going to let you push us, not one inch. (That's right.) If you come on beating us, we are going to fight back. (Right) We got our understanding. We are all God's children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain't going to be bought off and talked off. We are going to elect the county sheriff here this next time that don't need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don't forget that, heah. (Right) It brings back memories like you know you remember things we do.

"Now, if you don't think it is necessary, we don't have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and we ain't coming back no more until all our requests have been met. Is that the common consent of all of you here? (Applause) (Let's go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our . . . (Yea) We are all saying it now. Let's not say it now so much on my part. You know, I'm just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that's the case. Let's make us a white town. We would like for you to start it. Be courteous now. Don't mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them."

SPORHASE ET AL. v. NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM SUPREME COURT OF NEBRASKA

No. 81-613. Argued March 30, 1982—Decided July 2, 1982

A Nebraska statute requires any person intending to withdraw ground water from any well located in the State and transport it for use in an adjoining State, to obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources finds that such withdrawal is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, he will grant the permit if the State in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that State for use in Nebraska. Appellants own contiguous tracts of land in Nebraska and Colorado, on which a well on the Nebraska tract pumps ground water for irrigation of both the Nebraska and Colorado tracts, but they never applied for the permit required by the statute. Appellee brought an action in a Nebraska state court to enjoin appellants from transferring the water across the border without a permit. Rejecting the defense that the statute imposed an undue burden on interstate commerce, the trial court granted the injunction. The Nebraska Supreme Court affirmed.

Held:

1. Ground water is an article of commerce and therefore subject to congressional regulation. Pp. 945–954.

(a) Although appellee's claimed greater ownership interest in ground water than in certain other natural resources may not be irrelevant to Commerce Clause analysis, it does not remove Nebraska ground water from such scrutiny, since appellee's argument is still based on the legal fiction of state ownership. Pp. 945–952.

(b) The States' interests in conserving and preserving scarce water resources in the arid Western States clearly have an interstate dimension. The agricultural markets supplied by irrigated farms provide the archtypical example of commerce among the States for which the Framers of the Constitution intended to authorize federal regulation. Here, the multistate character of the aquifer underlying appellants' tracts of land, as well as parts of Texas, New Mexico, Oklahoma, and Kansas, demonstrates that there is a significant federal interest in conservation as well as in fair allocation of diminishing water resources. Pp. 952–954.

2. The reciprocity requirement of the Nebraska statute violates the Commerce Clause as imposing an impermissible burden on interstate

commerce. While the first three conditions set forth in the statute for granting a permit—that the withdrawal of the ground water be reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare—do not on their faces impermissibly burden interstate commerce, the reciprocity provision operates as an explicit barrier to commerce between Nebraska and its adjoining States. Nebraska therefore has the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Such requirement, when superimposed on the first three restrictions, fails to clear this initial hurdle, since there is no evidence that it is narrowly tailored to the conservation and preservation rationale. Thus, it does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Pp. 954–958.

3. Congress has not granted the States permission to engage in ground water regulation that would otherwise be impermissible. Although there are 37 federal statutes and a number of interstate compacts demonstrating Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional restraints on such state law. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal water projects nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. Pp. 958–960.

208 Neb. 703, 305 N. W. 2d 614, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 961.

Richard A. Dudden argued the cause and filed a brief for appellants.

G. Roderic Anderson, Assistant Attorney General of Nebraska, argued the cause for appellee. With him on the brief was *Paul L. Douglas*, Attorney General, and *Steven C. Smith*, Special Assistant Attorney General.*

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*Briefs of *amici curiae* urging affirmance were filed by *Jeff Bingaman*, Attorney General, and *Richard A. Simms*, *Jeffrey L. Fornaciari*, and *Stephen D. Dillon*, Special Assistant Attorneys General, for the State of New

JUSTICE STEVENS delivered the opinion of the Court.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:[1] (1) whether ground water is an article of commerce and therefore subject to congressional regulation; (2) whether the Nebraska restriction on the interstate transfer of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

Mexico; by *John P. Frank* and *William L. Lutz* for the Elephant Butte Irrigation District et al.; by *Jon T. Brown*, *William B. Bonvillian*, and *Stephen E. Roady* for the National Agricultural Lands Center et al.; and by *Patrick A. Parenteau* for the National Wildlife Federation et al.

Briefs of *amici curiae* were filed for the State of California by *George Deukmejian*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Roderick Walston* and *Gregory K. Wilkinson*, Deputy Attorneys General; for the State of Colorado et al. by *J. D. MacFarlane*, Attorney General of Colorado, *Richard F. Hennessey*, Deputy Attorney General, *Mary J. Mullarkey*, Solicitor General, and *Dennis M. Montgomery* and *William A. Paddock*, Assistant Attorneys General, *Steven F. Freudenthal*, Attorney General of Wyoming, *Walter Perry*, Senior Assistant Attorney General, and *Lawrance J. Wolfe*, Assistant Attorney General, *Robert T. Stephan*, Attorney General of Kansas, *Mark D. Meierhenry*, Attorney General of South Dakota, *John Ashcroft*, Attorney General of Missouri, *Richard H. Bryan*, Attorney General of Nevada, and *George Campbell*, Deputy Attorney General, *Robert O. Wefald*, Attorney General of North Dakota, and *David L. Wilkinson*, Attorney General of Utah; and for the City of El Paso by *Harry M. Reasoner* and *Charles J. Meyers*.

[1] Article I, § 8, cl. 3, of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." For general explanations of Commerce Clause analysis, see, *e. g.*, *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U. S. 648, 652–653 (1981); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766–770 (1945).

384-537 O - 83 - 14

Appellants jointly own contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered the well with the State of Nebraska in 1971, but neither they nor the present owners applied for the permit required by Neb. Rev. Stat. § 46–613.01 (1978). That section provides:

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska."

Appellee brought this action to enjoin appellants from transferring the water across the border without a permit.[2] The trial court rejected the defense that the statute imposed an undue burden on interstate commerce and granted the injunction. The Nebraska Supreme Court affirmed. 208 Neb. 703, 305 N. W. 2d 614 (1981). It held that, under Nebraska law, ground water is not "a market item freely transferable for value among private parties, and therefore [is] not an article of commerce." *Id.*, at 705, 305 N. W. 2d, at

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[2] Because of the reciprocity requirement of § 46–613.01, appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement. Cf. *Larson* v. *Valente*, 456 U. S. 228 (1982).

616.[3] The Chief Justice, while agreeing that the statutory criteria governing the transfer of water to an adjoining State did not violate the Commerce Clause, dissented on the narrow ground that appellee violated both the Federal and Nebraska Constitutions by attempting "to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control." *Id.*, at 713, 305 N. W. 2d, at 620.

I

In holding that ground water is not an article of commerce, the Nebraska Supreme Court and appellee cite as controlling precedent *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908). In that case a New Jersey statute prohibited the interstate transfer of any surface water located within the State.[4] The Hudson County Water Co. nevertheless contracted with New York City to supply one of its boroughs with water from the Passaic River in New Jersey. The State Attorney General sought from the New Jersey courts an injunction against fulfillment of the contract. Over the water company's objections that the statute impaired the obligation of contract, took property without just compensation, interfered with interstate commerce, denied New York citizens the privileges afforded New Jersey citizens, and denied New York citizens the equal protection of the laws, the injunction was granted. This Court, in an opinion by Justice Holmes, affirmed.

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[3] The Nebraska Supreme Court also rejected appellants' equal protection and due process challenges. Appellants renew those challenges before this Court, but we need not reach these issues in light of our disposition of the Commerce Clause claim.

[4] The Court quoted the statute: "'It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein.'" 209 U. S., at 353.

Most of the Court's opinion addresses the just compensation claim. Justice Holmes refused to ground the Court's holding, as did the New Jersey state courts,[5] on "the more or less attenuated residuum of title that the State may be said to possess." *Id.*, at 355. For the statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. Putting aside the "problems of irrigation," the State's interest in preserving its waters was well within its police power.[6] That interest was not dependent on any demonstration that the State's water resources were inadequate for present or future use. The State "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.*, at 357.

Having disposed of the just compensation claim, Justice Holmes turned very briefly to the other constitutional chal-

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[5] "The Courts below assumed or decided and we shall assume that the defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale." *Id.*, at 354.

[6] "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Id.*, at 356.

lenges. In one paragraph, he rejected the Contract Clause claim. In the remaining paragraph of the opinion, he rejected all the other defenses. His treatment of the Commerce Clause challenge consists of three sentences: "A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U. S. 519 [(1896)]." *Ibid.*

While appellee relies upon *Hudson County*, appellants rest on our summary affirmance of a three-judge District Court judgment in *City of Altus* v. *Carr*, 255 F. Supp. 828 (WD Tex.), summarily aff'd, 385 U. S. 35 (1966). The city of Altus is located near the southern border of Oklahoma. Large population increases rendered inadequate its source of municipal water. It consequently obtained from the owners of land in an adjoining Texas county the contractual right to pump the ground water underlying that land and to transport it across the border. The Texas Legislature thereafter enacted a statute that forbade the interstate exportation of ground water without the approval of that body.[7] The city filed suit in Federal District Court, claiming that the statute violated the Commerce Clause.

The city relied upon *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911), which invalidated an Oklahoma statute that prevented the interstate transfer of natural gas produced within the State,[8] and *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), which invalidated a West Virginia statute

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[7] The District Court quoted the statute: "'No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it.'" 255 F. Supp., at 830.

[8] Justice Holmes, the author of the Court's opinion in *Hudson County*, noted his dissent. See 221 U. S., at 262.

that accorded a preference to the citizens of that State in the purchase of natural gas produced therein.[9] The Texas Attorney General defended the statute on two grounds. First, he asserted that its purpose was to conserve and protect the State's water resources by regulating the withdrawal of ground water. The District Court rejected that defense because similar conservation claims had met defeat in *West* v. *Kansas Natural Gas Co.*, *supra*, and *Pennsylvania* v. *West Virginia*, *supra*.[10] Second, the State argued that the statute regulated ground water and that ground water is not an article of commerce, citing *Geer* v. *Connecticut*, 161 U. S. 519 (1896), and *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908). The court rejected this argument since the statute directly regulated the interstate transportation of

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[9] Justice Holmes dissented, expressing the view that the Court's decision was inconsistent with *Hudson County*. See 262 U. S., at 603.

[10] The District Court opinion, 255 F. Supp., at 839, included these quotations from the two cases:

"The statute of Oklahoma recognizes [natural gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle?" *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255 (1911).

"Another consideration advanced to the same end is that natural gas is a natural product of the State and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of the power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 598 (1923).

water that had been pumped from the ground, and under Texas law such water was an article of commerce. The court then had little difficulty in concluding that the statute imposed an impermissible burden on interstate commerce.[11]

In summarily affirming the District Court in *City of Altus*, we did not necessarily adopt the court's reasoning. Our affirmance indicates only our agreement with the result reached by the District Court. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 499 (1981). That result is not necessarily inconsistent with the Nebraska Supreme Court's holding in this case. For Texas law differs significantly from Nebraska law regarding the rights of a surface owner to ground water that he has withdrawn. According to the District Court in *City of Altus*, the "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately re-

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[11] "Considering the statute in question only with regard to whether it regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appear to us that [the Texas statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation." 255 F. Supp., at 839–840.

garded as an article of commerce. In Nebraska the surface owner has no comparable interest in ground water. As explained by the Nebraska Supreme Court, "'the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.'" 208 Neb., at 705, 305 N. W. 2d, at 617 (quoting *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N. W. 304, 308 (1933)).

City of Altus, however, is inconsistent with *Hudson County*. For in the latter case the Court found *Geer* v. *Connecticut*, *supra*, to be controlling on the Commerce Clause issue. *Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them. One such restriction is a prohibition against interstate transfer of the captured animals. This theory of public ownership was advanced as a defense in *City of Altus*. The State argued that it owned all subterranean water and therefore could recognize ownership in the surface owner who withdraws the water, but restrict that ownership to use of the water within the State. That theory, upon which the Commerce Clause issue in *Hudson County* was decided, was rejected by the District Court in *City of Altus*.[12] In expressly

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[12] "This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and West cases, or prohibits the withdrawal of such substance where the intent

overruling *Geer* three years ago, this Court traced the demise of the public ownership theory and definitively recast it as "'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Hughes* v. *Oklahoma*, 441 U. S. 322, 334 (1979) (quoting *Toomer* v. *Witsell*, 334 U. S. 385, 402 (1948)). See also *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 384–387 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284–285 (1977). In *Hughes* the Court found the State's interests insufficient to sustain a ban on the interstate transfer of natural minnows seined from waters within the State.

Appellee insists, however, that Nebraska water is distinguishable from other natural resources. The surface owner who withdraws Nebraska ground water enjoys a lesser ownership interest in the water than the captor of game birds in Connecticut or minnows in Oklahoma or ground water in Texas, for in *Geer*, *Hughes*, and *City of Altus* the States permitted intrastate trade in the natural resources once they were captured. Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership. The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, see *Metropolitan Utilities District* v. *Merritt Beach Co.*, 179 Neb. 783, 140 N. W. 2d 626 (1966), but the Nebraska Supreme Court distinguished them on the ground that the

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is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce." *Id.*, at 840.

transferor was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. 208 Neb., at 708, 305 N. W. 2d, at 618. Unless demand is greater than supply, however, this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch to market. Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity. It would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of the payment as compensation for distribution services, on the one hand, or as the price of goods, on the other. Cf. *In re Rahrer*, 140 U. S. 545, 558 (1891).

The second asserted distinction is that water, unlike other natural resources, is essential for human survival. Appellee, and the *amici curiae* that are vitally interested in conserving and preserving scarce water resources in the arid Western States, have convincingly demonstrated the desirability of state and local management of ground water.[13]

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[13] In *California* v. *United States*, 438 U. S. 645, 648 (1978), we explained some of the circumstances that support a general policy of local water management under differing legal systems:

"The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climate regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in

But the States' interests clearly have an interstate dimension. Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes.[14] The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas[15]—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource. Cf. *Arizona* v. *California*, 373 U. S. 546 (1963).

The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry. Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law, see *infra*, at 958–960, these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it also would curtail the affirmative power of Congress to implement its own policies concerning such regulation. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 621–623 (1978). If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws.

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that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had."

[14] Soil Conservation Service, U. S. Dept. of Agriculture, America's Soil and Water: Conditions and Trends 21 (1980).

[15] Comptroller General, Report to Congress, Ground Water Overdrafting Must Be Controlled 7–8 (1980).

Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

II

Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional. For the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766–767 (1945); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548–549 (1944); *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852). Determining the validity of state statutes affecting interstate commerce requires a more careful inquiry:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970) (citation omitted).

The only purpose that appellee advances for § 46–613.01 is to conserve and preserve diminishing sources of ground water. The purpose is unquestionably legitimate and highly important,[16] and the other aspects of Nebraska's ground

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[16] See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 188 (1950) ("Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide").

water regulation demonstrate that it is genuine. Appellants' land in Nebraska is located within the boundaries of the Upper Republican Ground Water Control Area, which was designated as such by the Director of the Nebraska Department of Water Resources based upon a determination that there is "[a]n inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply." Neb. Rev. Stat. § 46–658(1) (Supp. 1981); see App. 56–60. Pursuant to § 46–666(1), the Upper Republican Natural Resources District has promulgated special rules and regulations governing ground water withdrawal and use. See App. 61–82. The rules and regulations define as "critical" those townships in the control area in which the annual decline of the ground water table exceeds a fixed percentage; appellants' Nebraska tract is located within a critical township. The rules and regulations require the installation of flow meters on every well within the control area, specify the amount of water per acre that may be used for irrigation, and set the spacing that is required between wells. They also strictly limit the intrastate transfer of ground water: transfers are only permitted between lands controlled by the same ground water user, and all transfers must be approved by the District Board of Directors. *Id.*, at 68–69.

The State's interest in conservation and preservation of ground water is advanced by the first three conditions in § 46–613.01 for the withdrawal of water for an interstate transfer. Those requirements are "that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare." Although Commerce Clause concerns are implicated by the fact that § 46–613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe

withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of § 46–613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." *Hicklin* v. *Orbeck*, 437 U. S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 533 (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, *e. g.*, *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin* v. *Orbeck*, *supra*, at 533–534. In this regard, it is relevant that appellee's claim is logically

more substantial than claims to public ownership of other natural resources. See *supra*, at 950–951. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); cf. *Philadelphia* v. *New Jersey*, 437 U. S., at 627–628, and n. 6; *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371 (1978). A facial examination of the first three conditions set forth in § 46–613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Appellants, however, do challenge the requirement that "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska"—the reciprocity provision that troubled the Chief Justice of the Nebraska Supreme Court. Because Colorado forbids the exportation of its ground water,[17] the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. *Hughes* v. *Oklahoma*, 441 U. S., at 336; *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354 (1951).

The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is nar-

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[17] Colorado Rev. Stat. § 37–90–136 (1973) provides as follows:

"For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein."

rowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement—when superimposed on the first three restrictions in the statute—significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. *Hughes* v. *Oklahoma*, *supra*, at 337.[18]

III

Appellee's suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water is not well founded. The suggestion is based on 37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress.

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[18] The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce. *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 379–381 (1976).

Abstracts of the relevant sections of the 37 statutes relied upon by appellee were submitted in connection with the Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess., 302–310 (1964). Appellee refers the Court to that submission but only discusses § 8 of the Reclamation Act of 1902, 32 Stat. 390. That section, it turns out, is typical of the other 36 statutes. It contains two parts. The first provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Such language defines the extent of the federal legislation's pre-emptive effect on state law. *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 341 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 49 (1980). The second part provides that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Such language mandates that questions of water rights that arise in relation to a federal project are to be determined in accordance with state law. See *California* v. *United States*, 438 U. S. 645 (1978).

The interstate compacts to which appellee refers are agreements among States regarding rights to surface water. See The Council of State Governments, Interstate Compacts and Agencies 25–29, 31–32 (1979). Appellee emphasizes a compact between Nebraska and Colorado involving water rights to the South Platte River, see 44 Stat. (part 2) 195, and a compact among Nebraska, Colorado, and Kansas involving water rights to the Republican River, see 57 Stat. 86.

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law,[19] they do not

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[19] "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful

indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement,[20] constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "'intent and policy' to sustain state legislation from attack under the Commerce Clause" was "'expressly stated.'" *New England Power Co.* v. *New Hampshire*, *supra*, at 343 (quoting *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 427 (1946)).[21] Cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 155, n. 21 (1982).

The reciprocity requirement of Neb. Rev. Stat. § 46–613.01 violates the Commerce Clause. We leave to the state courts the question whether the invalid portion is severable. The judgment of the Nebraska Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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and continued deference to state water law by Congress." *California* v. *United States*, 438 U. S., at 653.

[20] Similarly, this Court has encouraged States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication. See *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943).

[21] See, *e. g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946) (McCarran-Ferguson Act, 59 Stat. 33); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) (§ 1606(a) of the Internal Revenue Code, 53 Stat. 1391); *Whitfield* v. *Ohio*, 297 U. S. 431 (1936) (Hawes-Cooper Act, 45 Stat. 1084); *In re Rahrer*, 140 U. S. 545 (1891) (Wilson Act, 26 Stat. 313).

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of Neb. Rev. Stat. § 46–613.01 (1978), which relates to ground water. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of Congress to regulate interstate commerce, conferred by the same provision of the Constitution, would enable it to legislate with respect to groundwater overdraft in some or all of the States.

That these two questions are quite distinct leaves no room for doubt. Congress may regulate not only the stream of commerce itself, but also activities which affect interstate commerce, including wholly intrastate activities. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941); *Houston & Texas R. Co.* v. *United States*, 234 U. S. 342 (1914). The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all. For example, in *Kirschbaum*, the employees were engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce were produced; no one contended that these employees themselves, or the work which they actually performed, dealt with articles of commerce. Nonetheless, the provisions of the Fair Labor Standards Act were applied to them because Congress extended the terms of the Act not only to those who were "engaged in commerce" but to those who were engaged "in the production of goods for commerce." 316 U. S., at 522.

Thus, the authority of Congress under the power to regulate interstate commerce may reach a good deal further than

the mere negative impact of the Commerce Clause in the absence of any action by Congress. Upon a showing that ground-water overdraft has a substantial economic effect on interstate commerce, for example, Congress arguably could regulate ground-water overdraft, even if ground water is not an "article of commerce" itself. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 281–283 (1981); *id.*, at 310–313 (REHNQUIST, J., concurring in judgment); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). It is therefore wholly unnecessary to decide whether Congress could regulate ground-water overdraft in order to decide this case; since Congress has not undertaken such a regulation, I would leave the determination of its validity until such time as it is necessary to decide that question.

The question actually involved in this case is whether Neb. Rev. Stat. § 46–613.01 (1978) runs afoul of the unexercised authority of Congress to regulate interstate commerce. While the Court apparently agrees that our equitable apportionment decrees in cases such as *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), and the execution and approval of interstate compacts apportioning water have given rise to "the legal expectation that under certain circumstances each State may restrict water within its borders," *ante*, at 956, it insists on an elaborate balancing process in which the State's "interest" is weighed under traditional Commerce Clause analysis.

I think that in more than one of our cases in which a State has invoked our original jurisdiction, the unsoundness of the Court's approach is manifest. For example, in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), the Court said:

> "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

Five years earlier, in *Kansas* v. *Colorado*, 185 U. S. 125, 142, 145–146 (1902), the Court had made clear that a State's quasi-sovereign interest in the flow of surface and subterranean water within its borders was of the same magnitude as its interest in pure air or healthy forests.

In my view, these cases appropriately recognize the traditional authority of a State over resources within its boundaries which are essential not only to the well-being, but often to the very lives of its citizens. In the exercise of this authority, a State may so regulate a natural resource so as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*.

Of course, a State may not discriminate against interstate commerce when it regulates even such a resource. If the State allows indiscriminate intrastate commercial dealings in a particular resource, it may have a difficult task proving that an outright prohibition on interstate commercial dealings is not such a discrimination. I had thought that this was the basis for this Court's decisions in *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979), *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), and *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). In each case, the State permitted a natural resource to be reduced to private possession, permitted an *intrastate* market to exist in that resource, and either barred *interstate* commerce entirely or granted its residents a commercial preference.[1]

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[1] Similarly, in *City of Altus* v. *Carr*, 255 F. Supp. 823 (WD Tex.), summarily aff'd, 385 U. S. 35 (1966), Texas placed no restrictions upon the use or the intrastate sale of ground water. The "rule in Texas was that an

By contrast, Nebraska so regulates ground water that it cannot be said that the State permits any "commerce," intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in ground water, but grants landowners only a right to *use ground water on the land from which it has been extracted.* Moreover, the landowner's right to use ground water is limited. Nebraska landowners may not extract ground water "in excess of a reasonable and beneficial use upon the land in which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole." *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N. W. 304, 308 (1933). With the exception of municipal water systems, Nebraska forbids any transportation of ground water off the land owned or controlled by the person who has appropriated the water from its subterranean source. 208 Neb. 703, 710, 305 N. W. 2d 614, 619 (1981). See App. 68–69.

Nebraska places additional restrictions on ground-water users within certain areas, such as the portion of appellants' land situated in Nebraska, where the shortage of ground water is determined to be critical. Water users in appellants' district are permitted only to irrigate the acreage irrigated in 1977, or the average number of acres irrigated between 1972 and 1976, whichever is greater, and must obtain permission from the water district's board before any

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owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Texas' absolute ownership rule is an anomaly among the Western States. See 5 R. Clark, Waters and Water Rights § 441 (1972 and 1978 Supp.). In Nebraska, as in most of the Western States, ground water is not treated as "any other species of property."

additional acreage may be placed under irrigation. The amount of ground water that may be extracted is strictly limited on an acre-inch-per-irrigated-acre basis. There are also detailed regulations as to the spacing of wells and the use and operation of flow meters. *Id.*, at 71–82.

Since Nebraska recognizes only a limited right to use ground water on land owned by the appropriator, it cannot be said that "commerce" in ground water exists as far as Nebraska is concerned. Therefore, it cannot be said that Neb. Rev. Stat. § 46–613.01 (1978) either discriminates against, or "burdens," interstate commerce. Section 46–613.01 is simply a regulation of the landowner's *right to use* ground water extracted from lands he owns within Nebraska.[2] Unlike the Court, I cannot agree that Nebraska's limitation upon a landowner's right to extract water from his land situated in Nebraska *for his own use* on land he owns in an adjoining State runs afoul of Congress' unexercised authority to regulate interstate commerce.[3]

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[2] Unlike several other Western States, Nebraska does not entirely forbid ground water extracted in Nebraska to be used in other States. See Brief for City of El Paso as *Amicus Curiae* 2, n. 3. As noted by the Court, Nebraska merely places conditions on such a use of the State's ground water. A permit must be obtained from the Nebraska Department of Water Resources. If the requested withdrawal of ground water is determined to be "reasonable, . . . not contrary to the conservation and use of ground water, and . . . not otherwise detrimental to the public welfare," a permit will be issued so long as the "state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska." Neb. Rev. Stat. § 46–613.01 (1978).

[3] The Court today invalidates only the reciprocity provision in § 46–613.01. *Ante*, at 957–958. Appellants, however, have never applied for the permit required by the Nebraska statute. I see nothing in the Court's opinion that would preclude the Nebraska Department of Water Resources from prohibiting appellants from transporting ground water into the Colorado portion of their land until they obtain the permit required by the statute. I also see nothing in the Court's opinion that would preclude the Department of Water Resources from denying appellants a permit because of a failure to satisfy the remaining conditions in the statute.

BOARD OF EDUCATION OF ROGERS, ARKANSAS, ET AL. *v.* McCLUSKEY, BY HIS NEXT FRIEND, McCLUSKEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1577. Decided July 2, 1982

Under §§ 9 and 10 of petitioner School Board's rules, the Board has discretion to suspend a high school student for "good cause," which is defined as including "sale, use or possession of alcoholic beverages or illegal drugs." Section 11 of the rules provides for mandatory suspension for the remainder of the semester if a student has on school premises used, sold, or been under the influence or in possession of "narcotics or other hallucinogenics, drugs, or controlled substances" classified as such by an Arkansas statute. That statute specifically exempts alcohol from its coverage of "controlled substances." After a hearing before the Board, respondent, a 10th-grade student, was expelled for the remainder of the semester because he was on school premises while intoxicated. Respondent then sought injunctive relief in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. IV). While there was conflicting evidence concerning which section of its rules the Board had invoked, the Board's Chairman testified that the Board had suspended students under § 11 for alcohol offenses for the past five years. The District Court concluded that as a matter of fact the Board had acted under § 11, that § 11 did not apply to alcohol, and that the Board thus had acted unreasonably and had violated respondent's right to substantive due process, even though the Board had discretion to suspend him under § 10. The Court of Appeals affirmed.

Held: The courts below plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case. The Board's interpretation of § 11 is reasonable, since even though alcohol is not a "controlled substance" under § 11, that section also covers "drugs" and alcohol is a "drug." It is reasonable to conclude that § 11 requires suspension for any drug use, including use of alcohol, on school premises, while § 10 permits discretionary suspension for drug use off school premises. In any event, federal courts are not authorized to construe school regulations, *Wood* v. *Strickland*, 420 U. S. 308, and thus the Board's interpretation of its regulations controls.

Certiorari granted; 662 F. 2d 1263, reversed.

PER CURIAM.

Respondent, a 10th-grade student in the Rogers, Ark., School District, left school on October 21, 1980, after the first period without permission, and, with four other students, consumed alcohol and became intoxicated. When he returned to school later that day to go on a band trip, he was notified that he was suspended from school. His parents were notified the next day that their son had been suspended pending a hearing before the Rogers School Board; a hearing was scheduled for October 29. At the hearing before the Board, none of the five students denied that they had been drinking, and the Board voted to expel all five for the remainder of the semester.

Respondent immediately sought injunctive relief under 42 U. S. C. § 1983 (1976 ed., Supp. IV), and the case was heard by the United States District Court for the Western District of Arkansas on December 4. The District Court decided that the School Board had violated respondent's right to substantive due process, and ordered that he be granted credit for the semester during which he was suspended and that all references to his suspension be expunged from his school records.

The District Court's action was based on its interpretation of the School Board's rules and its conclusions concerning which rules the Board invoked in suspending respondent. There is no doubt that the Board had the authority to suspend respondent under §§ 9 and 10 of its written Policies on Pupil Suspension. Section 9 provides that the Board *may* suspend or expel any student "for good cause." Section 10 defines "good cause," and provides that it includes "sale, use or possession of alcoholic beverages or illegal drugs." Thus it was clearly within the Board's discretion to suspend a student for becoming intoxicated.

The District Court decided that the Board had acted under § 11 of its rules, which provides for mandatory suspension when it applies. Section 11 provides:

"For the protection of other pupils in the school grades 9–12, the school board *shall* expel for the remainder of the semester with loss of credit for the semester's work any pupil whenever it has been established to the satisfaction of the board, or the superintendent, or the principal, or his assistant in charge, that the pupil has on school premises or at school sponsored activities (including trips) used, sold, been under the influence of, or been in possession of narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended."

There was conflicting testimony concerning which section the Board had invoked. The letters sent to respondent's parents informing them of the suspension and the hearing cited both § 10 and § 11. Adams, a Board member and a lawyer, testified that he based his motion to expel McCluskey on § 10 because he had doubts about the applicability of § 11. The Chairman of the Board testified that the Board had suspended students under § 11 for alcohol offenses for the past five years.

The District Court found as a matter of fact that the Board acted under § 11 when it suspended respondent. It then went on to decide that § 11 did not apply to alcohol.* Section 11 applies to "narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended." Act 590, Ark. Stat. Ann. § 82–2602(e) (Supp. 1981), specifically exempts alcohol from its coverage; therefore, alcohol is not a "controlled substance." Nor is it a "narcotic or other hallucinogenic." The District Court also concluded that alcohol is not a "drug." While technically alcohol is a drug, the District Court noted, it is not considered a drug in common parlance. For this reason, the District Court

*The Board has since amended its regulations so as to remove all question that suspension for the remainder of the semester is mandatory if a student is intoxicated on school premises.

concluded, the Board had acted unreasonably by suspending respondent under § 11. It held that the Board violated substantive due process by suspending him under the mandatory terms of § 11, even though the Board had discretion to suspend him under § 10.

A divided Court of Appeals for the Eighth Circuit affirmed. 662 F. 2d 1263 (1981). It reviewed the District Court's conclusion that the Board acted under § 11 rather than § 10 under the clearly-erroneous standard of Federal Rule of Civil Procedure 52(a), and held that the District Court's conclusion passed muster. It also affirmed the District Court's holding that § 11 cannot reasonably be interpreted to apply to alcohol because "the express terms of section 11 apply only to 'drugs' and expressly exempt alcohol." 662 F. 2d, at 1267. For this reason, the Court of Appeals concluded, *Wood* v. *Strickland*, 420 U. S. 308 (1975), was distinguishable. There this Court had stated that "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." *Id.*, at 326. Although this Court had plainly stated that federal courts were not authorized to construe school regulations, the Court of Appeals concluded that *Wood* v. *Strickland* was distinguishable because the school board in that case had construed its regulations reasonably while here the Board had construed its regulations unreasonably. 662 F. 2d, at 1267. Judge McMillian dissented because he concluded that *Wood* v. *Strickland* barred federal courts from construing the school regulations involved in this case differently than the Board had construed them.

Wood v. *Strickland* plainly requires that the Court of Appeals be reversed. There high school girls were expelled for "spiking" a punch served at a school meeting by adding two bottles of malt liquor. The malt liquor had an alcoholic content of 3.2% and the alcoholic content of the spiked punch was estimated at 0.91%. 420 U. S., at 326. The Court of Ap-

peals had set aside the girls' expulsions because they had been expelled for adding an alcoholic beverage to the punch, but a state statute defined "intoxicating liquor" as a beverage with an alcoholic content exceeding 5%, and the court thought the 5% rule of the statute should apply to the school regulation. We held that the court erred in substituting its own notions for the school board's definition of its rules:

> "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement." *Id.*, at 325.

The Court continued, as noted *supra*, by stating that

> "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings *or the proper construction of school regulations*." *Id.*, at 326 (emphasis added).

The Court of Appeals and the District Court plainly erred in distinguishing *Wood* v. *Strickland* on the ground that the Board's interpretation of § 11 in this case was unreasonable while the school board's construction of "alcoholic beverage" in *Wood* v. *Strickland* was reasonable. A case may be hypothesized in which a school board's interpretation of its rules is so extreme as to be a violation of due process, but this is surely not that case. The Board's interpretation of § 11 is reasonable. Contrary to the Court of Appeals, alcohol is not expressly exempted from the coverage of § 11. Section 11 covers "controlled substances classified as such by Act 590," and Act 590 expressly exempts alcohol from its coverage. Therefore, alcohol is not a "controlled substance" under § 11. But § 11 also covers "drugs," and, as the District Court conceded, alcohol is a "drug." Moreover, § 11 mandates suspension of students under the influence of drugs while on school premises. Section 10, which gives the Board discretion to suspend students for drug use, is not limited in its application

to drug use on school premises. It is reasonable to conclude that the regulations require suspension for any drug use, including use of alcohol, on school premises, while permitting suspension for drug use off school premises.

In any case, even if the District Court's and the Court of Appeals' views of § 11 struck us as clearly preferable to the Board's—which they do not—the Board's interpretation of its regulations controls under *Wood* v. *Strickland*. The Chairman of the Board testified that the Board had interpreted § 11 as requiring the suspension of students found intoxicated on school grounds for a number of years prior to respondent's suspension and it is undisputed that the Board had the authority to suspend students for that reason. We conclude that the District Court and the Court of Appeals plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case. Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

As JUSTICE REHNQUIST has reminded us, in "our zeal to provide 'equal justice under law,' we must never forget that this Court is not a forum for the correction of errors." *Boag* v. *MacDougall*, 454 U. S. 364, 367–368 (1982) (dissenting opinion). "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[1] This case illustrates how ineffectively the Court is supervising its discretionary docket.

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[1] Address of Chief Justice Vinson before the American Bar Association, September 7, 1949 (quoted in R. Stern & E. Gressman, Supreme Court Practice 258 (5th ed. 1978)).

The case is not of sufficient importance to warrant full briefing and argument. It is not worthy of an opinion signed by a Member of this Court. The disposition is explained by an anonymous author writing *"per curiam"*—that is to say, "for the Court." In ever-increasing numbers, appeals throughout the federal system are being decided in this anonymous fashion. It is not uncommon for courts of appeals to issue opinions that are not to be cited as authority in other cases.[2] In one recent published case—which was sufficiently important to induce this Court to grant certiorari even before a conflict in the circuits had developed—the court purported to justify such an ad hoc adjudication by asserting that it lacked "precedential character."[3] The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized. Regrettably the example set by this Court in cases of this kind is not one of resistance, but rather of encouragement, to the rising administrative tide.

We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review. In recent years, when we have exercised our discretionary jurisdiction and issued *per curiam* rulings deciding cases summarily, we have most frequently come to the aid of a prosecutor or a warden who has been rebuffed by another court.[4] Today we exercise our majestic power to enforce a

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[2] See Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978); Note, Unreported Decisions in the United States Courts of Appeals, 63 Cornell L. Rev. 128 (1977).

[3] *Rowley* v. *Board of Education of Hendrick Hudson Central School District*, 632 F. 2d 945, 948, n. 7 (CA2 1980), rev'd, *ante*, p. 176.

[4] In this Term, see *Duckworth* v. *Serrano*, 454 U. S. 1 (1981); *Jago* v. *Van Curen*, 454 U. S. 14 (1981); *Leeke* v. *Timmerman*, 454 U. S. 83 (1981); *California ex rel. Cooper* v. *Mitchell Brothers' Santa Ana Theater*, 454 U. S. 90 (1981); *Harris* v. *Rivera*, 454 U. S. 339 (1981); *Hutto* v. *Davis*, 454 U. S. 370 (1982); *Wainwright* v. *Torna*, 455 U. S. 586 (1982); *Sumner*

school board's suspension of a 10th-grade student who consumed too much alcohol on October 21, 1980.

If the student had been unjustly suspended, I wonder if the Court would consider the matter of sufficient national importance to require summary reversal. I doubt it.

I respectfully dissent.

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v. *Mata* 455 U. S. 591 (1982); *Fletcher* v. *Weir*, 455 U. S. 603 (1982); *United States* v. *Hollywood Motor Car Co.*, *ante*, p. 263; *Michigan* v. *Thomas*, *ante*, p. 259. But see *Boag* v. *MacDougall*, 454 U. S. 364 (1982).

It certainly cannot be said that egregious error is presented only in cases in which prosecutors and wardens seek review. See, *e. g.*, *McKinney* v. *Estelle*, 657 F. 2d 740 (CA5 1981), cert. denied, 456 U. S. 937 (1982); *Tejeda-Mata* v. *INS*, 626 F. 2d 721 (CA9 1980), cert. denied, 456 U. S. 994 (1982).

Reporter's Note

Orders commencing with July 2, 1982, begin with page 1117. The preceding orders in 458 U. S., for June 28, 1982, were reported in Part 1, at 1101–1117. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

384-537 O - 83 - 16

No. 79-5932. DOE ET AL. *v.* DELAWARE, 450 U. S. 382 and 451 U. S. 964. Motion for leave to file second petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit for the period September 13, 1982, to September 17, 1982, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JULY 2, 1982

Vacated and Remanded on Appeal

No. 81-922. PAN AMERICAN SAVINGS & LOAN ASSN. ET AL. *v.* PANKO ET AL. Appeal from Ct. App. Cal., 1st App. Dist. Judgment vacated and case remanded for further consideration in light of *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta, ante,* p. 141. Reported below: 119 Cal. App. 3d 916, 174 Cal. Rptr. 240.

No. 81-992. GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* HEHIR ET UX.; and

No. 81-993. CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. *v.* TAN ET AL.; and CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. *v.* ROMAGNOLI ET AL. Appeals from Ct. App. Cal., 4th App. Dist. Judgments vacated and cases remanded for further consideration in light of *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta, ante,* p. 141.

No. 81-1139. GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GROSS ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Judgment vacated and case remanded for further consideration in light of *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta, ante,* p. 141.

Certiorari Granted—Vacated and Remanded

No. 80-1888. CHASTAIN ET AL. *v.* DAVIS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lehman* v. *Lycoming County Children's Services Agency, ante,* p. 502. Reported below: 640 F. 2d 599.

No. 81-471. UNITED STATES *v.* MARQUEZ-AMAYA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Valenzuela-Bernal, ante,* p. 858. Reported below: 647 F. 2d 173.

No. 81-596. SPRINGDALE SCHOOL DISTRICT NO. 50 OF WASHINGTON COUNTY *v.* GRACE ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Ed. of Hendrick Hudson Central School Dist.* v. *Rowley, ante,* p. 176. Reported below: 656 F. 2d 300.

No. 81-774. MOORE *v.* BLACK PANTHER PARTY ET AL.; and

No. 81-1511. SMITH, ATTORNEY GENERAL, ET AL. *v.* BLACK PANTHER PARTY ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and cases remanded to the Court of Appeals with directions that it instruct the United States District Court for the District of Columbia to dismiss the complaint with prejudice. JUSTICE MARSHALL would deny the petitions for writs of certiorari. JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of these cases. Reported below: 213 U. S. App. D. C. 67, 661 F. 2d 1243.

No. 81-1860. J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Summit Valley Industries, Inc.* v. *Carpenters,* 456 U. S. 717 (1982). Reported below: 668 F. 2d 767.

No. 81-5534. RENNIE ET AL. *v.* KLEIN, COMMISSIONER, DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 3d Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Youngberg* v. *Romeo*, 457 U. S. 307 (1982). Reported below: 653 F. 2d 836.

Certiorari Granted—Reversed. (See No. 81-1577, *ante*, p. 966.)

Miscellaneous Orders

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Motion for issuance of a restraining order denied without prejudice. JUSTICE BRENNAN took no part in the consideration or decision of this motion. [For earlier decision herein, see 457 U. S. 164.]

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. It is ordered that Justice Paul C. Reardon (retired) of Boston, Mass., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic, clerical, and legal assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein. [For earlier order herein, see 456 U. S. 912.]

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 454 U. S. 812];

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812]; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812.] Cases restored to calendar for reargument. JUSTICE BRENNAN and JUSTICE BLACKMUN dissent.

No. 81–1774. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* BULLARD. C. A. 5th Cir. [Certiorari granted, 457 U. S. 1116.] Motion for appointment of counsel granted, and it is ordered that Kenneth E. Houp, Jr., Esquire, of Austin, Tex., be appointed to serve as counsel for respondent in this case. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

Certiorari Granted

No. 81–1675. KUSH ET AL. *v.* RUTLEDGE. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 660 F. 2d 1345.

No. 81–2150. JIM MCNEFF, INC. *v.* TODD ET AL. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 667 F. 2d 800.

Certiorari Denied

No. 80–1906. ALLIED INTERNATIONAL, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 640 F. 2d 1368.

No. 81-1192. GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* FOX ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1078.

No. 81-1290. SCANLON, SECRETARY OF EDUCATION OF PENNSYLVANIA, ET AL. *v.* TOKARCIK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 665 F. 2d 443.

No. 81-1503. CALIFORNIA *v.* GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-1744. FEDERAL HOME LOAN BANK BOARD *v.* GULF FEDERAL SAVINGS & LOAN ASSOCIATION OF JEFFERSON PARISH. C. A. 11th Cir. Certiorari denied. Reported below: 651 F. 2d 259.

No. 81-361. BRAMKAMP ET AL. *v.* PUERTO RICO EX REL. BAREZ, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 654 F. 2d 212.

No. 81-465. PORTER ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 306.

No. 81-1047. UNITED STATES *v.* SHER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 657 F. 2d 28 and 661 F. 2d 34.

No. 81-1692. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* VON BURLESON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 666 F. 2d 231.

No. 81-1548. VASQUEZ *v.* MCALLEN BAG & SUPPLY CO. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 660 F. 2d 686.

No. 81-1895. BRONZE SHIELDS, INC., ET AL. *v.* NEW JERSEY DEPARTMENT OF CIVIL SERVICE ET AL.; and HOWARD ET AL. *v.* NEW JERSEY DEPARTMENT OF CIVIL SERVICE ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 667 F. 2d 1074 (first case); 667 F. 2d 1099 (second case).

No. 81-5578. BREWER *v.* INDIANA. Sup. Ct. Ind.;

No. 81-5731. HYMAN *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and

No. 81-6606. FRANCOIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81-5578, —— Ind. ——, 417 N. E. 2d 889; No. 81-5731, 276 S. C. 559, 281 S. E. 2d 209; No. 81-6606, 407 So. 2d 885.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

JULY 6, 1982

Miscellaneous Order

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. Motion for leave to file a counterclaim referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 1119.]

AUGUST 5, 1982

Dismissal Under Rule 53

No. 81-1888. MORGAN DRIVE AWAY, INC., ET AL. *v.* SAMFORD ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 665 F. 2d 598.

AUGUST 10, 1982

Miscellaneous Order

No. A-147. MITCHELL, WARDEN, ET AL. *v.* LAWRENCE, NEXT FRIEND ACTING ON BEHALF OF COPPOLA. This matter came on before THE CHIEF JUSTICE as Circuit Justice for the Fourth Circuit on the application of James P. Mitchell, Warden, and Gerald L. Baliles, Attorney General of Virginia, and was referred by him to the Court. There being only four Members of the Court available in Washington, a conference call was arranged to include those outside Washington except JUSTICE O'CONNOR who was outside the United States. After consideration of the matters presented by the application of the petitioners, the application is granted and the stay entered by Circuit Judge John D. Butzner, Jr., of the United States Court of Appeals for the Fourth Circuit is hereby vacated. JUSTICE BRENNAN and JUSTICE MARSHALL would deny the application. JUSTICE STEVENS would call for a response from J. Gray Lawrence, Jr., the respondent above named. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

AUGUST 12, 1982

Dismissal Under Rule 53

No. 81-2333. ANDERSON ET AL. *v.* FLATEAU ET AL. Appeal from D. C. S. D. N. Y. dismissed under this Court's Rule 53. Reported below: 537 F. Supp. 257.

AUGUST 19, 1982

Dismissal Under Rule 53

No. 81-1810. NARANJO ET AL. *v.* CORRIZ. C. A. 10th Cir. [Certiorari granted, 456 U. S. 971.] Stipulation to dismiss the writ of certiorari was filed, and the case was dismissed pursuant to this Court's Rule 53.

Miscellaneous Order

No. A-169. KALLENBERGER *v.* BUCHANAN, SECRETARY OF STATE OF COLORADO. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BLACKMUN would grant the application. JUSTICE MARSHALL would defer consideration of the application pending the filing of a response by the respondent. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

AUGUST 24, 1982

Dismissal Under Rule 53

No. 82-75. HORIZONS APARTMENTS ASSOCIATES, LTD., ET AL. *v.* LEE COUNTY, FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 415 So. 2d 1373.

SEPTEMBER 7, 1982

Dismissal Under Rule 53

No. 81-1685. LIMMER ET AL. *v.* FERNANDES, AKA SANTANI. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 663 F. 2d 619.

SEPTEMBER 9, 1982

Miscellaneous Orders

No. A-958. MCDONALD *v.* ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. Application for injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-1138. PFISTER *v.* DELTA AIR LINES, INC., ET AL. C. A. D. C. Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-22. HALE *v.* UNITED STATES. C. A. 10th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–45 (82–78). CALIFORNIA *v.* SHIRLEY. Application for stay of enforcement of the judgment of the Supreme Court of California, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–102 (82–157). SMITH *v.* OLSON, REGISTRAR OF VOTERS, ORANGE COUNTY, CALIFORNIA, ET AL. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–103 (82–274). PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–266. IN RE DISBARMENT OF FELDMAN. Disbarment entered. [For earlier order herein, see 456 U. S. 956.]

No. D–271. IN RE DISBARMENT OF WAJERT. Disbarment entered. [For earlier order herein, see 456 U. S. 957.]

No. D–272. IN RE DISBARMENT OF LANGKAM. Disbarment entered. [For earlier order herein, see 456 U. S. 957.]

No. D–277. IN RE DISBARMENT OF BOEHM. Disbarment entered. [For earlier order herein, see 457 U. S. 1103.]

No. D–278. IN RE DISBARMENT OF PAGLIANITE. It is ordered that Frank A. Paglianite, of Pittston, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–279. IN RE DISBARMENT OF RESNICK. It is ordered that David Resnick, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-261. IN RE DISBARMENT OF HAMMERSMITH. Disbarment entered. [For earlier order herein, see 456 U. S. 902.]

No. D-280. IN RE DISBARMENT OF STERN. It is ordered that Julius Stern, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-281. IN RE DISBARMENT OF SANDS. It is ordered that Ira Jay Sands, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-282. IN RE DISBARMENT OF LEVINE. It is ordered that Michael Levine, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-283. IN RE DISBARMENT OF NADEL. It is ordered that Arthur G. Nadel, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-284. IN RE DISBARMENT OF FISHMAN. It is ordered that Gregg Lewis Fishman, of Forest Hills, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–285. IN RE DISBARMENT OF GLOECKNER. It is ordered that George N. Gloeckner, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–286. IN RE DISBARMENT OF NADLER. It is ordered that Floyd Norman Nadler, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–287. IN RE DISBARMENT OF BONDS. It is ordered that Rodney S. Bonds, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–288. IN RE DISBARMENT OF LIEBERMAN. It is ordered that Sidney Z. Lieberman, of McLean, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–289. IN RE DISBARMENT OF BRISBOIS. It is ordered that James A. Brisbois, of Saginaw, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Motion of respondents for divided argument denied.

No. D-290. IN RE DISBARMENT OF SPIRO. It is ordered that Demetri M. Spiro, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-291. IN RE DISBARMENT OF SUNDOCK. It is ordered that Michael A. Sundock, of Opelika, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-292. IN RE DISBARMENT OF FENDLER. It is ordered that Robert Harold Fendler, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80-1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80-1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. [Certiorari granted, 451 U. S. 1016.] Motion of respondents for further deferral of oral argument granted.

No. 81-185. SIMOPOULOS *v.* VIRGINIA. Sup. Ct. Va. [Probable jurisdiction noted, 456 U. S. 988.] Motions of National Organization for Women et al., Committee for Abortion Rights and Against Sterilization Abuse et al., and Certain Law Professors for leave to file briefs as *amici curiae* granted.

No. 81-334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as *amicus curiae* granted.

No. 81-523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, 456 U. S. 960.] Motion of Union of Industries of the European Community for leave to file a brief as *amicus curiae* granted. Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied. Motion of Committee on Unitary Tax for leave to file a brief as *amicus curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 81-680. HERMAN & MACLEAN *v.* HUDDLESTON ET AL.; and

No. 81-1076. HUDDLESTON ET AL. *v.* HERMAN & MACLEAN ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 914.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81-773. NORTH DAKOTA *v.* UNITED STATES. C. A. 8th Cir. [Probable jurisdiction noted, 455 U. S. 987.] Motion of National Wildlife Federation et al. for leave to file a brief as *amici curiae* granted.

No. 81-897. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* PERINI NORTH RIVER ASSOCIATES ET AL. C. A. 2d Cir. [Certiorari granted, 455 U. S. 937.] Motion of the Solicitor General for divided argument denied. Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument *pro hac vice* granted.

No. 81-1003. WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, 455 U. S. 919.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 81-1251. CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motions of National Education Association et al. and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted.

No. 81-1489. XEROX CORP. *v.* COUNTY OF HARRIS, TEXAS, ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. [Probable jurisdiction noted, 456 U. S. 913.] Motion of International Association of Assessing Officers for leave to file a brief as *amicus curiae* granted.

No. 81-1493. GILLETTE CO. *v.* MINER. Sup. Ct. Ill. [Certiorari granted, 456 U. S. 914.] Motions of Public Citizen and Consumer Coalition for leave to file briefs as *amici curiae* granted.

No. 81-1506. FEDERAL ELECTION COMMISSION ET AL. *v.* NATIONAL RIGHT TO WORK COMMITTEE ET AL. C. A. D. C. Cir. [Certiorari granted, 456 U. S. 914.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 81-1578. KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* DELTA AIR LINES, INC., ET AL.; KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS *v.* BURROUGHS CORP.; and KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 2d Cir. [Probable jurisdiction noted, 456 U. S. 924.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted. Motion of appellants Kramarsky et al. for divided argument and for leave to file separate brief and joint appendix denied.

384-537 O - 83 - 17

No. 81-1613. MEMPHIS BANK & TRUST CO. *v.* GARNER, SHELBY COUNTY TRUSTEE, ET AL. Sup. Ct. Tenn. [Probable jurisdiction noted, 456 U. S. 943.] Motions of Capital Preservation Fund, Inc., et al. and Farm Credit Banks for leave to file briefs as *amici curiae* granted.

No. 81-1627. SHEPARD *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. [Certiorari granted, 456 U. S. 970.] Motion of the Solicitor General for divided argument and for additional time for oral argument denied.

Rehearing Denied

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL., 457 U. S. 164;

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES, 457 U. S. 273;

No. 80-108. FIRST PENNSYLVANIA BANK N.A. *v.* ZEFFIRO ET AL., 456 U. S. 1005;

No. 80-1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL., 457 U. S. 202;

No. 80-1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL., 457 U. S. 202;

No. 80-1749. FEDERAL ENERGY REGULATORY COMMISSION ET AL. *v.* MISSISSIPPI ET AL., 456 U. S. 742;

No. 80-2138. CARTER *v.* DAYTON BOARD OF EDUCATION ET AL., 456 U. S. 989;

No. 80-6609. WILKERSON *v.* BLACKBURN, WARDEN, *ante*, p. 1105;

No. 81-451. HATHORN ET AL. *v.* LOVORN ET AL., 457 U. S. 255; and

No. 81-912. CLICK ET AL. *v.* IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL., 457 U. S. 1116. Petitions for rehearing denied.

No. 81-1478. HARVEY ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL., 457 U. S. 1105.

No. 81-1525. THOMPSON *v.* WOLTENBERG, 456 U. S. 1006;

No. 81-1534. NIEVES *v.* UNITED STATES, 457 U. S. 1117;

No. 81-1577. BOARD OF EDUCATION OF ROGERS, ARKANSAS, ET AL. *v.* MCCLUSKEY, BY HIS NEXT FRIEND, MCCLUSKEY, *ante*, p. 966;

No. 81-1589. HUNT *v.* COLLINS, 457 U. S. 1127;

No. 81-1665. DYKEMA ET AL. *v.* UNITED STATES ET AL., 456 U. S. 983;

No. 81-1822. FIALA *v.* VILLAGE OF CARPENTERSVILLE, 456 U. S. 990;

No. 81-2009. YEO *v.* MICHIGAN, 457 U. S. 1134;

No. 81-2016. RUPPEL *v.* UNITED STATES, *ante*, p. 1107;

No. 81-2018. BERGER *v.* UNITED STATES ET AL., 457 U. S. 1120;

No. 81-2045. NIEMI *v.* NATIONAL BROADCASTING CO., INC., ET AL., *ante*, p. 1108;

No. 81-5578. BREWER *v.* INDIANA, *ante*, p. 1122;

No. 81-5731. HYMAN *v.* SOUTH CAROLINA, *ante*, p. 1122;

No. 81-6528. MASELLI *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA, 457 U. S. 1108;

No. 81-6546. PASCHAL *v.* FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION ET AL., 457 U. S. 1109;

No. 81-6559. BLACK *v.* EAST OHIO GAS CO. ET AL., 457 U. S. 1109;

No. 81-6573. HARRINGTON *v.* TENNESSEE, 457 U. S. 1110;

No. 81-6630. HOOVER *v.* MISSISSIPPI, 457 U. S. 1137;

No. 81-6645. RITTER *v.* RITTER, 457 U. S. 1138;

No. 81-6652. NEUSTEIN *v.* UNITED STATES, 457 U. S. 1124; and

No. 81-6654. UNITED STATES EX REL. MILLER *v.* MCCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL., *ante*, p. 1109. Petitions for rehearing denied.

No. 81-6673. OCCHINO *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL., 457 U. S. 1139;

No. 81-6685. WILLIAMS *v.* PEPSI-COLA BOTTLING COMPANY OF ST. LOUIS, MISSOURI, ET AL., 457 U. S. 1139;

No. 81-6691. SUTAIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 1110;

No. 81-6715. IN RE CAMPBELL, 457 U. S. 1116; and

No. 81-6771. IN RE KULWIEC, *ante*, p. 1104. Petitions for rehearing denied.

No. 80-1290. CLEMENTS, GOVERNOR OF TEXAS, ET AL. *v.* FASHING ET AL., 457 U. S. 957. Petition for rehearing and/or clarification denied.

No. 80-6045. KREMER *v.* CHEMICAL CONSTRUCTION CORP., 456 U. S. 461. Motion for leave to file petition for rehearing denied.

SEPTEMBER 20, 1982

Dismissal Under Rule 53

No. 81-2284. BUTCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 676 F. 2d 713.

No. 81-6078. COCHRAN v. NORTHWESTERN BELL TELEPHONE CO. ET AL., 457 U. S. 1133.

No. 81-6055. WILLIAMS v. FIRST-COLA BOTTLING COMPANY OF ST. LOUIS, MISSOURI, ET AL., 457 U. S. 1135.

No. 81-6091. SOTAN ET AL. v. COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 916.

No. 81-6116. IN RE CAMPBELL, 457 U. S. 1116, and No. 81-6171. IN RE KUNKEL, *ante*, p. 916. Petitions for rehearing denied.

No. 80-1290. CLEMENTS v. GOVERNOR OF TEXAS, ET AL., PASHINE ET AL., 457 U. S. 961. Petition for rehearing and/or clarification denied.

No. 81-1822. FIALA v. VILLAGE OF CARPENTERSVILLE, Cor., 454 U. S. 1121. Motion for leave to file petition for rehearing denied.

No. 81-2016. RUFFEL v. UNITED STATES, *ante*, p. 1120.

No. 81-2018. BERGER v. UNITED STATES ET AL., 457 U. S. 1120.

SEPTEMBER 20, 1982

No. 81-2045. NIEMI v. NATIONAL [illegible]

No. 81-2264. BUTCHER v. UNITED STATES, 10th Cir., Certiorari dismissed under this Court's Rule 53. Reported below: 676 F. 2d 1193.

No. 81-6128. HYMAN v. SOUTH [illegible]

No. 81-6228. MASELLE v. STATE BOARD OF EQUALIZATION OF CALIFORNIA, 457 U. S. 1103;

No. 81-6546. PASCIAL v. FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION ET AL., 457 U. S. 1108;

No. 81-6556. BLACK v. EAST OHIO GAS CO. ET AL., 457 U. S. 1108;

No. 81-6572. HARRINGTON v. TENNESSEE, 457 U. S. 1110;

No. 81-6672. HOOVER v. MISSISSIPPI, 457 U. S. 1137;

No. 81-6845. RITTER v. RITTER, 457 U. S. 1138;

No. 81-6652. NEUSTEIN v. UNITED STATES, 457 U. S. 1124; and

No. 81-6654. UNITED STATES EX REL. MILLER v. McCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL., *ante*, p. 110. Petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1133 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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11

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

WHITE v. FLORIDA

ON APPLICATION FOR STAY

No. A-130. Decided August 13, 1982

An application to stay the judgment and mandate of the Florida Supreme Court, pending filing and disposition of certiorari, is denied. The judgment upheld applicant's conviction for first-degree murder and his death sentence. Although the application establishes that applicant may suffer irreparable harm in the future, there is no indication that the harm is imminent. No execution date has been set, and the State does not contemplate that one will be set in the near future. The application also does not specify the issues for which certiorari will be sought or the reasons why review is appropriate. Absent such a specification, it cannot be determined whether there is a reasonable probability that four Members of the Court would find that this case merits review.

JUSTICE POWELL, Circuit Justice.

William White has requested me as Circuit Justice to stay the judgment and mandate of the Supreme Court of Florida pending filing and disposition of his petition for a writ of certiorari. A state trial court convicted White of first-degree murder and sentenced him to death. The Florida Supreme Court upheld both the conviction and sentence. 415 So. 2d 719 (1982). It denied rehearing on July 8, 1982, and stayed the mandate until August 9, 1982, requiring White to seek any further stay from this Court.

In his application for a stay, filed by counsel, White states that he intends to file a petition for a writ of certiorari because the judgment affirming his conviction and sentence is "in violation of [the] rights secured by the Constitution of the United States." His application does not suggest any more specific basis for seeking the writ. The only reason ad-

vanced by White for staying the mandate is that, absent a stay, administrative proceedings culminating in the execution of his sentence will be instituted on August 9. The State has responded, however, that the threat of execution is not imminent. No execution date has been set, and the State does not contemplate that one will be set in the near future.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers).

See *Karcher* v. *Daggett*, 455 U. S. 1303 (1982) (BRENNAN, J., in chambers); *Whalen* v. *Roe*, 423 U. S. 1313, 1316–1317 (1975) (MARSHALL, J., in chambers). Although White's application establishes that he may suffer irreparable harm at some point in the future, there is no indication that the harm is imminent. Additionally, White's application does not specify either the issues for which certiorari will be sought or the reasons why review is appropriate. In the absence of such information, I am unable to determine whether there is a reasonable probability that four Members of the Court would find that this case merits review. Because there is no threat of imminent harm and no basis for determining whether certiorari would be granted, the request for a stay is denied.

BELTRAN v. SMITH ET AL.

ON APPLICATION FOR STAY

No. A-208. Decided August 26, 1982

An application to stay, pending appeal to the Court of Appeals, the District Court's judgment denying a preliminary injunction to prohibit federal officials from transferring applicant from one federal detention facility to another is denied. Applicant had been convicted of state offenses but was cooperating with state and federal authorities by testifying in pending prosecutions, and was in federal custody in the witness protection program. Although applicant may be correct in his assertion that the risk to his safety will be increased if he is moved, there is no indication that the officials responsible for the witness protection program will not continue to provide him with protection under that program. In light of the conclusions of the District Court and the Court of Appeals, which denied an injunction pending appeal and a stay pending application to this Court, that any increased risk to applicant does not rise to the level of irreparable injury, his claims are insufficient to justify interference with the Attorney General's discretion to run the prison system and to transfer applicant.

JUSTICE REHNQUIST, Circuit Justice.

Applicant Arturo Beltran, a former member of the Nuestra Familia criminal organization, is currently incarcerated in the Metropolitan Correction Center in San Diego on the basis of several criminal convictions in state courts. Because Beltran is cooperating with state and federal authorities by testifying in pending prosecutions, and because federal officials have determined that his cooperation has created a risk to him, he is in federal custody in the witness protection program. See 18 U. S. C. § 5003; Organized Crime Control Act of 1970, Title V, §§ 501–503 of the Act of Oct. 15, 1970, Pub. L. 91–452, 84 Stat. 933, note preceding 18 U. S. C. § 3481.

In July 1982, federal officials decided to transfer Beltran to another federal facility where he would remain in the witness protection program. On July 20, Beltran filed a complaint for declaratory relief and an application for a temporary re-

straining order in the Southern District of California. The District Court entered a temporary restraining order and set a hearing for the next morning. Between July 22 and July 30, the court held three hearings and received extensive briefs.

Beltran contended in the District Court that he would be in more danger at any other facility than at San Diego, in part because he would have to return to California to testify and the trips back and forth would be dangerous. He also claimed that he was entitled to remain in San Diego under the terms of his plea bargain with state officials. On July 30, the District Court denied a preliminary injunction. It ruled from the bench that Beltran had not demonstrated the requisite irreparable injury. Although there would be an added danger from the additional movement that the transfer would require, the court held that there was no indication that the federal officials charged with his movement would not take all necessary precautions, and that the added risk does not rise to immediate irreparable harm.

Beltran appealed to the Court of Appeals and sought a stay pending appeal. On July 30, the Court of Appeals granted a temporary stay and ordered the Government to file a response. On August 24, the Court of Appeals vacated its temporary stay, denied a motion for an injunction pending appeal, and denied a motion for a temporary stay pending application to this Court. Beltran's appeal from the denial of the preliminary injunction remains pending in the Court of Appeals.

Beltran has applied to me in my capacity as Circuit Justice for an emergency stay while his appeal to the Court of Appeals is pending. Beltran fears that he will be killed if he is transferred. He states there is no guarantee that a new facility will offer him as much safety and security as his current location. Finally, Beltran claims that part of his security in his current location is based on his familiarity with prison personnel and inmates and that once he is moved he will be

unable to return to the Metropolitan Correction Center in San Diego and enjoy the same degree of safety because the prison's population and personnel will change in the interim.

There is always a risk that Beltran will be attacked; this is why he is in the witness protection program. Although Beltran may be correct that that risk will be increased if he is moved, there is no indication that the officials responsible for the program will not continue to provide him with protection under the terms of the program. Beltran has not submitted to me any evidence sufficiently compelling to overcome the conclusion of the courts below that any increased risk he may bear does not rise to the level of irreparable injury. Indeed, Beltran's contentions are, in essence, that he is more comfortable and feels safer where he is than he would elsewhere. The Attorney General has authority to transfer Beltran from one facility to another in his discretion. 18 U. S. C. § 4082(b). In the light of the conclusions of the District Court and the Court of Appeals, Beltran's claims are insufficient to justify me in interfering with the Attorney General's discretion to run the prison system. See generally *Bell* v. *Wolfish*, 441 U. S. 520, 562 (1979).

For these reasons, the application is denied.

CORSETTI *v.* MASSACHUSETTS

ON APPLICATION FOR STAY

No. A-226. Decided September 1, 1982

An application to stay, pending review on certiorari, the Massachusetts Supreme Judicial Court's judgment affirming applicant's conviction for criminal contempt and his 90-day sentence is denied. Although applicant has demonstrated that he will suffer irreparable harm, he has not demonstrated that the balance of equities in his favor is sufficient to overcome the strong doubt that certiorari will be granted or, in any event, that the judgment below will be reversed.

JUSTICE BRENNAN, Circuit Justice.

Applicant has applied to me for a stay, pending this Court's review on certiorari, of the judgment of the Massachusetts Supreme Judicial Court affirming applicant's conviction of criminal contempt in the Massachusetts Superior Court and of the 90-day sentence imposed for such contempt. 387 Mass. 1, 438 N. E. 2d 805 (1982).

The principles that control my determination as Circuit Justice of this in-chambers application were stated, in pertinent part, in *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers):

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. . . . In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari . . . . Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was errone-

> ous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. . . . And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."

My task is not to adjudicate this application on my own view of the merits of the federal questions presented, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issues sufficiently meritorious to grant the petition of certiorari, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless I have concluded that there is not a reasonable probability that certiorari will be granted, and that in any event there is not a fair prospect of reversal. Although applicant has demonstrated that he will suffer irreparable harm, he has not demonstrated that the balance of equities in his favor is sufficient to overcome my strong doubt that certiorari will be granted or, in any event, that the judgment will be reversed. Accordingly, the application is denied.